VAT UPDATE
JULY 2019

Covering material from April – June 2019

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VAT Update July 2019

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1. INTRODUCTION

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

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

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

1.1 Appeals pending

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

The HMRC website section which reports the progress of appeals reappeared on 21 January 2011 after lying dormant for some time. It says that it will be updated monthly, but it appears to be less frequent or regular than that. The latest update appeared on 17 May 2019 after a gap since 26 February; it appears to have been updated again on 13 June with minor amendments.

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

- *Alan McCord*: HMRC granted leave to appeal against the FTT decision that a car dealer was entitled to input tax on cars purchased for domestic sales, but denied input tax on cars purchased for sale to customers in the Republic of Ireland.
- *Blackrock Investment Management (UK) Ltd*: argument about application of reverse charge to software bought in for use in management of investment funds – UT dismissed HMRC's appeal on the "exemption" issue but referred the "apportionment" issue to the CJEU.
- *Done Brothers (Cash Betting) Ltd and others*: HMRC have been granted leave to appeal against the FTT decision that the company was entitled to exemption of its gaming supplies on fiscal neutrality grounds.
- *Frank A Smart & Son Ltd v HMRC*: HMRC have been granted leave by the Supreme Court to appeal the CS decision in the taxpayer's

favour on the deductibility of input tax on the cost of single farm payment entitlements. HMRC will seek a reference to the CJEU on the same point as that at issue in the *University of Cambridge* case.

- *Hastings Insurance Services Ltd*: HMRC have applied for leave to appeal the FTT decision on place of establishment (UT hearing scheduled for 7 October 2019).
- *Jigsaw Medical Services Ltd*: company has been granted leave to appeal against UT's decision denying zero-rating of their ambulance services as "passenger transport".
- *LIFE Services Ltd/Learning Centre (Romford) Ltd*: the companies have been granted leave to appeal to the CA against UT's decision that their supplies did not qualify for the exemption for welfare.
- *Newey (t/a Ocean Finance)*: HMRC describes the CA decision as a "partial win for HMRC". The case has been remitted to the FTT for further consideration in the light of the CJEU judgment (hearing listed for June/July 2019).
- *Opodo Ltd*: HMRC seeking leave to appeal to the Upper Tribunal (against FTT decisions that do not appear to have been published yet – HMRC seeking a reference to the CJEU).
- *Pacific Computers Ltd*: MTIC case remitted by the UT to differently constituted FTT for rehearing (not on HMRC's list).
- *Pertemps Ltd*: HMRC will appeal against the FTT decision that the company's "mobile advantage plan" for employee travelling expenses did not involve making taxable supplies (hearing scheduled for July 2019).
- *Praesto Consulting UK Ltd*: HMRC seeking leave to appeal against the CA decision in favour of the company's deduction of input tax on legal costs.
- *Privin Corporation Ltd*: the FTT found in favour of a MTIC appellant. HMRC were granted leave to appeal to the UT, but it was agreed that the case would be remitted to a differently constituted FTT for rehearing (not on HMRC's list).
- *Rank Group plc*: HMRC has been granted leave to appeal against the FTT decision that certain supplies qualified for exemption on fiscal neutrality grounds (the separate decision on *Rank* in this update relates to a different question).
- *The Core (Swindon) Ltd*: HMRC are seeking leave to appeal against the FTT decision that certain products were "liquid meal replacements" rather than "beverages".
- *The Chancellor, Masters and Scholars of the University of Cambridge v HMRC*: CA has referred questions to CJEU (Case C-316/18) on deductibility of investment management costs where an endowment fund supports the whole of the university's activities.
- *The Wellcome Trust Ltd*: HMRC granted leave to appeal against the FTT decision that the company was not subject to a reverse charge on investment management fees.

- *Volkswagen Financial Services Ltd*: HMRC are considering the CJEU judgment on the partial exemption issues.
- *Zipvit Ltd*: (not on HMRC's list) taxpayer has been granted leave to appeal to the Supreme Court against the CA confirmation of decisions below that the company could not claim input tax on the VAT element of payments to Royal Mail without a VAT invoice, even though it was clear that taxable supplies had been made.

1.2 Other points on appeals

The following cases have disappeared from the HMRC list without explanation:

- *Hotels4U.com Ltd*: HMRC's list states "no appeal lodged" – FTT decision mainly in favour of the taxpayer. Hearing in November 2018 to decide whether to refer questions to the CJEU (decision awaited).
- *Lowcostholidays and Lowcostbeds*: being heard with *Hotels4U.com Ltd* (CJEU reference to be considered in November 2018).

The *Praesto Consulting* and *SAE Education* cases are still on the HMRC list as "decision awaited", even though those decisions (both in the taxpayer's favour – CA and SC respectively) were covered in the April update.

HMRC's list states that the following cases will not be appealed further by HMRC:

- *Pulsin' Ltd*: FTT decision that food was zero-rated.
- *Stoke by Nayland Golf and Leisure*: UT and FTT agreed that club qualified as not-for-profit sports body.
- *Tesco Freetime Ltd*: UT and FTT agreed that the promoter of a loyalty points scheme was entitled to deduct input tax on redemption costs.

1.3 Decisions in this update

The following cases from HMRC's list are in the current update:

- *Fortyseven Park Street Ltd*: the CA allowed HMRC's appeal against the UT decision that the company's supplies were exempt licences to occupy land not excluded as "similar to hotel accommodation".
- *The Ice Rink Company Ltd*: UT remitted the case to the same FTT for further consideration.

2. OUTPUTS

2.1 Scope of VAT: linking supplies to consideration

2.1.1 Consideration or compensation?

In November 2018 the CJEU gave a ruling in respect of a Portuguese telecommunications company which imposed a minimum contract term on customers. Anyone attempting to cancel the contract early, or simply stopping the monthly instalment payments, was pursued for the unpaid instalments to make up the minimum contracted amount. The company argued that this was compensation (which is what it was called in the contracts) and outside the scope of VAT; A-G Kokott gave an opinion in line with the UK courts in holding that the payment of the contracted amounts was for the delivery of the service, and the way in which it was charged, paid and enforced did not change the VAT treatment. It was all subject to VAT.

The A-G distinguished the situation in *Eugenie-les-Bains* (Case C-277/05) where a forfeited deposit for a hotel room was held to be non-VATable compensation. In that case, there was no service provided, and it was clear that the forfeit was to compensate the hotelier for the breach of contract by the customer. This situation was more similar to *Air France/KLM* (Case C-250/14) and *Hop! Brit-Air* (Case C-289/14), in which the "forfeit" was simply the whole price of a pre-paid air ticket. The fact that the whole price was paid in advance, and a seat was reserved for the passenger, meant that a service had been provided – even if the customer did not turn up to receive the benefit of it.

The A-G noted that the "compensation" was not usually collectable; even so, the tax authorities had sought to assess the VAT on it, using the amount invoiced as the net value of the supply. The taxpayer protested that this could not be right, as at the very least, the VAT fraction should be applied. The A-G said that non-payment should be relieved under art.90 PVD, when it is established with sufficient certainty that its contractual partner will not pay.

Following the issue of the A-G's opinion, the company applied for the oral part of the procedure to be reopened, arguing that the A-G's opinion was based on incorrect facts (concerning the amount charged to customers on early termination). The CJEU noted that the facts were to be determined by the referring court; the company had not objected to the description of those facts in the order for reference; and if they were wrong, it would be for the referring court to apply the CJEU's answer to the correct facts. The CJEU had enough information to answer the questions referred, and there was no need to reopen the oral procedure.

The full court agreed with the A-G: the cancellation payment was the same as would have been charged for the actual delivery of the services, and this meant that the customer had given consideration for the making available of the service. It did not then matter whether the service was received. If the payment was in reality compensation for the loss suffered by the telecoms company resulting from early termination, it would be a smaller amount than the charge for actually delivering the service, and it would be subject to a more accurate calculation.

Various other matters were held to be irrelevant – the fact that the objective of the lump sum was to discourage customers from failing to observe the minimum period, the fact that a commercial agent received more commission for conclusion of contracts with a minimum period than for other contracts, and the fact that the amount invoiced was classified under Portuguese law as a penalty. According to the principles of EU law, the payment was consideration for a taxable service.

CJEU (Case C-295/17): *MEO – Serviços de Comunicações e Multimédia v Autoridade Tributária e Aduaneir*

A new question has now been referred by the Portuguese courts to determine whether a cancellation payment that is more precisely determined than in the above case could be categorised as compensation and therefore outside the scope. The questions are as follows:

Must arts.2(1)(c), 9, 24, 72 and 73 [PVD] be construed as meaning that the levying by an electronic communications operator on its former customers (to whom it granted promotional benefits in the form of free-of-charge installation, service activation, portability or equipment, or the application of special rates, in exchange for a commitment by customers to observe a tie-in period, which those customers have not fulfilled for reasons attributable to themselves) of an amount which, as required by law, must not exceed the costs incurred by the supplier undertaking for the installation of the service and must be proportionate to the benefit granted to the customer, that benefit being identified and quantified as such in the contract concluded, and therefore may not automatically reflect the total value of the instalments outstanding on the date of termination, constitutes a supply of services liable to VAT?

In the light of the provisions cited above, does the fact that the amounts concerned are payable following termination of the contract, when the operator no longer supplies services to the customer, and the fact that no specific act of consumption has occurred since the contract was terminated, preclude the classification of such amounts as consideration for the supply of services?

This is of particular interest in the UK because of HMRC's recent change of policy in respect of forfeited deposits and retained payments, as set out in RCB 13/2018. HMRC used to more readily accept that a forfeited deposit could be reclassified as "compensation" rather than consideration for a supply that the customer failed to take advantage of; now they will only accept an adjustment to the output tax if the supplier returns the money to the customer. Particular questions of interest include:

- Whether HMRC are correct in believing that they can distinguish the situation that they describe from the situation in *Eugenie-les-Bains*, and therefore can ignore a CJEU decision;
- Whether there is a point at which a "deposit" becomes "payment for the supply" – in *MEO*, the whole amount was due; traditionally, a hotel deposit would be less than the price for the room. It is hard to see how to set a level to distinguish "mere deposit" from "advance consideration" – if all it required was "a little less than the full price", clearly there would be scope for abuse.

CJEU (Reference) (Case C-43/19): *Vodafone Portugal – Comunicações Pessoais, SA v Autoridade Tributária e Aduaneira*

2.1.2 "Overpayments"

NCP reclaimed VAT on alleged "voluntary payments" made by customers in its car parks between June 2009 and December 2012. The total amount claimed was £488,000. The basis of the claim was the fact that customers without the correct change would pay more than the amount required to obtain a "pay and display" ticket for a given period. As the machines did not give change, the company made an extra profit. It argued that this was not subject to VAT, as the displayed prices set the consideration for parking and the balance was "ex gratia". This argument had succeeded in *Borough Council of King's Lynn and West Norfolk* (TC02342).

The company's representative in the FTT (TC04784) cited cases such as the "Dutch potato case" (*Staatssecretaris van Financien v Cooperatieve Aardappelenbewaarplaats GA* Case C-154/80), *Apple & Pear Development Council, Tolsma*, *Commission v Finland* and *Societe Thermale d'Eugenie-les-Bains* on what constitutes consideration and the requirement for a direct and immediate link to the supply. She argued that the customer did not enjoy any additional consumption for the additional payment. Customers were not obliged to pay an extra amount: they could park elsewhere, go and find change, or pay by an alternative method. The payment of an additional amount was similar to giving a tip in a restaurant – it was not part of the consideration for the main supply.

HMRC's counsel responded that the correct starting point was the contract made between the parties. The obligation on the customer was to pay not less than the amount displayed on the tariff board: paying an extra amount was a contractual offer which was accepted by the company through the medium of its machine, or an offer by the company of parking at a minimum price which was accepted by the customer paying a greater amount.

HMRC did not appeal the *King's Lynn* decision. It was specific to its facts, because the local authority had statutory restrictions on the amount it could charge for parking. HMRC did not claim that the decision had been wrong, but that it was not applicable to a commercial company.

The FTT noted that the approaches of the taxpayer and HMRC were quite different: the taxpayer started with EU concepts of consideration, while HMRC relied on domestic concepts of contract law. As EU law had to be paramount, it was regrettable that there was no EU legal definition of consideration.

The FTT did not agree that the extra payments were arbitrary, uncertain or voluntary. A customer was faced with a "binary choice": pay the available change for the right to park, or park somewhere else. Unlike in the *Finland* case, the payment arose from a commercial decision by the customer, and not from "the ability to pay" in the sense of an external judgement about the person's income.

The FTT was not convinced that the *King's Lynn* decision was justified on the basis of the statutory order. In any case, that decision was not binding on the FTT, and the circumstances were certainly different; many of the arguments about contracts had not been put to the earlier Tribunal.

The company had also argued that the earlier decision created the potential for a fiscal distortion if local authorities were able to keep the

"VAT" in their overcharges but commercial companies were not. The present Tribunal did not agree. While two customers might be receiving similar supplies, and the statutory regime might be an "artificial distinction based on insignificant differences", the FTT was not persuaded that it should follow a decision that it was not bound by and was not convinced by.

The FTT concluded that the full amount paid by the customer was all consideration for the supply of parking, and the appeal was dismissed.

The company appealed to the Upper Tribunal (Mrs Justice Rose and Judge Greg Sinfield). They considered the precedent case law again, and came to a very brief decision: *King's Lynn* was wrongly decided, and the overpayments were consideration for a supply for VAT purposes. They noted that "consideration" for VAT purposes is not the same as consideration in English contract law:

"*It is the value actually given by the customer (or a third party) in return for the service supplied and actually received by the supplier and not a value assessed according to objective criteria. The service and the value given or to be given in return for it may be ascertained from the legal relationship between the supplier and the customer. Under the contract between NCP and the customer which is formed when the customer inserts money into the ticket machine at the car park and receives a ticket, NCP grants the customer the right to park his or her car for one hour in return for inserting not less than £1.40. If the customer wishes to park for up to three hours then he or she must pay not less than £2.10. It follows that NCP agrees to grant a customer the right to park for up to one hour in return for paying an amount between £1.40 and £2.09. If a customer pays £1.50, that amount is the value given by the customer and received by the supplier in return for the right to park for up to one hour. Accordingly, that is the taxable amount for VAT purposes.*"

The appeal was dismissed again, and the company appealed again to the Court of Appeal. Newey LJ gave the leading judgment, in which he briefly summarised the facts and the decisions below. He noted that "consideration" does not in the VAT context refer to what might be deemed "consideration" for the purposes of domestic contract law but has an autonomous EU-wide meaning. The authorities also show that "consideration" is a "subjective value" in the sense that "the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria".

The taxpayer's counsel argued that the overpayment was "voluntary in the relevant sense" and, while it might be difficult practically to recover it from NCP, it was in principle recoverable. HMRC's counsel responded that the UT's view of the contractual position was correct, and there was a direct link between the provision of parking and the amount actually paid for it.

In the course of argument, the taxpayer's counsel accepted that if, from a contractual point of view, the price of the hour's parking was set in the hypothetical example at the £1.50 paid by the customer, NCP's appeal could not succeed. That must be right. If £1.50 was the price for the parking as a matter of contract, the requisite "direct link", "legal relationship" and "reciprocal performance" must all exist. None of the £1.50 would be "voluntary" in the same way as the payments to the busker

in *Tolsma*. That the parking could have been obtained for 10p less would, moreover, be irrelevant given that consideration is a "subjective value".

The judge came to a slightly different analysis of the contractual position from that of the Upper Tribunal, but with the same result. NCP's offer was "to grant the right to park for an hour in return for the coins shown by the machine as having been inserted when the green light flashes... If the customer nevertheless chooses to insert £1.50 and presses the green button, it remains the case that she has accepted the offer to provide an hour's parking at that price."

The judge commented that he had not been presented with information about the King's Lynn case and would not therefore express a view on the correctness of the decision, but "I would certainly not wish to be taken to have endorsed it."

Males and Patten LJJ agreed, and the company's appeal was dismissed.

Court of Appeal: *National Car Parks Ltd v HMRC*

2.1.3 Independent person

An individual was a member of the supervisory board of a foundation whose main activity is to provide sustainable housing for people in need. Members of the board could not be employees; they were appointed for a term of four years. The functions of the board were the governance of the organisation and oversight of the executive management.

From 1 January 2013, the Netherlands authorities changed their view of this type of engagement, and decided that the remuneration of the board member was subject to VAT. He made a VAT return but appealed against the ruling, arguing that his activity, while "economic", was not "independent". Eventually questions were referred to the CJEU.

The referring court put forward factors suggesting and counting against independence. Those in favour included:

- the members of the supervisory board of the foundation are appointed, suspended and dismissed by the supervisory board;
- this supervisory board fixes the remuneration of its members, this remuneration not depending on their participation in the meetings or the hours of work actually performed by them, and
- a member of the supervisory board may not individually exercise the powers conferred on the board, so that the member acts not on his behalf, on his own behalf and under his own responsibility, but on behalf of and under the responsibility of the whole board.

Those against included:

- a person who has concluded a contract of employment with the foundation concerned cannot be a member of the supervisory board;
- although the supervisory board appoints its members, the appointment results in the conclusion of a contract for the provision of services between the member concerned and the foundation, the latter alone, as a legal entity, being able to conclude such a contract;
- when the contract is concluded, the same foundation is not free, with regard to the conditions of work and remuneration, to derogate from

the measures taken in this respect by its supervisory board and it does not assume the responsibilities of an ordinary employer, and

- the members of the supervisory board of the foundation act independently in a critical manner towards the other members of the foundation and the governing body of the foundation.

The CJEU was satisfied that a term of four years, with remuneration, was sufficient to constitute economic activity, in spite of the relatively limited scope of what the board members actually did. He was not an employee and was engaged under a contract for services. However, it was clear that he did not act on his own behalf and under his own responsibility, and he bore no economic risk associated with carrying out the activities. Unlike an entrepreneur, he exercised no significant influence over his income or expenditure. In those circumstances, he could not be said to be carrying on an independent economic activity within the meaning of the PVD, and therefore should not have to charge VAT.

CJEU (Case C-420/18): *IO v Inspecteur van de rijksbelastingdienst*

2.1.4 Updated Notice

HMRC have updated their Notice *Sponsorship* with clarification on the treatment of mixed sponsorship and donations. It now says "*If a donation is made separately from your sponsorship agreement, or your sponsorship agreement document makes clear which part is payment for services and which is a donation, you do not need to account for VAT on any donation or gift of the kind described in paragraph 2.2. However, it must be clear that any benefits your sponsor receives are not conditional on the making of the donation or gift.*"

Notice 701/41

2.2 Disbursements

2.2.1 Recharge of legal fees

An individual claimed for personal injury against his employer, BA. His solicitors obtained medical reports and paid for them through a "medical reporting organisation" owned by the firm; VAT was charged on the whole cost of these reports, and when BA admitted liability, the costs were charged on to BA. BA disputed whether it should pay the VAT on the charges for medical reports.

BA's point was not that the work itself should have been exempt (it would be taxable following the *d'Ambrumenil* case), but rather that the doctors providing the work might not be registered for VAT. BA would not be able to deduct any VAT charged because it was not the recipient of the supply.

A District Judge held that she was only required to consider whether the charges for disbursements were "unreasonable and disproportionate". In her view, it was unreasonable and disproportionate to expect the solicitors to enquire into the VAT status of individual suppliers and supplies, and therefore there was no reason to disallow the recharge of the VAT-

inclusive costs. BA appealed, and the case was referred to the Court of Appeal because of the importance of the issue (in spite of the small amounts involved in the particular dispute).

Newey LJ considered both the question before the District Judge, whether the costs were reasonably and proportionately incurred, and also the proper VAT treatment of the charges. He agreed with the judge on the first point, which would be enough to determine the appeal against BA; however, he agreed that it was important to establish the correct treatment for the future.

He examined a range of precedent cases on recharges and agency, noting the importance of contracts and commercial and economic reality in determining who supplies what to whom. The question was whether the reports were obtained by the solicitor but supplied to the client, or were supplied to the solicitor as part of the cost of providing a legal service to the client. The case of *Barratt, Goff and Tomlinson* (TC00949) had considered a very similar point, and Judge Demack had decided that the cost of medical reports was a VAT-free disbursement. The judge in *Brabners LLP* had disagreed with the analysis in *Barratt* and had held that search fees were part of the solicitors' own costs.

The judge considered various possible ways in which the legal relationships might be arranged, but concluded that BA would only be correct if the lawyer was acting as a mere "postbox" between the doctor and the client. The solicitor would have obtained the report in order to advise the client on the merits of the claim and to facilitate the pursuit of that claim. Consideration of the report will have been part of the solicitor's broader supply of services to the client. In the typical case, the solicitor would have obtained the reports as principal, and disbursement treatment would be incorrect. BA's appeal was dismissed.

Court of Appeal: *British Airways plc v John Prosser*

2.3 Exemptions

2.3.1 Fund management exemption

The *Value Added Tax (Finance) (EU Exit) (Revocation) Order 2019* revokes SI 2019/43, which was to have extended the scope of the UK's VAT fund management exemption in relation to pension funds with effect from Exit day, to bring it into line with EU law. The government intends to give the industry more time to prepare by introducing the same changes in a new order, but with a certain commencement date of 1 April 2020. The revocation order came into force on 8 July 2019.

SI 2019/1014

2.3.2 Operation of ATMs

A German bank outsourced the operation of ATMs to another company. This involved operating and maintaining the ATMs, replenishing them, installing computer hardware and software in them to enable them to read bank card data, sending a withdrawal authorisation request to the bank

that issued the bank card used and registering withdrawal transactions. The tax authority ruled that the supply by the outsource company to the bank was taxable; the company appealed, and questions were referred to the CJEU (the dispute started in 2007 in relation to transactions in 2005). Advocate-General Bot has given an opinion.

The referring court considered that the transactions were similar in principle to those that gave rise to the CJEU decision in *Bookit* – the company was providing technical and administrative services making it possible to withdraw cash from ATMs, simply giving technical effect to instructions contained in an authorisation code, rather than giving effect to the change in the financial and legal position as required for exemption. However, the court was not sure whether the presence of another transaction (the sale of cinema tickets) was crucial to the *Bookit* decision; in this case, there was only a transaction in money.

The A-G made a number of preliminary observations:

- The withdrawal of money from an ATM is a "payment";
- It was therefore possible that the exemption for "transactions concerning payments" would apply to transactions sufficiently connected with such ATM withdrawals;
- Exemptions must be interpreted and applied strictly and consistently across the EU.

The A-G went on to identify key reasons for the CJEU holding that Bookit did not supply an exempt service: the company did not itself directly debit or credit the accounts concerned, that it did not act by means of accounting entries, and that it did not instruct such debit or credit. The Court also held that the supplier of that service did not assume any liability as regards the achievement of the changes in the legal and financial situation that are characteristic of the existence of an exempted transfer or payment transaction.

The appellant in this case did not take ownership of the money. It arranged for the physical transfer of the banknotes, but they belonged first to the bank and then to the customer; the appellant was never a party to the transaction. Even though some of the company's services were essential to the transaction taking place, that was not enough to make them, or the whole package of services of which they comprised a part, exempt. The whole package constituted no more than technical and administrative services, and even though German banks have outsourced a great deal of their ATM operation, that did not make the ATM operator part of the financial system.

The A-G recommended that the CJEU should respond that exemption did not apply to the services at issue in the case.

CJEU (A-G) (Case C-42/18): *Finanzamt Trier v Cardpoint GmbH*

2.3.3 Educational dancing

There has been another case about the borderline between classes that are sufficiently "educational" to qualify for the exemption for private tuition, and those that are purely recreational and are standard rated. Classes in Pilates, yoga and belly-dancing have all fallen on the standard rated side; this concerned a teacher of Ceroc dancing, who operated a self-employed

business as a franchisee of an organisation that owned the Ceroc brand and intellectual property.

The teacher operated through a company between 2006 and September 2010, and again after September 2012; in between those two dates, she operated as a sole trader and did not register for VAT. HMRC assessed for output tax and initially also charged a penalty for failure to notify liability, but the penalty was withdrawn before the appeal hearing.

The judge considered the nature of Ceroc, which is a system of dance moves (up to 900 in total) that are taught in an organised syllabus to have a wide application to different styles of dance. The owner of the franchisor company gave evidence about the development of the system and its similarity to Key Stage 3 physical education in schools, although it was accepted that Ceroc itself was not taught in schools.

The judge noted that the main CJEU precedent, *Haderer* (Case C-445/05), was concerned with the relationship between the self-employed teacher and the pupils, rather than with the subject matter of the tuition. However, he considered it instructive for the guidance it gives in other areas. In particular, the CJEU noted that exemptions must be interpreted strictly, but also should be interpreted consistently with the objectives pursued by those exemptions and should comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. The requirement of strict interpretation does not mean that the terms used to specify the exemptions should be construed in such a way as to deprive the exemptions of their intended effect.

In her opinion for that case, A-G Sharpston suggested that there should be a dividing line between exempt tuition and "purely recreational activities of no educational value"; she then went on to say "but any subject or activity in which instruction is commonly given in schools or universities must in my view fall within the scope of the exemption, regardless of whether it follows a strictly defined programme or curriculum." The full court did not adopt the same distinction in the same terms, but agreed that an activity which was ordinarily taught in schools or universities could be taken outside the concept of "school or university education" if it was purely recreational.

The judge summarised the principles derived from this case and also from *Hocking* (TC04130 – the Pilates case) and *Eulitz* (Case C-473/08) as follows:

(1) That the subject or activity should be one that is ordinarily, or commonly, taught in schools or universities.

(2) The subject or activity is not limited only to education which leads to examinations for the purpose of obtaining qualifications or which provides training for the purpose of carrying out a professional or trade activity, but includes other activities which are taught in schools or universities in order to develop pupils' or students' knowledge and skills.

(3) The subject or activity should not be one that is purely recreational.

(4) The supply must be one of tuition in that subject or activity, in the sense of a transfer of knowledge or skills. The tuition must be educational in character but, beyond that, there is no test of comparability with what actually happens in a school.

(5) The mere presence of an element of teaching cannot shift an activity which is otherwise purely recreational from one side of the line to the other.

The fifth principle presented a difficulty: it had to be a question of judgement as to where the line should be drawn between something that was "too recreational" to be educational, and something that was more educational than recreational.

HMRC accepted that dance was a subject that was ordinarily taught in schools. The issues were therefore whether teaching Ceroc was the same as teaching dance, and whether learning Ceroc was a purely recreational activity.

HMRC argued that Ceroc was a specific form of dance, and should therefore not be equated with teaching of dance in schools in the same way that belly-dancing was not considered "a subject ordinarily taught" in the *Cheruvier* case. The judge did not agree. The Ceroc methodology was broader and applicable to many forms of dance; statements by the franchisor suggesting it was more specific were intended to protect intellectual property, and should not be interpreted out of context.

HMRC argued that the advertising for Ceroc events emphasised the social and fun aspects, and it was therefore purely recreational. The judge considered that it was necessary to carry out an objective analysis of the supply from the teacher to each individual pupil. There was a significant transfer of knowledge and skills at each event, and it was therefore not purely recreational. Dance itself was accepted by HMRC as a subject ordinarily taught and not purely recreational.

The judge concluded that, comparing the National Curriculum for PE with the Ceroc method, it fell within the exemption. The appeal was allowed.

First-Tier Tribunal (TC07149): *Anna Cook*

2.3.4 Welfare services

A charity provided a range of welfare services to disabled persons who received personal health budgets from their local authorities. These budgets covered the cost of a carer or personal assistant, and paying that person is subject to PAYE. The charity provided a payroll service to its clients, and appealed when HMRC ruled that the payroll service was standard rated.

The Tribunal decision starts with a detailed consideration of the law on personal budgets (held by an organisation that manages it on the disabled person's behalf) and direct payments, which may be paid by the authority to the disabled person or someone nominated by them. It then notes the basis in the PVD for the welfare exemption: it covers "goods and services closely linked to welfare" (art.132(1)(g)) but excludes "where the supply is not essential to the transactions exempted" (art.134(a)). VATA 1994 Sch.9 Group 7 Note 6 states that welfare services must be "directly connected" with the provision of care, and must be services in respect of which a private welfare institution is regulated.

The charity argued that the payroll service it offered was different from a commercial service, and was closely related to welfare services. The recipients would find it difficult to manage the employment of a personal

carer without the service; it was clear that employing a personal carer was something envisaged by the rules and guidelines relating to personal payments.

Although exemptions have to be strictly interpreted, they should also be applied consistently with their intended effects. The objective of art.132(1)(g) is to reduce the cost of the services falling within the welfare exemption and so to make them more accessible to the individuals who may benefit from them. A number of cases were cited in support of the proposition that the welfare exemption should be interpreted broadly, including *Watford & District Old People's Housing Association* (VTD 15660) and *YMCA Birmingham* (TC06636). Becoming an employer was a necessary part of being independent, and it required support because of the recipient's impairment.

HMRC considered that the services were not "closely linked". They noted that the only CJEU decision to consider the precise question was *Les Jardins de Jouvence* (Case C-334/14); however, there were other cases in which the meaning of "closely linked" had been considered in the context of other exemptions, such as *Commission v Germany* (Case C-287/00) (university research projects should not be exempt) and *Brockenhurst College* (Case C-699/15) (which emphasised the importance of "essential").

Judge Peter Kempster followed the approach of the CA in *Brockenhurst*. The exemptions should be interpreted in order to give effect to their objectives, and the words "closely linked" should not be given an especially narrow interpretation. The closely linked supply should be ancillary to a main supply, and it should be essential to attain the objective of the main supply.

Applying these principles to the facts, the Tribunal concluded that the payroll service should be exempt. It was a means for better enjoying the services of a Personal Assistant, and without it the welfare service would be diminished.

The appeal was allowed.

First-Tier Tribunal (TC07182): *Cheshire Centre for Independent Living*

2.4 Zero-rating

2.4.1 Private prescriptions

Supplies of medicines dispensed on prescriptions may be zero-rated under VATA 1994 Sch.8 Group 12 Item 1 if they meet the conditions stated there. Sales of medicines in other circumstances are standard rated, unless they form part of a single composite supply of administering exempt healthcare.

A pharmacy treated supplies of medicines on private prescription as zero-rated. HMRC assessed £156,782 of underdeclared output tax for the period from 1 May 2012 to 30 May 2014, and the company appealed.

Customers visited a website operated by a Guernsey company which offered medical screening and other medical services. They undertook online consultations with doctors supplied by a different UK company, E-med Private Medical Services Ltd, which would then issue a prescription to the appellant in this case. The drugs supplied were invoiced to the Guernsey company and no VAT was charged. A similar arrangement existed with a Mauritius company.

The law on prescriptions changed in 2008 to allow pharmacists to dispense drugs on the instruction of any EEA regulated doctor, and allowed electronic prescriptions. The pharmacist in the case was aware of this change, and assumed that it applied to zero-rating as well – that the scope of the previous VAT relief had also been extended.

The key question was the interpretation of “appropriate practitioner” in the law: a “registered medical practitioner” could write prescriptions that could be dispensed zero-rated. One of the doctors who prescribed for E-med was registered with the General Medical Council in the UK, and it was accepted that his prescriptions were zero-rated. The other was registered with the equivalent body in Romania, and appeared to be in practice in the Czech Republic. HMRC ruled that he was not an “appropriate practitioner”.

The company’s counsel argued that principles of fiscal neutrality and conforming construction should lead to the conclusion that the two doctors should be treated in the same way. HMRC responded that the law was clear and unambiguous, and did not treat a foreign doctor as an appropriate practitioner. Because the dispute concerned zero-rating, there was no directly enforceable EU right.

The judge noted that the zero-rating rules were subject to the “standstill provisions” in PVD art.110. This meant that it was not permissible to extend the qualifying categories after 1 January 1991. She went on to consider in detail arguments about the history of the legislation and the definition of who could issue zero-rated prescriptions, and she preferred the construction put forward by HMRC’s counsel. The UK legislation referred throughout to a UK register, and prescriptions written by a foreign doctor were not zero-rated as a matter of UK law.

On the other hand, the principle of fiscal neutrality applied to require the two types of supply to be treated in the same way. They were in practice indistinguishable; customers did not have a choice of doctor, but would receive effectively the same service from whichever happened to write the prescription. The change to allow lawful dispensing on foreign

prescriptions did not breach the standstill clause: the zero-rated category was "lawfully dispensed medicines", and changing the scope of what was lawful did not expand the category.

The taxpayer's counsel then argued for conforming construction to be applied. The judge considered that was permissible, subject to the following constraints, which were derived from *Vodafone 2* and *Rapid Sequence*:

(1) The interpretation must go with the grain of the legislation;

(2) It must be compatible with the underlying thrust of the legislation;

(3) An interpretation which is inconsistent with a fundamental or cardinal feature of the legislation crosses the boundary between interpretation and amendment;

(4) The Court/Tribunal must not make a decision for which it is not equipped or which gives rise to practical repercussions it not equipped to evaluate; and

(5) A conforming construction cannot be adopted where it is clear that Parliament specifically intended to depart from EU law.

The judge considered that the history of the provision suggested that Parliament positively intended to exclude EEA prescribers from its scope. Although it breached the principle of fiscal neutrality, it was not possible to adopt a conforming construction; the FTT could not provide an effective remedy for the problem with the legislation, and the appeal was dismissed.

First-Tier Tribunal (TC07104): *Pearl Chemist Ltd*

2.4.2 Transport of disabled passengers

HMRC have issued a Brief to confirm that they have not changed their policy on the scope of the zero rate for transport services following the Upper Tribunal decision in *Jigsaw Medical Services Ltd*. Broadly, the position remains that if a vehicle would seat 10 or more passengers, were it not for adaptations made to accommodate wheelchair users, the supply of passenger transport in such a vehicle is zero-rated.

The need for clarification arose because the decision referred to "common ground" that "patient transport ambulance services are both exempt and zero-rated". This was only referring to the context of the case, not to all patient transport ambulance services.

The Brief sets out HMRC's view on assessing whether a vehicle qualifies as capable of carrying 10 or more persons (including the driver), and offers the following analysis of the "*Jigsaw* approach":

1. Identify what was done to the vehicle to design it or adapt it for the safe carriage of a person in a wheelchair.

2. If the wheelchair modifications were not made, what extra passenger capacity could be added?

What is not allowed, is to presume what other changes could be made to increase the number of seats. That is inconsistent with the rule that looks at the vehicle as it is and how the vehicle is being used.

The following will assist in applying the tests for zero rating.

Does the vehicle have 10 or more seats that are safe to use at the same time? If so, transport in that vehicle is zero rated.

If not, does the vehicle have wheelchair modifications? If 'No', the transport will be standard rated unless the exemption for the transport of sick or injured persons applies.

If 'Yes' then, without the wheelchair modifications, how many notional seats would occupy the resultant space? Then, does the number of actual seats plus these notional seats equal 10 or more that can be safely used at the same time? If so, transport in that vehicle is zero rated.

Revenue & Customs Brief 3/2019

2.5 Lower rate

2.5.1 Restriction on lower rate for energy saving

Following the Commission's infringement proceedings against the UK in 2015 (Case C-161/14), the government has at last changed the law. The *Value Added Tax (Reduced Rate) (Energy-Saving Materials) Order 2019* takes effect from 1 October 2019 to remove lower rating from the installation of wind and water turbines, and to restrict installation in dwellings to cases covered by social policy reasons. These are where the supply is made to a qualifying person (a person who is aged 60 or over or is in receipt of certain benefits), a relevant housing association or where the residential accommodation is a building or part of a building used solely for a relevant residential purpose.

The relief will also be maintained where the cost (measured at open market value, net of VAT) of the materials does not exceed 60% of the total cost of the installation, even where the recipient is not a qualifying person.

The SI was issued as SI 2019/954 then withdrawn and reissued with minor amendments.

SI 2019/958

2.6 Computational matters

Nothing to report.

2.7 *Discounts, rebates and gifts*

2.7.1 Credit notes

The *Value Added Tax (Amendment) Regulations 2019* have been laid to make the amendments to the rules on credit notes that have been described in the previous update.

Provisions are made to:

- amend Part 3 (VAT invoices and other invoicing requirements) and Part 5 (accounting, payment and records) of SI 1995/2518;
- provide that VAT registered traders are required to account for VAT on supplies of goods and services calculated by reference to the price payable for those supplies. In cases where the price of the supply increases or decreases after the supply has been made, adjustments must be made under provisions in SI 1995/2518 Pt 5;
- make changes in relation to such adjustments, and introduce new rules in relation to the accounting documents which the supplier is required to provide to the recipient of a supply;
- introduce new requirements for the provision by the supplier of debit notes and credit notes to the recipient of a supply when there are increases or decreases in consideration;
- make provision for the definition of increases and decreases in consideration, and when they are to be treated as occurring for the purposes of SI 1995/2518;
- amend SI 1995/2518 reg.31 to reflect the changes made by regulation 4;
- amend SI 1995/2518 reg.38 to reflect the changes made by regulations 4–6, and to make it clear that, while making an adjustment for an increase or decrease in consideration is not, in itself, the correction of an error, any failure to make such an adjustment in the prescribed accounting period in which it is required to be made will result in an error which must then be corrected;
- amend SI 1995/2518 reg.38A by making consequential amendments and by adding clarification in relation to error correction similar to that made by regulation 8.

SI 2019/1048

2.7.2 Free wine! Or not...

Marks & Spencer made a promotional offer described as “Dine In for £10 with Free Wine”. Customers bought three specified food items for £10 and received a “free” bottle of wine. If sold separately, the food would be zero-rated and the wine standard rated. The company argued that no consideration should be allocated to the wine. HMRC’s assessments were for £6.5m (February 2014 to May 2015), £1.78m (May 2015 to August 2015), £1.66m (February 2016), and £2.02m (May 2016).

The FTT (TC06471) considered a number of different elements:

(1) The correct VAT treatment of the wine element of the promotion.

(2) The effect of the Bespoke Retail Scheme Agreement entered into between M&S and HMRC.

(3) The effect of the deemed supply rules.

(4) The recovery of input tax by M&S on wine purchased by it and disposed of under the promotion.

M&S had entered into an agreement with HMRC concerning an earlier promotion scheme. The company considered that the "free wine" promotion was covered by that agreement, and it was therefore not required to account for output tax on the gift.

HMRC argued that there was simply a purchase of four items for £10, which had to be apportioned on a fair basis. There was no "gift". That was the commercial and economic reality. It was "heretical" to allow M&S to deduct input tax on the purchase of the wine and then not to require output tax on the sale, when it was in reality generating turnover. There was no written contract between the parties, and the promotional schemes in *Loyalty Management* and *Kuwait Petroleum* were irrelevant because they involved supplies at different times – in this case, all four items were sold and paid for together.

M&S's representative argued that the Tribunal had to respect an arm's length agreement between unconnected persons. There were in reality two separate offers, both of which made commercial sense for M&S: "three food items for £10" and "free wine". There were a number of factors to support the contention that the wine was genuinely free:

(1) The absence of any cash alternative or alternative product in the event of non-availability of the wine.

(2) The fact that the customer does not need to take the wine in order to benefit from the £10 food offer.

(3) The fact that in no circumstances can a customer obtain a cash refund if he returns the wine for any reason.

(4) The absence of any legal right or entitlement to the free wine on the part of the customer.

(5) The fact that M&S's till systems recognise the wine as free, and record it as such on till receipts.

(6) The marketing of the wine as free.

The FTT judge (Thomas Scott) emphasised that his decision was based on the particular facts, and should not be taken as setting a more general principle for the treatment of "free" goods. In his view, there was only one promotion, and it was clear that customers bought four items for £10. It was necessary to apportion that total consideration.

The judge went on to examine the wording and the legal effect of the bespoke retail scheme agreement entered into by M&S and HMRC. For several reasons, it did not assist the taxpayer. In particular, there was a specific clause that stated "in the event of dispute, the normal VAT treatment applies" – that was clearly engaged.

M&S's representative argued that the wine could be ignored under Sch.4 para.5 because it cost less than £50. The judge noted that M&S could not prove that the annual value of supplies to the same person was not

exceeded, and they could not take the benefit of the doubt in such a situation. In any case, he was satisfied that there was not in fact a gift.

The appeal was dismissed, but the company appealed to the Upper Tribunal. M&S put forward two grounds of appeal:

- first, the FTT erred in law by deciding that the wine was not supplied free of charge and the £10 consideration should be allocated across all four items; the FTT was wrong to conclude that the description of the wine as "free" was a label being used in the marketing sense, rather than reflecting "commercial common sense" or economic reality, and the true position was that the £10 was the consideration for the supply for the three food items and not for the wine.
- second, the Bespoke Retail Scheme Agreement bound HMRC to treat the promotion as M&S contended;

The third ground, relating to the deemed supplies under Sch.4 para.5, was not pursued in the Upper Tribunal.

The UT considered that the FTT had come to a broadly correct analysis of the contract between M&S and the customer. The UT considered that the situation was analogous to *NCP* – the consideration actually paid was given in exchange for the goods actually supplied in each case. The customer paid the money to receive the three food items and the wine, and the consideration had to be apportioned.

The UT would have come to a different decision on the effect of the Retail Scheme. However, M&S had conceded that, if the conclusion on the first ground was upheld, the wine could not be regarded as a "free item" within the scheme, and the second ground of appeal fell away. The judges considered that the terms of the scheme were clear and applicable; if they had concluded that the wine could properly be described as "free", they would have agreed that the retail scheme required HMRC to treat it in the way that M&S argued for.

The appeal was dismissed again.

Upper Tribunal: *Marks and Spencer plc v HMRC*

2.8 Compound and multiple

2.8.1 Skates on?

In TC06117, the FTT allowed an appeal by two companies that supplied packages of allowing a child to hire skates and skate on its ice rinks. The hire of skates to a child on its own would be zero-rated; the question was whether any part of the package deal could be zero-rated.

HMRC had picked up the fact that the companies were not charging VAT on all supplies from their VAT returns, and wrote to enquire whether this related to the hire of children's skates. The first company confirmed that it was, and pointed out that this was standard industry practice; the company's adviser pointed out that Public Notice 714 para.9.3 supported the treatment. The officer replied with an analysis of "single supply indicators" and "multiple supply indicators", and concluded that the

present case should be treated as a single standard rated supply. The resulting assessment would be £641,601 (later amended to treat the receipts as VAT-inclusive). A similar process with the other company led to an assessment of £52,783 including interest. “Deliberate conduct” penalties were threatened.

The Tribunal examined the way in which the rinks operated, and noted that different prices were charged to people with and without skates. A survey suggested that 45% of users had their own skates, while nearly 55% did not.

The company put forward a number of arguments that the supplies were separate. Neither supply was predominant and neither was ancillary. The pricing clearly distinguished between the two elements. There was also an argument that the *Talacre* principle might apply to a single supply in this area – that even a compound supply could be partially taxed at the zero rate.

HMRC put forward three propositions, with detailed points to support each one:

- multiple services including skate hire are advertised as a package and customers pay a single price;
- for typical customers skating is their aim;
- the supply of ice skates is integral to the use of the ice rink.

The *Morrisons* decision (on barbecues) should be applied – there was no good reason to carve out the skate hire, when it was an integral part of a single supply.

Judge Richard Thomas started his “discussion” with the following comment:

Unlike many VAT cases on the general issue of single and multiple supplies, this case was mercifully free of great long lists of European and domestic authorities. This is the correct approach because, as we have been told by Lord Hoffmann everything starts with CPP, and with the exception of Levob and maybe a domestic case or two, everything ends there.

After a review of those precedents, the judge concluded that this was clearly a situation in which there were separate elements of the package. It was not artificial to split them. Unlike the situation in *CPP* or *Levob*, significant numbers of customers bought one element of the package without the other. Therefore it made no sense to say that the elements were not dissociable when on a majority of the occasions that users entered the reception to use the rinks they chose only one of the two main elements, entry to the rink.

The appeal therefore succeeded, but for completeness the judge considered the “fallback” argument based on carving out an element of a compound supply. He agreed with HMRC that *Morrisons* and *Colaingrove (fuel)* applied: explicit words would be required in the law to give that result, and they were not present. The second “fallback” argument, based on fiscal neutrality, was not considered because the judge did not think he had sufficient evidence to reach a decision.

The judge made the following highly critical comments:

118. We were not asked to consider whether the assessments made in this case were in fact made to the best of Mr Merson's judgment. But we find it decidedly odd that following a VAT inspection and meeting with the management of PIB in 2012 after which he took policy advice and approved their zero-rating the hire of skates, he later reversed that decision, apparently because of the issue by HMRC of revised guidance to its staff about CPP (which had been heard years before) – see §14.

119. Even odder was the decision to apply this guidance (or to have it applied by specialists for him) to the companies in this case without any attempt to discover whether there were any differences between PIB's operations and that of the appellants and without visiting their operations or talking to their management. Indeed all he asked the appellants was whether their exempt or zero-rated sales covered children's ice skates, and on the basis of their confirmation he justified his assessments.

120. That the text of his letter to IRC was simply cut and pasted can be seen from the initially puzzling reference to PIB's future conduct in it – see §17.

121. Mr Merson also seems to have confessed that his figures in his assessments were obviously wrong.

122. We also do not understand why PIB and possibly other cases in common ownership were not able to convince HMRC that it would cause them hardship to pay the VAT demanded, but the appellants could.

123. Nor do we understand why if HMRC changed their view of CPP etc in 2012 or 2013 they felt it appropriate to assess large amounts (over £600,000 in IRC's case) going back four years: obviously they had the statutory right to, but that should not necessarily the be all and end all.

124. Finally to threaten Schedule 24 FA 2007 penalties on the basis of what Mr Merson knew (or did not know) when he threatened them was not, to our minds, the action of a reasonable VAT officer.

In spite of the reference to unreasonable conduct, the judge did not suggest that the taxpayer should apply for, or would be entitled to, costs.

HMRC appealed to the Upper Tribunal, arguing that the FTT had made errors of law, and the supply should be regarded as a package that did not qualify for zero-rating. The company submitted arguments that, if HMRC were successful in their contention that there was a single standard-rated composite supply, it would still be possible to carve out a zero-rated element (i.e. appealing against the FTT decision on the *Morrisons/Colaingrove* point).

HMRC's argument was that the FTT should have considered the viewpoint of a purchaser of the package, rather than the viewpoint of an average customer. Someone who did not own skates would surely regard the package that they purchased as a single supply that it would be artificial to divide; it was irrelevant that other customers brought their own skates, because they were receiving a different supply.

The company accepted that this was a valid argument, but responded that it was necessary to consider all the circumstances, which would include the range of options available even if a person without skates would buy the package.

The UT started by analysing the significance of the "typical consumer" in *CPP*. The consideration of the typical consumer was to assist in identifying precisely what has been supplied and whether that amounts to a single composite supply or several separate supplies. It therefore necessarily follows that the "typical consumer" must be a recipient of the package whose characterisation is in dispute, and not simply a general customer of the business.

The UT considered that arguing by analogy from decisions such as *Levob* and *Deutsche Bank* was not particularly helpful because of the different contexts (customised software and investment management services). The principles the UT derived from CJEU precedents were set out as follows:

(1) The ECJ has not given exhaustive guidance that covers all situations.

(2) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.

(3) Given the nature of the supplies at issue in this appeal, we consider that the Levob line of authority is more relevant. Since skating cannot be enjoyed without both access to an ice rink and a pair of ice skates, the question of which element of a skating with skates package is "principal" and which is "ancillary" is unlikely to be of much assistance in determining whether the skating with skates package involves single or multiple supplies.

(4) Therefore, a relevant question in this appeal is whether the constituent elements of a skating with skates package as supplied to a typical customer of that package are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

(5) The question in paragraph (4) above must be answered by reference to all the circumstances in which a supply of skating with skates takes place.

(6) If a typical consumer has a choice as to whether or not to purchase one or more constituents of a skating with skates package, that is a relevant circumstance. If the freedom to choose is genuine and reflects the economic reality of the arrangements between the parties, it will be an important factor.

(7) If a skating with skates package involves a single supply, then the question of whether that single supply is standard-rated or zero-rated would fall to be determined by considering whether the supply of the children's skates, or the supply of admission to the rinks predominates. However, Ms Brown was not seeking to argue that, if there was a single supply, it was zero-rated and therefore we will not consider this issue any further in this decision.

The UT concluded that the FTT had followed the wrong approach, in that it had considered the views and choices available to all customers of the companies. It should have concentrated on those customers who came without skates and who therefore bought the package. The taxpayer's counsel argued that the FTT had considered the real options available to customers, but the UT held that the FTT would have had to have had some evidence to support a conclusion that those options (e.g. buying skates at the last minute) were realistic rather than wholly artificial. It did

not appear that any such evidence was provided, and the FTT certainly did not draw any conclusions from such evidence.

In their cross-appeal, the companies tried to distinguish between the wording of VATA 1994 s.29A and s.30, in order to support an argument that zero-rated supplies could more easily be "carved out" of single composite supplies than lower rated supplies such as those considered in *Morrisons* and *Colaingrove*. The UT did not accept that such a distinction was justified. The principles were the same, and part of a composite supply could only be given a different liability if the law explicitly provided for it. The FTT had come to the correct decision for the correct reason.

The UT decided that the proper course was to remit the case to the same FTT for consideration of evidence on whether the options available to a purchaser of the package were realistic and relevant in deciding whether it would be artificial to divide the package into two supplies. In deciding to remit, the UT emphasised that it had not criticised the FTT's decision in such a way that the reconsideration might be prejudiced.

It was left to the parties to seek to agree case management directions.

Upper Tribunal: *HMRC v The Ice Rink Company Ltd and another*

2.9 Agency

Nothing to report.

2.10 Second hand goods

Nothing to report.

2.11 Charities and clubs

2.11.1 Updated Notice

HMRC have updated their Notice *How VAT affects charities* to reflect the same points on mixed sponsorship and donations that are covered in section 2.1.4 above.

Notice 701/1

2.12 *Other supply problems*

2.12.1 Renewable energy certificates

HMRC have issued a Brief and updated their Notice *Domestic reverse charge procedure* to explain a new regulation imposing a DRC on businesses trading in renewable energy certificates. This is an anti-fraud measure to deal with the risk of missing trader fraud, and takes effect from 14 June 2019. HMRC say they will take a 'light touch' approach to penalties in the first six months of operation of the reverse charge, where businesses have made reasonable efforts to comply with the new rules.

Revenue & Customs Brief 4/2019, Notice 735, SI 2019/1015

2.12.2 Article

In an article in *Taxation* ("The VAT Top Ten"), Melanie Lord sets out her view of the ten most common reasons for taxpayer regret in relation to VAT – leading to the need for intervention from a VAT specialist. These are:

1. unusual transactions or situations;
2. making assumptions;
3. "brilliant deals" (missing trader fraud);
4. taxpayers resisting change;
5. people believing what they have been told by HMRC officers;
6. people trying to work out the VAT result from "logic";
7. people trying to work out the VAT result from "what seems fair";
8. traders hearing correct VAT advice selectively and acting on the parts they like;
9. traders failing to notice that the law or tax rates have changed;
10. traders failing to act reasonably, or to use reasonableness in their calculations (e.g. when an apportionment is required).

Taxation, 18 April 2019

3. LAND AND PROPERTY

3.1 Exemption

3.1.1 Timeshares?

A company sold "fractional interests" in a high value property in Mayfair. In return for a substantial upfront price, a purchaser acquired the ability to occupy a residence in the property of a specified category for a maximum number of nights in each year until 31 October 2050, and to access a range of related benefits during that period. These included the option of exchanging stays in other properties and receiving rental income.

The company argued that it simply provided a licence to occupy land. It was not providing accommodation in "a hotel, inn, boarding house or similar establishment" (VATA 1994 Sch.9 Group 1 Item 1(d)), nor was it providing holiday accommodation.

HMRC responded that the appellant did not provide any interest in land capable of falling within the exemption, but rather a taxable service of a right to participate in a bundle of benefits. If it was a supply of land, it was excluded by item 1(d).

The marketing material and website testimonials showed that some customers regarded the property as similar to a luxury hotel, but others treated it as a "second home". The Tribunal did not consider this to be significant one way or the other.

The FTT (TC05318) went on to examine the agreements in detail. The company pointed out a number of significant differences between the rights of a member and the rights of a hotel customer. For example:

(1) Members are required to pay an Annual Residence Fee which covers all running costs of the property and a sinking fund to replace mechanical and other assets. There is no such overt contribution to such costs for hotel guests.

(2) Hotel guests pay a nightly fee only whereas members pay a substantial upfront purchase price plus the Annual Residence Fee.

(3) A hotel guest has no influence over costs whereas the members have some influence through the Members Committee which agrees the Annual Operating Budget and Annual Residence Fee.

(4) A hotel guest has the right to enjoy the residence for the period of the booking only whereas a member has rights to occupy up to 31 October 2050.

(5) A hotel guest cannot leave personal belongings between stays whereas a member can do so.

(6) Unlike a member, a hotel guest cannot rent his room or sell his right to occupy it or use his interest as security.

The appellant argued that the CJEU's decisions in *RCI Europe* (Case C-37/08) and *MacDonald Resorts* (Case C-270/09) showed that its supplies should be regarded as supplies of land. Several other precedents were cited in a comprehensive defence of the company's position.

Both sides agreed that it was necessary to consider the commercial reality and all the surrounding circumstances. The FTT considered that it was clear that the members were paying the substantial upfront price in return for the right to occupy a residence in a desirable location in the heart of Mayfair in London for a maximum period of time each year on an ongoing basis over many years. The use of other programmes offered by the manager was optional and secondary. Unlike *MacDonald Resorts*, there was certainty at the time of supply what property would be involved; that was enough to make it a letting of immovable property. There was nothing in the *Card Protection Plan* principles to change the nature of this principal supply.

The FTT went on to consider the "hotel exclusion". It noted that the CJEU had considered (*Blasi v Finanzamt Mnchen I*, Case C-346/95) "the duration of the stay" relevant in applying the exemption: temporary accommodation would compete with the hotel sector, and should therefore be taxable. A German rule requiring a six-month lease before exemption applied was held not to be incompatible with the Directive. The FTT rejected the appellant's arguments that the length of the agreement was relevant (many years) – it was the length of the stay in each year that suggested it should be treated as temporary accommodation similar to that supplied by hotels.

The FTT considered the differences between the rights of a member and a hotel guest, and between the rights of a member staying in the property and a non-member (who, it was accepted, would be paying for taxable hotel accommodation). Those differences did not seem as significant as the similarities. The hotel exclusion applied, and the appeal was dismissed.

The company appealed to the Upper Tribunal, which summarised the FTT decision as follows:

(1) First, the FTT decided that the supplies of the Fractional Interests fell, in principle, within the exemption from VAT provided for the leasing or letting of immovable property ("the land exemption issue").

(2) Secondly, however, the FTT found that the land exemption was excluded because the grant of the Fractional Interests was the provision of relevant accommodation in a similar establishment to an hotel ("the hotel sector issue").

(3) Finally, the FTT dismissed FPSL's argument that under the principle of fiscal neutrality the supplies of the Fractional Interests should be treated in the same way (in other words as exempt) as more traditional timeshare interests ("the fiscal neutrality issue").

In their response to the company's arguments, HMRC effectively cross-appealed the decision on "licence to occupy". The UT considered extensive arguments that the supply failed to meet the basic conditions for a letting of land, and rejected them. The grant of the Fractional Interest was the grant of a right to occupy a residence and to exclude others from enjoying such a right, and was thus within the concept of the "letting of immovable property" as described in *Temco*.

This was subject to the question whether that grant was a passive activity or whether it was outside the land exemption by reason of the company having added significant value to the supply because of the additional

facilities services and benefits available to members. This was considered by the CJEU in *Stade Luc Varenne* (Case C-55/14). The UT did not wholly agree with the FTT's reasoning in this area. The FTT had concluded that the company had contracted to supply the services of the manager to its customers, and sub-contracted that work to another related company; the UT held that the actual arrangement was more similar to *Telewest*, in that the management services were supplied separately by a related company and were not part of the obligations that fell on the appellant. It might have procured the services, but that was still a relatively passive involvement. The UT agreed with the conclusion of the FTT: subject to the hotel exclusion, the supply by the company was exempt as the leasing or letting of immovable property.

Turning to the hotel exclusion, the UT disagreed with both the reasoning and conclusion of the FTT. It was not correct to concentrate on the individual annual stays as comparable to a succession of lettings similar to hotel accommodation: the actual supply was of an enduring right, which could be sold, sublet or used as security for a loan, and this went substantially beyond anything similar in the hotel sector. The UT set aside the FTT decision and remade it, holding that the hotel exclusion did not apply.

It was therefore not necessary to consider the fiscal neutrality argument. However, the UT would have rejected the company's appeal on this point. The supplies made in the timeshare sector were too varied to be directly comparable; there was no exemption "for the sector". It was necessary to consider the application of the exemption to the particular supplies at issue, as set out in EU and domestic law.

The company's appeal was allowed on the hotel exclusion point, and HMRC's cross-appeal was rejected on the exemption point.

HMRC appealed again to the Court of Appeal, where Newey LJ gave the leading judgment. He set out a number of principles from precedent cases on leasing of land, including the comment in *Blasi* (Case C-346/95) that the "hotel sector exclusion" should not be interpreted strictly. The leading case is regarded as *Temco* (Case C-284/03), which confirmed that leasing of immovable property has an independent meaning in EU law, and explained what that meaning is: "essentially the conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right".

The judge went on to summarise the issues before the court:

i) Was the land exemption inapplicable because "the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right" was missing from FPSL's supplies to Members? [Issue 1]

ii) Was the land exemption inapplicable because the supplies at issue did not involve merely a relatively passive activity but rather significant added value? [Issue 2]

iii) Supposing that the supplies were in principle capable of falling within the land exemption, were they excluded from the exemption by item 1(d) ("Item 1(d)") in group 1 of part II of schedule 9 to the VATA? [Issue 3]

On issue 1, HMRC argued that a person did not acquire a right to occupy property when they bought a fractional interest. They only acquired the opportunity to reserve the property. It might not be available, in which case rights could be deferred to a later year. The judge did not accept this: it was not necessary for the acquirer to know exactly what would be occupied for the right to constitute a letting of land, and the possibility that there would be no supply of land at all was remote.

On issue 2, HMRC argued that the property manager supplied its services to the appellant, which then supplied a more complex and active service to its members than the simple letting of land. There was no contract between the members and the manager; the commercial and economic reality accorded with the contracts in suggesting that the company acquired the services from the manager in order to meet its obligations to its members.

The judge noted that this would not be enough on its own to decide the case in HMRC's favour: the supply was not simply making the property available as referred to in *Temco*, but was a "a more complicated service" as in *Stade Luc Varenne*. However, such supplies could still be exempt as a letting of land.

What decided the case in HMRC's favour was the exclusion in Sch.9 Group 1 Item 1(d). The Upper Tribunal had not been entitled to interfere with the FTT's conclusion that it applied. Item 1(d) is not to be construed narrowly, and the UT's view that "sleeping accommodation" somehow restricted the meaning of the exclusion could not be justified. None of the CJEU precedents suggested that the length of the right to "sleeping accommodation" could take the grant of such a right outside the scope of the exception. HMRC's appeal was unanimously allowed.

Court of Appeal: *Fortyseven Park Street Ltd v HMRC*

3.2 Option to tax

3.2.1 Updated Notice

HMRC have updated their Notice *Opting to tax land and buildings*, revising the list of authorised signatories for the purposes of notifying an option to include those signing on behalf of corporate bodies, overseas entities and holders of a power of attorney.

The Notice is, of course, particularly important because substantial sections of it have the force of law.

Notice 742A

3.3 Developers and builders

3.3.1 Reverse charge legislation

The *Value Added Tax (Section 55A) (Specified Services and Excepted Supplies) Order 2019* brings in the reverse charge for construction services with effect from 1 October 2019. The final version of the law provides that the charge will only apply to supplies for which payment must be reported for construction industry scheme (CIS) purposes. The summary of the SI states that it acts to:

- apply a VAT reverse charge to construction services;
- define certain terms which appear in this Order;
- provide that the reverse charge will apply to services of a description specified in article 4 and that the supplies specified in article 8 are excepted from the reverse charge;
- specify construction services as being services to which the reverse charge applies;
- define construction services, specifying what services are and are not included within the term;
- provides for exceptions so that the reverse charge will only apply where construction services are supplied to other construction businesses;
- provide that certain exceptions may not apply where other construction services are being supplied by the same supplier to the same recipient in relation to the same construction site and those other services do not qualify as excepted supplies;
- make provision for supplies of construction services comprising a number of elements to be excepted from the reverse charge only when all of those elements would be excepted if separately supplied;
- provide that section 55A(3) of the Value Added Tax Act 1994 (which makes provision for reverse charge supplies to be treated as supplies made by the recipient for the purposes of VAT registration limits) shall not apply in relation to construction services as defined in this Order.

Under “Impact”, the Explanatory Note says the following:

The impact on business, charities or voluntary bodies is potentially significant for those supplying construction services because it is estimated that up to 150,000 businesses could be required to use it on supplies they make or receive. Only businesses that receive supplies where payments are reported through the Construction Industry Scheme will have to apply the reverse charge. In cases where a non-construction business falls within the scope of the Construction Industry Scheme because of the high value of its purchases of construction services, it may nevertheless come within the “end user” exception.

SI 2019/892

3.3.2 Reverse charge guidance

HMRC have updated their guidance on the Domestic Reverse Charge that will apply from 1 October 2019. This now makes a number of issues clearer; it is obviously worth reading in detail for those directly affected, but the following extracts appear important.

<u>Scope of the DRC</u>

The reverse charge will affect supplies of building and construction services supplied at the standard or reduced rates that also need to be reported under CIS. These are called specified supplies.

There is an important difference between CIS and the reverse charge where materials are included within a service. The reverse charge applies to the whole service whereas CIS payments to net status sub-contractors are apportioned and no deductions are made on the materials content.

The reverse charge does not apply if the service is zero rated for VAT or if the customer is not registered for VAT in the UK.

It also does not apply to some services. These are those supplied to end users or intermediaries connected with end users.

Employment businesses who supply staff and who are responsible for paying the temporary workers they supply, are not subject to the reverse charge.

<u>Flowchart</u>

There is a flowchart which goes through the logical process of deciding to apply the DRC:

1. *Does the supply fall within the scope of CIS? YES*
2. *Is the supply standard rated or reduced rated? YES*
3. *Is your customer VAT registered? YES*
4. *Is your customer registered for CIS? YES*
5. *Has your customer provided confirmation that it is an end user? NO*

DRC applies

"<u>Light touch" for six months</u>

The peculiar comment about "claiming end user status" has gone. Instead, the guidance now says:

HMRC officers may assess for errors during the light touch period, but penalties will only be considered if you are deliberately taking advantage of the measure by not accounting for it correctly.

<u>Other matters</u>

As a result of the reverse charge some businesses may find that, because they no longer pay the VAT on some of their sales to HMRC, they become repayment traders (their VAT Return is a net claim from HMRC instead of a net payment). Repayment traders can apply to move to monthly returns to speed up payments due from HMRC.

<u>Supply with other elements</u>

If any of the services in a supply chain are subject to the reverse charge, all other services (even if that service would be excluded if it were being supplied as a single service) will also be subject to it.

Supply and fix works will be subject to the reverse charge. For example, a joiner constructing a staircase offsite then installing it onsite is making a reverse charge service, even if the charge for installation is only a minor element of the overall charge.

In addition, if there has already been a reverse charge service between 2 parties on a construction site, and if both parties agree, any subsequent construction supplies on that site between the same parties can be treated as reverse charge services.

If there is doubt whether a type of works falls within the definition of a specified service, as long as the recipient is VAT registered and the payments are subject to CIS, the reverse charge should apply.

<u>End users</u>

The reverse charge does not apply to consumers or final customers of building and construction services. Any consumers or final customers who are registered for VAT and CIS will need to ensure their suppliers don't apply the reverse charge on services supplied to them.

For reverse charge purposes consumers and final customers are called end users. They are businesses, or groups of businesses, that do not make onward supplies of the building and construction services in question, but they are registered for CIS as mainstream or deemed contractors because they carry out construction operations, or because the value of their purchases of building and construction services exceeds the threshold for CIS.

Intermediary suppliers

Intermediary suppliers are VAT and CIS registered businesses that are connected or linked to end users.

To be connected or linked to an end user, intermediary suppliers must either:

- *share a relevant interest in the same land where the construction works are taking place*
- *be part of the same corporate group or undertaking as defined in s.1161 Companies Act 2006*

<u>Reverse charge treatment of end users and intermediaries</u>

The concept of intermediary suppliers means that if a number of connected businesses are collaborating together to purchase construction services, they are all treated as if they are end users and the reverse charge does not apply to their purchases.

For example, a property-owning group may buy construction services through one member of the group and recharge those services to either other group companies, their tenants or both. All the members of the property owning group and their tenants will be end users and the reverse charge should not apply.

Landlords, lessors, licensors, tenants, lessees or licensees and any persons 'connected' to them have a relevant interest in land. Having an agreement for lease is also a relevant interest in land. However, having a relevant interest in land does not include temporary rights to occupy land to carry out building and construction services.

You cannot choose whether you are an end user or an intermediary supplier because it is a matter of fact.

Asking suppliers about end user or intermediary status

You may not be sure whether you are supplying a customer who is an end user or intermediary supplier. In this situation, you should ask the customer if they are an end user or intermediary supplier and keep a record of the answer. It will be up to the customer to make the supplier aware that they are an end user or intermediary supplier and that VAT should be charged in the normal way instead of being subject to reverse charge.

Sometimes it may be obvious that the customer is an end user, for example if there is a repeat contract, and it will be acceptable for you to charge VAT in the normal way.

Examples of end users include UK VAT registered mainstream or deemed contractors under CIS rules. With the exception of property developers, they are typically not construction businesses and are found in the retail, manufacturing, utilities and property investment sectors as well as public bodies.

Intermediary suppliers can call themselves end users in all communications which should be in writing (either digitally, or on paper). There is no set wording, but this is an example of suitable wording:

'We are an end user for the purposes of section 55A VAT Act 1994 reverse charge for building and construction services. Please issue us with a normal VAT invoice, with VAT charged at the appropriate rate. We will not account for the reverse charge.'

If the reverse charge treatment depends on the customer's end user status and the treatment adopted is found to be incorrect (for example, because the customer is an end user but has not provided written confirmation resulting in the reverse charge being applied incorrectly) HMRC will expect the customer to notify the supplier that it is an end user and request a corrected invoice.

In the case of self-billing, a new invoice will have to be issued and the VAT will have to be paid to the supplier.

Verifying the VAT status of customers

Before you can apply the reverse charge, you need to be satisfied that your customer is VAT registered. You can check that your customer's VAT number is valid and belongs to them on the European Commission website.

Verifying CIS registration of customers

You do not need to verify the CIS registration of existing customers if your contract is within CIS (but you should keep evidence of this where you have it, such as a deductions certificate as part of your VAT records).

You should ask new customers to provide details of their registration as a contractor for CIS purposes, or a copy of their CIS verification of you, and retain these.

However, if you are registered for CIS as a contractor HMRC recommends you use the CIS verification system. You will still be asked to confirm that you have placed an order with a sub-contractor before completing the verification, but for VAT purposes you can confirm this even though an order has not been placed by you.

There are also specific comments about contracts straddling the change in the rules, paperwork and entries on VAT returns, cash accounting and the flat rate scheme.

www.gov.uk/guidance/vat-domestic-reverse-charge-for-building-and-construction-services

3.3.3 Reverse charge problem

There is a reverse charge on construction services in Hungary. In 2010 and 2011, a Hungarian company paid invoices from construction companies in connection with a motorway project. The suppliers charged VAT and the appellant deducted it. In 2015, the tax authority carried out an audit, assessed for tax of about €275,000, and added penalties and late payment charges.

The company's domestic appeal was based on an argument that the reverse charge should not have applied to the transactions. The company also claimed that the tax authority had denied them the right to deduct input tax, and had not considered the possibility that the suppliers had accounted for the output tax, resulting in potential double taxation. The tax authority ruled that the proper course was for the suppliers to correct their invoices to reflect the reverse charge.

The referring court asked whether the tax authority was obliged to investigate whether the supplier had accounted for the tax, and also whether the supplier was able to refund the output tax and claim it back from the tax authority. The questions referred to the principles of proportionality, fiscal neutrality and effectiveness, suggesting that the referring court was concerned that the tax authority had taken an unduly harsh line.

The CJEU took an equally hard line. It considered that the reverse charge regime imposed a "substantive requirement" for the right of deduction on the claimant – that the claimant must also account for the output tax that is to be claimed as input tax. As the appellant had not done so, it was not entitled to the deduction.

The Hungarian government had made representations to the court that there were domestic procedures for the customer to claim the overpaid VAT back from the supplier. The court noted that "if, in a situation where the VAT has actually been paid to the Treasury by the supplier of the services, the reimbursement of the VAT by the supplier to the recipient of the services is impossible or excessively difficult, in particular in the case of the insolvency of that supplier of services, the principle of effectiveness may require that the recipient of the services concerned be able to address its application for reimbursement to the tax authorities directly. In such a case, the Member States must provide for the instruments and the detailed

procedural rules necessary to enable that recipient of services to recover the unduly invoiced tax in order to respect the principle of effectiveness."

The appellant had argued before the court that one of the suppliers was insolvent. The court suggested that this would be a circumstance that would make correction of the situation impossible or excessively difficult. If that was the case, and it was established that the supplier had accounted for the output tax to the authorities, the appellant would have a claim for direct reimbursement of the overpaid VAT. However, that was a matter quite separate from the point at issue: the claim for input tax was incorrect, because it should have been dealt with under the reverse charge procedure. The tax authorities were under no obligation to check the supplier's position before disallowing the claim to input tax, and a direct claim for reimbursement would be a subsequent procedure for the appellant to enter into, subject to different rules.

CJEU (Case C-691/17): *PORR Építési Kft v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*

3.4 Input tax claims on land

3.4.1 DIY claims

An individual appealed against HMRC's refusal of a DIY claim. At the start of the hearing, he asked HMRC's representative to specify what were the matters of dispute; although he said that the only issue was the application of Note 2(d) (whether the building had been constructed in accordance with planning consent), he nevertheless made various other references in his submissions to the Tribunal, which therefore commented on them. The Tribunal also noted that HMRC had initially suggested that a penalty might be due, and had not withdrawn that suggestion.

The judge went through the history of the project and the dispute in detail, noting a number of areas of confusion in the way in which HMRC had raised queries and put forward their objections and decisions. HMRC had interpreted the planning consent as allowing an alteration of an existing building, but as it had been demolished completely, in their view Note 2(d) was not satisfied.

The judge (Richard Thomas) asked the parties to read the Tribunal's decision in *Pearson* (TC02735) in which Judge Bishopp said that it was not for the Tribunal to police the planning rules – rather it was for the planning authority to determine whether the finished building complied. If the authority took no action, the Tribunal should proceed on the footing that the work was lawful as required by s.35(1)(b), and there was "sufficient" compliance with the planning consent to satisfy Note 2(d). On that basis, the FTT was satisfied that the present appellant's claim succeeded.

Although HMRC had restricted themselves to Note 2(d), the judge made further comments about Note 2(c) and the "annexe" arguments, in case HMRC decided to appeal. The judge was satisfied that there was no prohibition on separate use or disposal in the planning consent, nor was the building an annexe in relation to any other building.

The judge also noted a number of "disturbing" aspects in relation to the threat of penalties, which had not been carried forward or discussed in the hearing. The judge made it clear that he did not consider penalties were appropriate in the case, even if it turned out that the claim should not succeed. He commented:

The appellant in his SoC brought the Tribunal's attention to the penalties letter while admitting it did not have a direct bearing on the issues in the appeal. He pointed out, as we have done, that the letter was issued despite the fact that he had not had an opportunity to respond to HMRC's rejection of his claim. The effect of it was to exert pressure on him not to pursue the claim. He says his family were against contesting the matter because of the threat by the government to prosecute and they exerted pressure on him to drop the matter for fear of prosecution. This placed him under extreme and unnecessary pressure. This type of threatening correspondence was, he says, tantamount to intimidation and should not have been issued by HMRC until all of his arguments were at least recorded.

We agree with the appellant.

Finally, the judge suggested that the appellant might consider applying for costs, as he clearly regarded HMRC's conduct in bringing, defending or conducting the proceedings had been unreasonable.

First-Tier Tribunal (TC07116): *Christopher Swales*

3.4.2 Services or materials?

HMRC refused a DIY claim submitted by a retired director of a building company on the basis that the supplies from his old company had been the construction of a new dwelling, so no VAT should have been charged. His initial response was that the supplies had been of materials without goods.

There was a discrepancy between the amount claimed and the total of the invoices presented in evidence. The appellant accepted that he might have been confused over some events and dates. The judge noted that it was now too late for the building company to recover any overcharged VAT from HMRC (the supplies were in 2009 and 2010), but nevertheless it should not have been charged. HMRC were correct to refuse to refund the VAT in this situation, and the appeal was dismissed.

First-Tier Tribunal (TC07151): *Ian Bushell*

3.5 Other land problems

Nothing to report.

4. INTERNATIONAL SUPPLIES

4.1 E-commerce

4.1.1 MOSS after EU exit

There is some information about using MOSS before and after Brexit on the GOV.UK website. This includes the point that: "If you want to continue to use MOSS, you must register for the scheme by the 10th day of the month following your first sale after the UK leaves the EU. For example, you'll need to register by 10 December 2019 if the UK leaves the EU on 31 October and you make a sale between 1 and 30 November. UK businesses will only be able to register for MOSS in an EU member state after the UK has left the EU."

www.gov.uk/guidance/vat-it-system-rules-and-processes-if-the-uk-leaves-the-eu-without-a-deal#using-the-uks-vat-mini-one-stop-shop

4.2 Where is a supply of services?

4.2.1 Place of supply

A dispute arose between the Netherlands authorities and a taxpayer about the place of supply, and therefore the liability of supply, of erotic interactive performances delivered over the internet. Setting aside the salacious context, this appears to be an important consideration of a number of concepts that were written in the VAT law before the internet was invented, and which are hard to apply to services supplied by internet transmission.

The taxpayer was registered for VAT and established in the Netherlands. His business included the supply, for consideration, of interactive erotic sessions filmed and broadcast live over the internet. The models used for the broadcast were in the Philippines; they worked for the taxpayer, who provided them with the hardware and software required to make the broadcasts. The customers set up an account with an ISP, which received payment and remitted some of it to the taxpayer. The customers were able to interact with the models during the live broadcast.

The taxpayer did not submit a VAT return; the authorities raised an assessment, and he appealed. The Netherlands Court of Appeal accepted his argument that the activity was the supply of entertainment, and this was materially carried out by the models in the Philippines. The tax authorities appealed, arguing that the place of supply should be where the customers were when they acquired the service.

The referring court considered that the key questions were whether the supply constituted an "entertainment service", which is subject to the "physical performance" rule on place of supply, or whether it constituted an "electronically delivered service", where the place a non-business customer receives the supply would be relevant after 1 January 2015. The referring court considered that it should probably not be regarded as an electronic service because it was interactive in nature, requiring human

intervention. However, the questions asked for clarification of how the supply should be classified, and if it fell within both headings, which should take precedence.

The CJEU commented that the period in which the disputed supplies took place (2006 – 2009): the 6th Directive was still in force; however, no material changes were made in enacting the PVD. The case law at that time held that there was no precedence between art.9(1) (the basic rule – now art.45) and art.9(2) (the list of exceptions, including "physical performance" for entertainment services – now art.54(1)). It was simply necessary to consider whether the supply fell within any of the exceptions, and if it did not, the basic rule would apply; this was not similar to exemption, where the exceptions to the general rule (taxability) must be interpreted strictly.

"Entertainment services" required "no particular artistic level"; not only services intended for entertainment, but also "similar activities", fall within the provision. The present supply was more complex, involving the establishment of a technical, organisational and contractual framework for the delivery of the shows to customers in the Netherlands. This was not comparable to traditional cultural events that required a specific time and place and physical presence of both parties. However, there was nothing in art.9(2)(c) that required the application of the provision to be restricted to such traditional events.

There was disagreement between the authorities making representations to the CJEU on the place of "physical performance". The Commission considered that it should be where the models put on their show. The Dutch and French governments considered that the "performance" involved the application of technology, and that meant the service was performed only where the customer was able to access the show. This was argued to be consistent with the purpose of the Directive in taxing consumption at the point of use.

The CJEU agreed with the A-G that the "complex service" was in reality provided by the taxpayer, rather than by the models he employed. The proper place of "physical performance" should be regarded as his business establishment in the Netherlands. This would provide a "rational result" as the CJEU had sought in the *Berkholz* decision: taxation in the Netherlands of services supplied by a Netherlands business to Netherlands customers appeared to be more logical than treating such a supply as outside the scope of VAT.

The CJEU went on to conclude that a live interactive broadcast did not fall within the definition of "electronically delivered services", because the supplier and all the customers were in the same member state. It appears that, had it been necessary to consider the question, the argument that the broadcasts required human intervention would in any case have taken them outside the scope of "electronically delivered services"; however, because it could not affect the place of supply, the CJEU did not reach a conclusion. It was also unnecessary to consider the third question referred, which asked how to decide between the first two tests if they produced different answers.

CJEU (Case C-568/17): *Staatssecretaris van Financien v Geleen*

4.2.2 Storage and insurance

A self-storage company appealed against a decision to refuse a reclaim of £793,000 of under-claimed input tax and also an assessment for £72,000 of over-claimed input tax relating to the period April 2009 to September 2012. There were four main issues:

- whether the company was making supplies of insurance to UK customers;
- whether it was supplying insurance intermediary services to a Guernsey-resident insurance captive subsidiary of its own parent company;
- what the place of the supplies was – if the supply was to the Guernsey company was it made to the recipient in Guernsey, or to a fixed establishment in the UK;
- whether the assessment was out of time.

The company's position was that it was making "specified supplies" to the Guernsey company, and it was therefore entitled to recover input tax. HMRC's position was that it was making supplies to its UK customers, or that it was making supplies to a FE of the Guernsey company. In either case, the input tax would be attributable to exempt supplies.

Customers of the storage company had to insure the goods they deposited. They were offered insurance through the captive insurer; the UK company collected premiums together with IPT and remitted 70% of the net premium, together with the IPT, to the Guernsey company. The Guernsey company effected reinsurance with Royal & Sun Alliance, which was not connected to any of the parties. The Guernsey company accounted for UK IPT on the necessary returns.

The Tribunal examined the contracts. The company understood them to have the effect that it was the beneficiary of a master insurance contract with its fellow subsidiary, with the customers having rights under that policy in case of loss. That suggested a similar arrangement to that in *Card Protection Plan*, where the supplier had a block policy and extended the benefit of it to its customers. That was held to be a supply of insurance by the company. The company's counsel sought to distinguish the situations, arguing that the UK company was not an insured person and was therefore only acting as an intermediary. It was the Guernsey company that made the supplies of insurance as principal. HMRC disagreed: the situation was very similar to *CPP*.

The Tribunal considered *CPP* and also *Wheels Private Hire Ltd* (UT 2017) and *BGZ Leasing* (Case C-224/11). Each of these considered a situation in which there were three people involved in an insurance arrangement, and examined the question of who was supplying insurance within art.135(1)(a) PVD. In each case the person in the middle was held to be supplying insurance based on the specific facts of the arrangement.

After examining these precedents, the judge concluded that there was no significant difference between the present case and *CPP*. Some of the terms of the policy clearly envisaged that it was the company that was insured under it; for example, the insurance limits were £80m in total and £2.5m in respect of any one premises, which clearly related to the

company rather than to a customer. There was a single policy of insurance effected by the company, the benefit of which was extended to new customers as they joined.

The appeals were therefore dismissed in principle, but it was necessary to consider whether the assessment had been raised out of time. It had been issued on 30 October 2015, and related to periods 10/11 to 07/12 and "99/99". It was dependent on the "one year from knowledge of facts" rule.

The history of the provision of information to HMRC was examined. The critical points were that the company provided some information on 4 August 2014 and some more on 2 December 2014. The taxpayer's counsel submitted that HMRC had had sufficient information in December 2013 when an initial decision letter was issued; an initial statement of case for an appeal was dated 15 April 2014. HMRC argued that the document provided on 2 December 2014 was the critical last piece of the jigsaw that enabled them to issue an assessment; counsel's response was that HMRC had not identified any aspect of this document that had caused them to materially change their understanding of the supply chain and therefore to issue the assessment.

The judge agreed with HMRC. Until the company finally provided a copy of the Customer Goods Policy, it was not clear to HMRC whether the nature of the arrangements was similar to *CPP*. The assessment was therefore not out of time.

Because the question of place of supply had been fully argued, the judge briefly expressed an opinion on it, even though HMRC had won on the issue of who made the supply of insurance to the customers. If the judge was wrong on that, it would be necessary for an appeal Tribunal to consider whether the supplies were "specified supplies".

Here, the argument was about whether what the UK company did in selling insurance to customers made it a FE of the Guernsey company. HMRC argued that only "high level activity" took place in Guernsey, and the day-to-day operation was in the UK company's premises where its staff had full authority to sell insurance to customers. They relied on *DFDS* and other similar precedents.

Curiously, the decision makes no reference to *Hastings Insurance*, although the arguments are on the same points of law. The judge agreed with counsel for the taxpayer that the Guernsey company could not be regarded as having a FE in the UK. DFDS did not apply because the UK company was not an "auxiliary organ" of the Guernsey insurer. If the judge had found for the company on the nature of its supplies, he would have also found for it on the place of those supplies.

However, the appeal was dismissed in principle.

First-Tier Tribunal (TC07115): *Safestore Ltd*

4.2.3 Provision of international services

The Department for International Trade has published a new collection of guidance for stakeholders on providing services to any country in the EU, Iceland, Liechtenstein, Norway or Switzerland if the UK leaves the EU without a deal in place. On VAT, the guide states that "If the UK leaves

the EU without an agreement, the main VAT 'place of supply' rules will remain the same for UK businesses, though there may be some areas of change."

www.gov.uk/guidance/providing-services-to-any-country-in-the-eu-iceland-liechtenstein-norway-or-switzerland-after-eu-exit

There is also more detailed guidance on the VAT rules in another location.

www.gov.uk/government/publications/vat-for-businesses-if-theres-no-brexit-deal/vat-for-businesses-if-theres-no-brexit-deal#place-of-supply-rules-for-UK-businesses-supplying-services-into-the-EU

4.2.4 Article

In an article in *Taxation*, Neil Warren describes a situation in which an HMRC officer initially refused to accept that HMRC's own published Notice was correct in relation to a business-to-business supply by a UK company to a customer in Spain. The officer considered that the UK company's suppliers, who were supplying ancillary services in relation to an event taking place in Spain, should not have charged it UK VAT. The officer refused to accept that the law had changed with effect from 1 January 2011; the article explains how the problem was eventually resolved, with repayment supplement being paid to the taxpayer.

Taxation, 3 May 2019

4.3 International supplies of goods

4.3.1 Fuel cards

A company engages in the transport of commercial vehicles of well-known manufacturers from the factory directly to the customer. That service is provided via several subsidiaries whose registered offices are in different member states. The holding company organises and manages the supply of fuel cards, issued by different fuel suppliers, to all its subsidiaries. All transactions carried out by means of fuel cards are settled centrally in Austria; at the end of each month, the holding company passes on the cost of fuel to the relevant subsidiary, together with a surcharge of 2%. These recharges are settled by payment or by offset against invoices issued to the Austrian company.

The Austrian company claimed a refund of VAT incurred on fuel in Poland. The Polish authorities refused the claim, citing *Auto Lease Holland* (Case C-185/01) as authority for the view that the company was not supplying goods in Poland but rather a facility that enabled the cardholders to buy goods. It was not entitled to claim the VAT because it effectively provided credit facilities, which would be exempt in Poland.

On appeal, the referring court was not sure whether the replacement of the 6th Directive by the PVD had any impact on the decision in *Auto Lease Holland*. The wording of art.135(1)(b) exempts the granting or the negotiation of credit and the management of credit by the person granting it; the court was not sure that the company's transactions could be

characterised as falling within that definition. The question referred asked whether the company's transactions could instead be regarded as complex chain transactions the primary purpose of which is the supply of fuel.

The CJEU considered that nothing has materially changed since the earlier decision. The person filling the tank acquires the fuel and the right to dispose of it as owner. The holding company provided its subsidiary with a simple means of acquiring fuel and paying for it on deferred terms; that was a supply of credit, and it was exempt within art.135(1)(b).

The decision does not consider the possibility that the Polish company should be entitled to deduct input tax on the fuel as a disbursement; it appears that the fuel has become an input of an exempt supply, even though it is charged back to a taxable trader.

CJEU (Case C-235/18): *Vega International Car Transport and Logistic-Trading GmbH v Dyrektor Izby Skarbowej w Warszawie*

4.3.2 Government funding for customs declarations

Up to 31 May 2019 businesses could apply online for grants to help fund training and IT improvements connected with completion of customs declarations, in preparation for the UK leaving the EU. This grant scheme, administered on behalf of HMRC by PwC, opened for applications in December 2018 following the government's announcement in October of £8m in funding. In April, the government confirmed that applications would close by 31 May and possibly earlier, dependent on uptake.

www.gov.uk/guidance/grants-for-businesses-that-complete-customs-declarations

4.3.3 HMRC guides to trading after a no-deal Brexit

HMRC continue to add statutory instruments to the dedicated web page for no-deal Brexit legislation. There is a full list at the address below.

www.gov.uk/government/publications/statutory-instruments-relating-to-eu-exit

HMRC updated its collection on 8 April with a reminder that traders will need a UK EORI number beginning with 'GB', followed by 12 digits, in time for 31 October 2019.

www.gov.uk/government/collections/trading-with-the-eu-if-the-uk-leaves-without-a-deal

4.3.4 Updated Notices

HMRC have updated their Notice *Deferring duty, VAT and other charges*, mainly to reflect changes since introduction of the Union Customs Code in May 2016, including guarantee requirements.

Notice 101

HMRC have updated their Notice *Importing scientific instruments free of duty and VAT*, apparently only to include a revised telephone number for the National Import Reliefs Unit.

Notice 340

HMRC have updated their Notice *Imports by charities free of duty and VAT* to reflect the 30-day time limit for taxpayers to request review of an HMRC decision and for HMRC subsequently to carry out its review (previously 45 days).

Notice 317

HMRC have updated their Notice *Customs special procedures for the Union Customs Code*, apparently only to include a new address for Customs Nottingham.

Notice 3001

4.3.5 Appointed Day

The *Taxation (Cross-border Trade) Act 2018 (Appointed Day No 5 and Miscellaneous Commencements) (EU Exit) Regulations 2019* appoint 8 April 2019 as the date on which parts of Schedule 7 to the Act and specific provisions of three sets of customs regulations come into force. These enable premises to be approved as transit sheds for imported goods, besides giving effect to preparatory provisions in relation to payment and deferment of import duty, as well as simplified procedures in relation to the new Crown Dependencies Customs Union.

SI 2019/819

4.3.6 Post clearance demands

A company sought to appeal against some 40 C18 demand notices totalling over £300,000 in import VAT and customs duty. HMRC ruled that the time limit for objecting had passed; the FTT ruled in February 2018 that the time limit was met in 24 cases, and in the remainder it gave permission for the appeals to be made late. HMRC appealed to the UT.

The demands were in relation to goods entered for Inward Processing Relief where the company had not submitted a Bill of Discharge within the 6 month “throughput period”. The company claimed not to have received many of these documents because they had been sent to a previous address. It argued that, when they were reissued and it applied for review, it would be in time to make appeals.

The FTT decided that as the company had notified HMRC, although not the EORI team, that it had moved offices, the notices were not validly served when they were sent to the wrong address. In deciding to allow the out-of-time appeals to proceed, the FTT attached considerable weight to the fact that valid appeals were to be made on another 24, reducing the prejudice to HMRC of having to argue a case they thought had been settled.

The UT rejected a contention by HMRC that their published guidance imposed an obligation on traders to notify the EORI team specifically. However, the company should have recognised that different departments should be notified separately, and should not have assumed that putting a new address on a VAT registration application constituted an instruction to send future correspondence on customs duty matters to that address. Some other contacts should have notified HMRC, but later than the FTT had held; so the first 15 C18s were validly communicated to the company

at the time they were issued, by being sent to the company's address as recorded on HMRC's files.

In applying the time limits, the FTT had concluded that the "date of a document" was the date it was sent, not the date shown on it. The second issue of C18s still showed the original date. The UT held that the FTT had made an error of law: when the law referred to "the date of a document" for the purposes of a time limit, that should be interpreted as meaning the date shown on that document. The fact that this would mean that the time limit for appealing might have expired before the document was received was not sufficient justification for the FTT's conclusion.

The UT held that the FTT had not applied the law correctly in considering the prejudice to HMRC from allowing the appeals to go ahead. It should not have attached significant weight to the fact that other appeals were going ahead as they were not late, and it did not attach enough important to the need for litigation to be conducted efficiently and at proportionate cost and for time limits to be respected.

Lastly, the UT dismissed HMRC's ground of appeal which asserted that the FTT had not considered the merits of the appeal in enough detail.

Having identified errors of law, the UT had to decide what to do. It set the FTTs' decision aside and remade it. There was a serious and significant delay between the company receiving HMRC's refusal to carry out a review (November 2016) and making an appeal to the FTT (June 2017). If the FTT had applied the law correctly, it would have concluded that all 40 C18s were appealed late, and it would have rejected the application to appeal out of time because the balance of prejudice did not justify it.

HMRC's appeal was allowed in full, and all 40 appeals were refused.

Upper Tribunal: *HMRC v Sharya UK Ltd*

4.4 European rules

4.4.1 Anti-fraud measure

The EU has launched its 'transaction network analysis' (TNA) tool to help detect VAT fraud by providing tax authorities with automated analysis of VAT data from intra-EU supplies. The tool will be used within the framework of the new administrative cooperation regulation, which entered into force in November 2018 and will apply for most purposes from 1 January 2020. The TNA has been developed on a voluntary basis by 25 member states (not including the UK). It will allow Member States to rapidly exchange and jointly process VAT data, leading to earlier detection of suspicious networks.

europa.eu/rapid/press-release_IP-19-2468_en.htm

4.4.2 Nature of supply

A Portuguese real estate agent was engaged to sell some agricultural land. It found a purchaser, but the client refused to go through with the sale, and refused to pay the agent's fee. The agent made a claim for the fee and was awarded judgement by a court; the debtor still did not pay, so a further action for execution of the debt was pursued. A property belonging to the debtor was seized to secure payment. Nearly four years after the original supply, the agency assigned its rights in the enforcement proceedings to another company for payment of a capital sum.

The original debt had been €125,000, plus VAT of €26,250; the capital sum was €200,000 more than that. The agency accounted for output tax on €125,000, but described the balance as an "other unspecified profit" and did not pay any VAT on it. The Portuguese authorities assessed the agency for VAT on the whole €351,620 received, without apparently making any reduction for the VAT already accounted for on €151,250, holding that the two transactions were quite separate – the assignment of the seized property was another taxable transaction.

A question was referred to the CJEU, asking whether the "transfer of a procedural position" such as this fell within the exemption for "granting, negotiating or managing credit" within art.135(1)(b) PVD. The Advocate-General has given an opinion, and has extended the question to consider whether art.135(1)(d) might apply as well or instead ("transactions, including trading, in respect of deposits of funds, current accounts, payments, transfers, claims, checks and other negotiable instruments, other than the recovery of debt").

The company argued that the assignment of the claim did not involve a supply of goods or services for consideration, and it was therefore outside the scope of VAT. The Portuguese government considered that it was the assignment of a tangible good (the seized property). The Commission argued that there were two taxable services, the assignment of a receivable and the transfer of the claim rights or "procedural position".

The A-G's opinion was that there was a single, unitary but complex transaction, which comprised the transfer of immovable property; that might be exempt under the provisions applicable to such transfers. The company relied on *GFKL Financial Services AG* (Case C-93/10), in which the CJEU held that a company buying defaulted debts at below their face value was not making a supply of services for consideration. The situation was completely different: there was property involved as security, and the value of the property appeared to be substantially higher than the face value of the original debt. Further, the appellant agency was not in the position of GFKL – it was making the assignment, not receiving it.

Next, the A-G noted that the parties had described the transaction as an "assignment of debt"; however, that could not determine the matter, when it was clear that the economic reality was the transfer of rights and obligations relating to the property that had been awarded to the agency. The A-G rejected the Commission's split of the transaction into two parts: in his view, there was no transfer of a debt, but a single, complex transaction. The economic reality was that the purchaser had been attracted by the right to dispose of the property as owner: that suggested that there was a supply of goods, as described in PVD art.14. If for some

reason it was not a supply of goods (e.g. the referring court determined that the facts as represented to the CJEU had misled the A-G), then it would still fall to be taxed as a supply of services.

The taxpayer also argued that the transaction was not in the context of its "economic activity" because the transfer was a one-off transaction outside its normal estate agency business. The Commission, the Portuguese government and the Advocate-General all rejected this suggestion. An exceptional transaction is still within the scope of VAT if it is carried out by a taxable person in the context of his taxable activity, as this was.

The A-G went on to consider whether exemption should apply under art.135(1)(b), as asked by the referring court, or under art.135(1)(d), which he added in order to provide a helpful answer. The referring court appears to have believed that (b) was relevant because the word for "debt" in the Portuguese law version of (d) is the same as that used for "credit" in (b). It was necessary to apply the exemptions consistently throughout the EU and to interpret the terms strictly, in order to harmonise the treatment of similar transactions as much as possible. The company had based part of its argument on Portuguese law, which could not determine the issue.

The Advocate-General agreed with the Commission and the Portuguese tax authority that the transaction did not fall within the "granting of credit" or any of the other terms of art.135(1)(b). Because the asset transferred was a right over immovable property, rather than a pure debt, it did not fall within art.135(1)(d) either.

Although the A-G considered that the proper classification of the transaction was as a transfer of immovable property, which could be exempt under art.135(1)(j) or (k), there was insufficient information in the order for reference about the nature of the property for a proper consideration of that issue. The A-G recommended that the court should answer the question by stating that the financial exemptions did not apply to this type of transaction.

CJEU (A-G) (Case C-692/17): *Paulo Nascimento Consulting – News Mediação Imobiliária Lda v Autoridade Tributária e Aduaneira*

4.4.3 Change of status

An individual (or, technically, a legal representative acting for him) objected to VAT being added to court enforcement fees charged to him. His argument was that the fees, determined in accordance with the Polish law on court enforcement officers, already included VAT. The Polish Supreme Court held that the fact that the law did not mention VAT meant that the fees were to be regarded as a gross amount already including any VAT due. Questions were then referred to the CJEU to determine whether that interpretation was consistent with the PVD.

Until June 2015, court enforcement officers in Poland were regarded as state officials covered by the exclusion of state functions from taxable body status. The Finance Minister then decided that they should not be regarded as covered by the exemption and should therefore be subject to VAT. The official statement at the time said that the fees would be VAT-inclusive, but there was no change to the statutory level of fees; the CJEU noted that this effectively reduced the officers' fees by the amount of the VAT.

The Polish Supreme Court agreed with the Finance Minister that court enforcement officers carry on their activity as members of a liberal profession rather than as bodies governed by public law, and they are therefore subject to VAT in the normal way.

The referring court was not sure whether treating the fees as taxable, but making no adjustment to the amount of the statutory level of fees, was in accordance with the principles of neutrality of VAT and proportionality; it appeared that the VAT was borne by the business rather than by the final consumer.

The CJEU held that there was nothing in the PVD to overturn such a practice in a member state. There was no doubt that the fees were VATable, and that the trader was liable to pay the VAT; the fact that the gross level of fees was set by statute, and the trader was therefore only able to retain a smaller amount, was not something that the PVD contained a rule on either way.

CJEU (Case C-214/18): *HW v PSM 'K' and Aleksandra Treder*

4.4.4 Standstill clause

It is a general principle of EU law that inputs used for a trader's taxed transactions should give an entitlement to input tax credit. There was provision in the 6th VAT Directive for Member States to continue to impose blocks on input tax that were in force in that country when the Directive first took effect; such blocks may be removed by the country at a later date, but they may not be extended or reintroduced if they have been removed. The intention was that a "definitive system" would be introduced within four years of the introduction of the 6th Directive (i.e. in the early 1980s), but that did not happen.

Polish law denies any input tax credit for the purchase of overnight accommodation and catering services, with the exception of purchases for onward supply by tourism or transport businesses. The first exception to the block (relating to tourism businesses) was repealed in the version of the law that applied from 1 December 2008. This meant that the only costs of catering that were allowed for credit were "the purchase of ready meals prepared for passengers by taxable persons providing passenger transport services".

A Polish company acquired overnight accommodation and catering services purchased in part for its own use and, in part, for resale to its subsidiaries, themselves taxable persons in that Member State. The company considered that it was not the final consumer of the supply, and it should therefore in principle be entitled to deduct the input tax on the purchase where it had charged the services on to other taxable persons.

The Polish authorities rejected this claim on the basis of the unambiguous block in the Polish law. On appeal, the Polish court noted that the wording of the block had changed subsequent to the accession of Poland to the EU (1 May 2004), which was when the 6th Directive took effect in that country. This effectively extended a blocking order.

The referring court noted the CJEU decisions in *Ampafrance* (Case C-177/99) and *Sanofi* (Case C-181/99) in which blocks that contravened the basic principle of the right of deduction were rejected by the court, even though they had been approved by Council derogations, because the

Directive specified the circumstances in which a derogation could be granted and those circumstances did not apply. The referring court was not sure whether the same principles would apply to article 176, which provides for the maintenance of blocks existing at the date of accession.

The CJEU considered that, in principle, the change to the Polish law appeared to infringe the terms of art.176. Removing an exception to the blocking order was the same as extending the block. However, as the Commission pointed out in its submission, it was not clear that the supplies in this case fell within the original exception: that only referred to costs incurred by a tourism business for onward supply in connection with that b business. These costs appeared to be incurred for the taxpayer's own use and for invoicing to subsidiary companies.

It was also necessary to consider whether the blocked categories were adequately defined by the law, so that it could be determined with certainty what was covered and what was not. The CJEU noted that the definition of "overnight accommodation and catering services" was "somewhat generic", but it did appear to be a category that complied with the law as set down in precedent cases.

The Commission also submitted that a block should not be permitted where costs were undoubtedly used for the business of a taxable person. The CJEU disagreed. Art.176 allowed a member state to retain "all the exclusions" it had on accession, and that included pure business expenditure (as discussed in *Royscot Leasing*, Case C-305/97). The decisions in *Ampafrance* and *Sanofi* were based on derogations that contravened the conditions of the Directive, not on the standstill clause.

The CJEU therefore held that the extension of the block in the Polish law was in contravention of the Directive; however, the inputs of the taxpayer could validly be blocked if they were covered by the law that applied up to 1 December 2008 (i.e. the original scope of the blocking rule), even though they were incurred after that date, which it was for the referring court to determine.

CJEU (Case C-225/18): *Grupa Lotos SA v Minister Finansow*

4.4.5 Offshore platforms

A Romanian company sold three "self-raising seawater rigs" operating in the Black Sea to Maltese companies. It treated the consideration (US $82m) as exempt under art.148(c) PVD. The Romanian authorities ruled that they were not "vessels" while they were drilling, and they were therefore not "used for navigation on the high seas". Questions were referred to the CJEU, covering whether parking the rig meant that it was no longer a vessel, and if so, whether the exemption could be maintained by moving it around for more time than it was used for drilling.

The court agreed with the Romanian authorities. "Vessels used for navigation on the high seas" did not include a floating structure such as a rig that was predominantly used in its immobile state standing on the sea-bed.

CJEU (Case C-291/18): *Grup Servicii Petroliere SA v Agenţia Naţională of Administrare Fiscală - Direcţia Generală de Soluţionare a Contestaţiilor, Agenţia Naţională from Administrare Fiscală - Direcţia Generală from Administrare to Marilor Contribuabili*

4.4.6 Customs value

Articles 29 to 31 of the Customs Code provide a process for determining the chargeable value of an import, which is then used both for duty and for VAT. A company operating in the Baltic states entered into a contract with an Indian pharmaceutical manufacturer to import and distribute its products. It used the "transaction value" described in art.29, taking the value from pro forma invoices issued by the manufacturer at the time of importation. It appears that the actual amount paid might be affected by later factors such as discounts and wastage, in accordance with a contract between the supplier and the Baltic company. The Latvian authorities carried out an audit and decided that the company should have used the "deductive method" in art.30(2)(c) of the Code rather than the transaction value (value based on the unit price corresponding to sales in the Community of the imported goods or of identical or similar imported goods totalling the highest quantity, thus made to persons not related to the sellers – subject also to rules in art.152 of the Implementing Regulation), and imposed penalties.

Questions were referred to the CJEU on the valuation method. First, the court considered how to identify "like goods" for the purposes of art.30(2)(b). It ruled that the competent national customs authority must take into consideration any relevant element, such as the composition of the goods, their substitutability with regard to their effects and their commercial interchangeability, leading to a factual assessment that takes into account any element which may have an impact on the real economic value of the goods. This will include the market position of the imported goods and their manufacturer.

The next question concerned the application of art.30(2)(c) and art.152 of the Implementing Regulation, which require a consideration of the value of similar goods within 90 days of the importation. The referring court asked whether this was an absolute time limit or was capable of flexible application. The court noted that the valuation methods must be used hierarchically, so art.30(2)(c) is only relevant if the earlier methods cannot produce a result. In the context, it was clear that the 90 day limit should be applied rigorously, because it was an exception to the normal rules.

The valuation method did not allow for reductions in the selling price of imported goods. Commercial discounts granted by the seller were not mentioned in the article, and their inclusion could lead to a customs value even further from the real economic value of the imported goods.

CJEU (Case C-1/18): *"Oribalt Rīga" SIA v Valsts ieņēmumu dienests*

4.4.7 Second hand gold

A company bought and sold raw materials, precious stones and precious metals, and bought from individuals objects having a high grade of gold or other precious metals. The Spanish authorities considered that these purchases were subject to an indirect tax separate from VAT. Questions were referred to the CJEU on whether this was permissible, given that VAT is supposed to be the only turnover tax of its type across the EU.

Art.401 PVD allows the retention of other taxes subject to a number of conditions. Although it appears to rule out anything that "looks like" a

turnover tax, the precedent cases on the subject have held that only a general tax on goods and services has the characteristics of VAT; as long as the disputed tax did not apply in the same way as VAT, it was not ruled out by art.401.

CJEU (Case C-185/18): *Oro Efectivo SL v Bizkaia Foral Diputación*

4.5 Foreign refund reclaims

4.5.1 Cross-border refund claim

The French authorities rejected a cross-border refund claim made by a German company for French VAT paid in the year 2014. The claim had been made through the electronic portal on 17 September 2015; the authorities asked for further information by e-mail on 14 December, specifying a time limit of one month for giving a reply. When no reply was received within this time, the claim was rejected on 29 January 2016.

The company appealed against the refusal, and produced the requested information in support of its appeal. The tax authorities objected, arguing that complying with the request outside the time limit did not assist the taxpayer; if the taxpayer's claim not to have been aware of the time limit was accepted as relevant, it would be impossible to regulate the collection of additional information.

The time limit is specified in art.20 Directive 2008/9; the referring court noted that the Directive does not specify the consequences of failing to comply with it. The taxpayer argued that refusal of the claim was contrary to the principles of neutrality and proportionality.

The CJEU noted that the refund mechanism for foreign VAT is an extension of the right to deduct "upstream VAT" under art.168, which is a fundamental part of the VAT system that cannot, in principle, be limited. The right is exercisable immediately.

The CJEU has in the past held that the time limit for submitting a claim is absolute, and missing the deadline is a reason on its own for the claim to be refused. The limit is now 9 months after the end of the calendar year; it was 6 months under the old 8th Directive, which also used the expression "at the latest" in describing the time limit for making a claim.

Art.20 does not use the same expression. The Advocate-General suggested that the absence of the words implied that the legislature had not intended to create the same limitation effect. The CJEU noted that information requested under art.20 may be demanded from people other than the claimant, including the tax authorities of the other country; if a delay by someone over whom the claimant had no influence would lead to the loss of the claim, that would be a disproportionate result. It would contravene the principles of equivalence and effectiveness.

The consequence of the time limit in art.20 is that the time within which the member state must state a decision to accept or reject the claim runs from the expiry of that period. The A-G pointed out that, under art.21, the member state may decide to accept the claim even if the further information has not been provided.

In addition, art.26 restricts the claimant's right to interest where a claim is paid late because information has not been provided in a timely manner to the tax authorities. This suggests that a late response to a request cannot be intended to lead to automatic rejection of the claim.

It must therefore be possible to regularise the situation by submitting the further information late, at the loss of the right to interest on the late payment of the claim, as long as the original claim was filed in time.

CJEU (Case C-133/18): *Sea Chefs Cruise Services GmbH v Minister of Action and Public Accounts*

4.5.2 Extended deadline for 13th Directive claims

Revenue & Customs Brief 12/2018 on *Refunds of VAT in the UK for non-EU businesses* has been updated and reissued, further extending the deadline for US claimants of 2017/18 refund claims until 30 May 2019. The original extension arose from HMRC accepting that a change of policy imposing stricter conditions for acceptance of certificates of status had not been adequately publicised; the new extension is to allow for delays in processing COS requests in the US.

R&C Brief 12/2018

5. INPUTS

5.1 Economic activity

Nothing to report.

5.2 Who receives the supply?

5.2.1 Import VAT deducted as input tax by non-owners

HMRC have published a Brief to highlight two instances in which import VAT is recovered incorrectly as input tax by taxable persons who are not the owners of relevant goods, and to set out the correct treatment to be applied in all cases from 15 July 2019.

The first situation relates to 'toll operators', who import goods (for example pharmaceutical goods), process them and distribute them within the UK for clinical trials. The toll operator does not take ownership of the goods and does not resell them. They may however, distribute the goods onwards at the instruction of the owner (their customer). The only supply by the toll operator is of its services to its client (the owner of the imported goods). Title to the goods at all times remains with their overseas customers (the owners). However, the toll operator acts as 'importer of record' on UK import declarations, pays the import VAT to HMRC and receives the import VAT certificate (C79).

The correct procedure is for the owner to be the importer of record and reclaim the import VAT, either in accordance with VATA 1994 s.24 (i.e. on a VAT return – if registered for VAT in the UK) or under the 13th Directive (if not registered in the UK).

The second situation is where title to the goods has passed to a customer before the goods have arrived in the UK, but the seller has acted as 'importer of record' on UK import declarations, paid the import VAT to HMRC and received the import VAT certificate (C79). The correct procedure is for the new owner of the goods to be the importer of record and reclaim the import VAT on the C79 and not the previous owner.

From 15 July 2019, HMRC will only allow claims for input tax deduction made using the correct procedures. This allows an appropriate transitional period for businesses to make any necessary changes to ensure the correct procedures are used going forward. HMRC accept that as previous guidance was not clear on the correct procedure, businesses in these situations have been acting in good faith. HMRC will not pursue historical VAT deduction where the VAT could have been recovered in full by the owner of the goods at the time of importation as long as there is no risk of duplicated claims. In this context 'historical' means deductions made before 15 July 2019.

This will apply to any affected businesses that meet all the qualifying criteria, such as:

- VAT deductions were made in genuine error, through misinterpretation of the legislation or guidance;

- the owner of the goods would have been entitled to full import VAT recovery;
- HMRC are satisfied that there has been no VAT deduction by another person.

R&C Brief 2/2019

5.3 Partial exemption

5.3.1 One building or two?

TC06506 was concerned with a repayment return for 01/16 submitted by Glasgow School of Arts (GSA) claiming £405,301, and a Form 652 submitted at the same time applying for £65,778 in respect of costs of a building project. HMRC rejected both claims and replaced them with an assessment for £96,525.

GSA had carried out construction works at its Garnethill campus. There was a difference of opinion as to whether there were two buildings involved, the Reid Building and the Assembly Building; to start with, GSA had referred only to the Reid Building, but later it argued that there were two buildings, while HMRC's position was the opposite of this.

The Tribunal explained that the decision would use "the Assembly Building" to refer to an area of the site occupied by the Students' Union, and "the Reid Building" as an area occupied by GSA itself. However, the whole site had frequently been referred to by both parties as "the Reid Building".

The judge considered the history of the refurbishment project, which involved substantial amounts of demolition and reconstruction. The Assembly Building is an older sandstone structure which shares a party wall with the Reid Building, a modern steel-and-glass construction opposite the historic Mackintosh Building which has recently been destroyed by a second fire in a short period. They were functionally separate, with minimal shared facilities (sprinkler and air handling systems and heating), and access from one building to the other only used for maintenance purposes. The buildings are classified separately for rates, with the Assembly Building classified as a business and the Reid Building as a charity.

The Assembly Building was leased to the Students' Union. The judge noted that the agreement is in reality a Service Level Agreement rather than a lease; the rental is £5,000pa plus VAT. This was at an effective rate of 45p per square foot at a time when the market rate for a city centre bar or restaurant was £7.62 and office space was £12 to £15.

The construction company had originally tendered for the whole refurbishment and reconstruction project as a single contract, and had rendered combined invoices. GSA asked for separate invoices to identify the VAT element of the Assembly Building refurbishment, when it had decided that it ought to be possible to reclaim it. The VAT on the costs had initially been treated as residual, and had recovered it according to an

agreed combined PESM (business/non-business and partial exemption) that had operated since August 2009.

GSA's tax agent wrote to HMRC in December 2013 in an attempt to agree a new "capital item special method" based on the floor area of the whole Reid Building site. This suggested that 16.28% of the combined building was used for wholly taxable purposes. On 14 August 2014 the agent submitted an option to tax covering the whole building. In October 2014, the agent submitted a capital goods scheme adjustment working which produced an overall taxable percentage of 29.98%; the taxable areas included the Assembly Building (rented to the Students' Union), a refectory (operated by a company as agents for GSA) and a retail shop (operated by a commercial subsidiary).

HMRC refused the claims on the basis that the outputs of £102,500 did not fairly represent the economic use of the building costs and did not justify the recovery of £2.1m of input tax.

In correspondence during 2015, the tax agent explained that GSA now maintained that the Assembly Building was a separate building from the Reid Building; although the option to tax had referred to the Reid Building, the clear intention had been to opt the Assembly Building. VAT had been charged and accounted for on all rental income; the Assembly Building had been used for wholly taxable purposes. The agent stated that there was no internal link between the buildings, in spite of supplying plans which clearly showed that such a link existed. Further investigation and correspondence ensued about the nature and possible use of the access doors, which were now only to be used as an emergency fire exit from the Assembly Building.

HMRC's argument was summarised as follows:

(a) There was a single supply which had not been altered by the issue of the credit notes and invoices outwith the accounting system.

(b) VAT had been charged at the time of the supply and deducted using the PESM and BNB then in place.

(c) The supply was properly attributable to all of the appellant's activities so the VAT on the construction services was residual and it is not possible years later to re-attribute part of that supply to fully taxable.

(d) The cost component on the supply of construction of the Assembly Building relates to all of the appellant's activities not just the lease so the deduction should not be limited to the Assembly Building alone.

(e) The cost component test relates to whether there is a "direct and immediate link" between the input and the output tax.

(f) Whilst it is accepted that a business does not require to be profitable to deduct its input tax, and that deduction is not being denied by HMRC, the attribution solely to the lease does not reflect the economic reality.

(g) One should look objectively at purpose and funding when considering the economic use of costs and the grant of a lease at an almost notional cost was not the sole or even principal purpose of the refurbishment funded by the Scottish Funding Council.

GSA's argument was that the separate identity of the two buildings was a question of fact, which necessarily determined that the VAT was incurred

on two separate sets of costs; and the VAT incurred on the Assembly Building was then fully recoverable, because it was used for wholly taxable purposes.

The judge considered precedents on whether buildings can be regarded as separate, in particular *Cantrell*. The internal access provisions of Sch.8 Group 5 Notes 16 and 17 only relate to the question of whether something is an "annexe", which had no relevance here. There were factors favouring both possible outcomes, but overall the judge was satisfied that the Reid Building was a single structure with a self-contained area within it. It was "one building constructed as such". The changes to restrict the internal access were made as a result of the HMRC enquiry, not as part of the original plans.

It was still necessary to consider whether there was one supply, on which the input tax would be residual, or two, on which one part was wholly used for taxable supplies. The judge was satisfied that the intention at the time had always been for a single project; in effect, the VAT consideration after the event had led to the "artificial dissection of the transaction". The request for replacement invoices and credit notes did not change the nature of the supply. Even if there were two buildings, there was only one building supply.

The judge also accepted HMRC's argument that the letting of the Assembly Building to the Students' Union did not constitute an economic activity. Although a low rent did not preclude such activity, the judge noted that it would take GSA 500 years to recoup its capital outlay, not allowing for the fact that it bore the insurance and some other costs. It provided the lease and the facilities as part of its necessary support of the Students' Union.

In effect, HMRC won on every argument. The appeal was dismissed.

The school appealed to the Upper Tribunal. The judge summarised the FTT's findings, and in particular identified the key points: the FTT had concluded that the edifice was more akin to a semi-detached building with an internal link than separate buildings; however, the key question was whether there was one supply or two, which it had considered using the principles derived from *CPP* and *Levob*. The conclusion was supported by the following findings of fact:

- A single price was charged (although this was not decisive);
- The project had a single procurement strategy encompassing both buildings;
- It was a condition of funding that BREEAM rating (concerning sustainability) be achieved, which meant that the buildings had to be constructed together and physically linked;
- Planning applications were for both buildings;
- The economic and commercial reality was that the appellant intended to, and did, develop the site as a whole;
- Separate invoices were not provided until after the VAT issue arose.

The FTT had also concluded that the letting of the Assembly Building to the Students' Union was not an economic activity, on the grounds that the

rent would not recoup the costs of the outlay for 500 years. The lease and facilities were provided as part of the school's necessary support of the Union, and not as an economic activity.

The UT's decision is rather briefer than its review of the decision below. It could see no error of law in the FTT's conclusion that the two structures were in essence a single building, but also agreed with the FTT that it was not a particularly significant finding. As regards the question of a single supply, the FTT had applied the correct test, and an appellate Tribunal should be reluctant to overturn a finding of this kind. Although the appellant wanted and obtained two separate premises with different functions, that did not raise an inference that there were separate supplies. The original invoicing arrangement appeared to reflect the economic and commercial reality of the project more accurately than the amended arrangement that was substituted after the VAT issue had been identified.

For those reasons the appeal failed; for completeness, the UT also considered the question of a separate supply in relation to the Assembly Building. The judges applied the principles of *Wakefield College* and held that the lease was within art.2 PVD (a supply for consideration) but was not within art.9 (economic activity) because of the nominal rent. The school was therefore not making taxable supplies to the Union, and it was not possible to recover input tax charged on the basis of such supplies being taxable.

Upper Tribunal: *Glasgow School of Art v HMRC*

5.3.2 Production costs

HMRC refused a claim by the Royal Opera House to recover £530,000 of input tax associated with the costs of staging productions between June 2011 and August 2012. It was common ground that the production costs were residual because of direct and immediate links to some taxable supplies that the ROH made (e.g. programme sales and production specific commercial sponsorship), while the ticket sales were exempt. However, HMRC considered that the standard method override significantly reduced the amount of recoverable input tax.

Before the hearing, ROH conceded that there was no direct link between the costs and third party commercial income, licensing income and service recharges, and sales of CDs etc. of non-ROH productions; while HMRC conceded that there was a direct link with backstage tours. What remained at issue were the following taxable supplies:

(1) Catering income (bars and restaurants);

(2) Shop income;

(3) Commercial venue hire;

(4) Production work for other companies; and

(5) Ice cream sales.

Judge John Brooks listed a large number of precedent cases to which he was directed by counsel, but he noted from the *Mayflower* judgment of Carnwath LJ that the principles were well established:

(i) Input tax is directly attributable to a given output if it has a "direct and immediate link" with that output (referred to as "the BLP test");

(ii) That test has been formulated in different ways over the years, for example: whether the input is a "cost component" of the output; or whether the input is "essential" to the particular output. Such formulations are the same in substance as the "direct and immediate link" test;

(iii) The application of the BLP test is a matter of objective analysis as to how particular inputs are used and is not dependent upon establishing what is the ultimate aim pursued by the taxable person. It requires more than mere commercial links between transactions, or a "but for" approach;

(iv) The test is not one of identifying what is the transaction with which the input has the most direct and immediate link, but whether there is a sufficiently direct and immediate link with a taxable economic activity; and

(v) The test is one of mixed fact and law, and is therefore amenable to review in the higher courts, albeit the test is fact sensitive.

He added two more principles, one from *College of Estate Management*, and one from the A-G's opinion in *Abbey National*:

(vi) It may be necessary to determine whether, for tax purposes, a number of supplies are to be treated as elements in some over-arching single supply. If so, that supply should not be artificially split;

(vii) A transaction which is exempt from VAT will "break the chain" of attribution.

The judge examined the way in which the "direct and immediate link" test had been applied in a long string of cases, including *Mayflower*, *Dial-a-Phone*, *Lok'n'Store, Roald Dahl Museum and Story Centre, Chester Zoo, Sveda* and *Associated Newspapers*. The most recent cases cited were the *Cambridge University* case, where the CA has referred questions to the CJEU, and the CJEU decision in *VW Financial Services*. After quoting extensively from these precedents, the judge turned to the facts of the present case.

The production costs were those specific to each production, and not the costs of the ROH permanent staff or overheads. They included the fees for guest performers and conductors, creative teams, music copyright costs where relevant, the cost of sets, props, costumes, transportation, extras and actors. The costs varied considerably from one production to another, depending on the scale of the show and on whether it was an original production or a revival.

The essential argument for ROH was that the commercial and economic reality was that it could not incur production costs on the scale it did without those costs generating a level of income from the disputed sources. There was a "virtuous circle" that enabled the business to operate. HMRC dismissed this as the kind of "but for" link that was referred to in *Mayflower Theatre Trust*.

The judge listed a further ten points to apply in reaching a decision. Key among these were the need for an objective, fact-specific analysis of the extent of the link between the inputs and output supplies; a chain transaction that was exempt would "break the link" between inputs and outputs, but if there were separate chains linking to exempt and taxable outputs, there would be no break.

The judge considered that the link between the catering income and the production costs was similar to that between sales of ice cream and production costs in *Mayflower*. However, he was mindful of the more recent case law, in particular *Sveda* and *Associated Newspapers*, in which the question was whether there was a "necessary economic link between the initial expenditure and the economic activities which follow". The productions were central to everything that ROH did: they brought the customers into the bars and restaurants. This was, according to the judge, more than a mere "but for" link. The production costs were essential to the catering supplies; objectively, the purpose was not merely to sell tickets, but to enable ROH to maintain its catering income. The judge noted that Patten LJ had appeared to come to a similar conclusion when commenting on *Mayflower* in the *Associated Newspapers* decision; and this extended to the sale of ice cream as well as catering.

The same could not be said of the shop income, apart from sales of recordings of ROH productions. Similarly, venue hire was only to be taken into account where it specifically related to a production. For example, the Wimbledon Champions' Gala Dinner of 2014 was not sufficiently linked to any production. Production work for other companies was also not related to the costs of ROH productions.

The appeal was allowed in part; the financial effect of recalculating the standard method override, taking into account only the "linked" revenues, is not set out in the decision.

First-Tier Tribunal (TC07157): *Royal Opera House Covent Garden Foundation*

5.4 Cars

5.4.1 Salary sacrifice

A NHS Trust applied for judicial review of HMRC's refusal to refund VAT incurred on leasing of cars and claimed under VATA 1994 s.41(3). The cars were provided to employees under a salary sacrifice scheme. HMRC had refunded 50% of the VAT, but the Trust claimed the remaining 50% by way of error correction. The appeal had to be made by way of judicial review in the Upper Tribunal because a claim under s.41 is not an appealable matter under s.83. The Trust was granted permission to pursue its claim that:

(1) HMRC erred in law in concluding that the Car Scheme constituted a business activity of the Trust such that s.41(3) was not engaged ("the Business or Economic Activity Issue");

(2) the Decision breached the Trust's legitimate expectations ("the Legitimate Expectation Issue"); and

(3) HMRC erred in law in imposing a four-year cap, as extended by the HMRC guidance, on the Trust's Claim ("the Time Bar Issue") (the VAT claimed was incurred between 1 January 2012 and 31 January 2017, and was claimed on 31 March 2017 – HMRC ruled that tax incurred before 1 October 2012 was out of time).

The decision begins with a note of the status of public bodies under the PVD (essentially non-taxable unless they engage in some economic activities) and UK rules relevant to the car scheme – SI 1992/630 on salary sacrifice, which desupplied the supply of the car in such circumstances, and SI 1992/3222, which blocked 50% of the input tax on leased cars. The judge noted that s.41(3) and directions made under it were introduced to remove the disincentive involved in placing certain public service contracts with external suppliers in the private sector.

The Treasury direction made under s.41(3) in December 2002 set out the categories of Government department that may claim refunds of VAT (including NHS Trusts) and lists the services in relation to which VAT may be refunded. This includes "hire of vehicles including repair and maintenance", subject to the following condition:

(a) either the supply of those services or goods is not for the purpose of:

(i) any business carried on by the department; or

(ii) ... and (b) the department complies with the requirements of [HMRC] both as to the time, form and manner of making the claim and also on the keeping, preservation and production of records relating to the supply, acquisition or importation in question.

It was common ground that "business carried on" had the same meaning as "economic activity" in art.9(1) PVD. The burden of proof lay with the Trust to show, on the balance of probabilities, that its activity of leasing cars to its employees was not a business or economic activity.

Until the end of 2011, the Trust had recovered all the VAT incurred on cars on the basis that it was incurred for the non-business purpose of providing statutory healthcare. HMRC changed their guidance with effect from the beginning of 2012 to bring the treatment of such car use in line with input tax for commercial organisations, disallowing half the VAT on leasing to reflect private use. The Trust had argued in correspondence that this ought to be a matter for legislation rather than guidance.

The Trust's counsel argued that there were three reasons the claim should succeed:

- SI 1992/630 treated the salary sacrifice scheme as not involving a supply;
- the car scheme was not an economic activity;
- the Trust entered into the car scheme while operating under a special legal regime as a public body.

HMRC did not agree that the effect of the de-supply order was to take the activity outside the scope of "business". They argued that the deeming provision only provided that the activity was not to be charged as a supply for consideration, and had no other effects. There was precedent on the extent to which a "statutory fiction" should be applied: "the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless

such application would clearly be within the purposes of the fiction" (*Marshall v Kerr* 1993).

The judge accepted the Trust's first argument: the de-supply order meant that the car scheme could not be treated as an economic activity, because that required "supplies for consideration". It was not part of a wider economic activity of the Trust; it therefore fell within s.41(3). The Trust was correct in its view that, if the blocking order was supposed to apply to s.41 claims as HMRC argued, that could only be achieved by changing the legislation.

In case this conclusion was incorrect, the UT went on to consider whether, in the absence of the de-supply order, it would have regarded the car scheme as an economic activity. Here, it agreed with HMRC. It discussed the application of *Wakefield College*, *Borsele* and *Finland*, and concluded that it satisfied the tests. Although it was an ancillary activity for the Trust, nevertheless it was a common activity of employers and operated within the framework of a marketplace, and the Trust was not acting as a final consumer in the same way that the local authority acted in *Borsele*. The Trust supplied cars, rather than consuming them.

The UT also agreed with HMRC on the "special legal regime" point: it was clear from the language of art.13(1) PVD that public authorities that engage in activities or transactions under a special legal regime are to be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition. There was no doubt that the ability of the Trust to recover VAT that would be irrecoverable by commercial car leasing businesses would lead to significant distortions of competition. In any event, the cars were not provided under a special legal regime because they were provided under the same legal conditions as those that would apply to taxable persons leasing cars to businesses or private individuals and the Trust did not provide any evidence or submissions to the contrary.

As the Trust succeeded on the technical ground, it was not necessary for the Tribunal to consider its legitimate expectations. However, it was necessary to consider the effect of the time-bar. The claim was not made under s.80, and therefore the standard four-year limit did not apply; however, HMRC had the power to set "reasonable conditions" for a s.41 claim. The UT considered that a four-year limit was a reasonable condition, and upheld the limitation on the claim to the VAT incurred from 1 October 2012.

Upper Tribunal: *R (oao Northumbria Healthcare NHS Foundation Trust) v HMRC*

5.5 Business entertainment

Nothing to report.

5.6 Non-business use of supplies

Nothing to report.

5.7 Bad debt relief

5.7.1 Derogation from art.90(1)?

A Czech company claimed a repayment of tax that included output tax charged to, but not received from, a customer that had commenced insolvency proceedings. The Czech authorities refused the claim on the basis that the Czech law did not allow an adjustment where the customer had ceased to be a taxable person, which had happened in this case. The company argued that this was contrary to art.90 PVD, and questions were referred to the CJEU.

The CJEU noted that art.90 reflects one of the fundamental principles of VAT: the authorities should not collect (or retain) an amount of VAT exceeding the tax which the taxable person received. The apparent permission for derogation from giving relief, provided in art.90(2), is (according to the CJEU) "based on the notion that in certain circumstances and because of the legal situation prevailing in the Member State concerned, non-payment of consideration may be difficult to establish or may only be temporary". The derogation therefore has to be justified by reference to the principles of VAT, and cannot be used to exclude altogether a reduction in the taxable amount where non-payment is clear and final.

In the present case, the fact that the debtor had ceased to be a taxable person was confirmation that non-payment was permanent and certain. The Czech government's justification of the provision, as aimed at preventing evasion and loss of revenue, could not override the purpose and scheme of the provision, or undermine the neutrality of the tax.

The court concluded that the Czech provision went further than the derogation permitted by the PVD, and should therefore not be given effect.

CJEU (Case C-127/18): *A-PACK CZ sro v Odvolací finanční ředitelství*

5.7.2 Historical claim

In May 2014 a company submitted a claim for bad debt relief in respect of supplies made between 1 April 1989 and 18 March 1997. The claim had been varied during the course of the dispute, but at the time of the hearing it stood at around £9.9m plus statutory interest. The judge agreed to give a decision in principle, leaving them to agree the quantum.

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

have to satisfy HMRC that it had not already claimed relief. The Brief suggested various ways in which this could be done.

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

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

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

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

(a) There were historical bad debts;

(b) BDR was not previously claimed thereon; and

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

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

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

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

The claim therefore failed, and the appeal was dismissed.

First-Tier Tribunal (TC07142): *Saint-Gobain Building Distribution Ltd*

5.7.3 Diverted receipts

A company sold goods to customers who used their credit or debit cards to purchase over the telephone. A dishonest employee diverted some of these receipts to his own bank account. The company claimed bad debt relief in respect of these sales in its 07/16 quarter.

HMRC took the view that the fraud amounted to a theft of cash by the manager, and the conditions for BDR were not met. The appellant argued that the question was rather whether it had ever received payment for the goods or services.

HMRC's review letter concluded that the employee "was trusted to collect payments and was legitimately representing the company at the time of payment". The judge considered that this was the wrong question. It was necessary to consider whether the employee was "on a dishonest frolic of his own", and whether the company received payment.

In the judge's view, the employee clearly did not have actual or ostensible authority to divert money to his own accounts. He was not therefore acting on behalf of the company, and his actions could not be attributed to the company. The company therefore did not receive the funds, and it was entitled to BDR.

The decision is very brief, and is a little surprising. It is possible that the situation is more analogous to illegible credit card vouchers, which can be excluded from Daily Gross Takings under a retail scheme; relief seems more naturally to be available under art.90 PVD than under the specific rules and conditions of VATA 1994 s.36 and the related regulations. It will be interesting to see if HMRC appeal.

First-Tier Tribunal (TC07184): *Total Catering Equipment Ltd*

5.8 Other input tax problems

5.8.1 Missing traders

HMRC denied a company £144,000 of input tax in its 10/15 accounting period. HMRC decided that the company's transactions in memory cards were connected with fraud, and the company ought to have known of that connection. The company did not normally trade in memory cards; it argued that, although there was a defaulting supplier in the chain, it had not been fraudulent.

The FTT examined the deals involved and the history of the defaulting trader, which was not connected to the appellant. Although the director of the defaulter did not give evidence, the Tribunal concluded on the balance of probabilities that he was not merely bad at business: he had acquired the company and carried on its activities in a way to avoid scrutiny from HMRC, and it appeared that the company was a fraudulent defaulter.

The history of the purchases of the memory cards was examined in detail. The deal was offered to the directors of the appellant by a long-standing friend with whom they had subsequently fallen out; they felt they had been let down by someone they trusted. The director who took the

decision had no knowledge of MTIC fraud before HMRC carried out a visit after the transactions. That was only one factor to be taken into account; it was still possible that he ought to have known that there was something wrong with the deals. The director accepted that, after the completion of the deals, they did not "sit well with him", and he had refused the offer of further transactions.

The judge concluded that the "no other reasonable explanation" test from *Mobilx* was not met. The deal had been suggested by a long-standing friend who had given plausible explanations for the arrangements and who had given the company genuine and profitable business in the past. The director had been somewhat naive but was a sensible businessman with sound moral standards.

The appeal was allowed.

First-Tier Tribunal (TC07163): *Beigebell Ltd*

A company appealed against the denial of input tax of £426,000 on the purchase of electronic goods, mainly Sony Playstations. The company had been involved in 20 deals, and during the hearing accepted that all were connected with a fraudulent loss of tax. The Tribunal examined the circumstances of the suppliers and customers and all the deals in detail over 600 paragraphs, and concluded that the director actually knew that the transactions were connected to an orchestrated and contrived fraud. The reasons for this conclusion alone were numbered 1 to 23, starting with the finding that the director was not a credible witness.

First-Tier Tribunal (TC07058): *EDC Direct Ltd*

HMRC denied a partnership over £1.9m in input tax deducted on 56 purchases of metals in accounting periods from 1 December 2012 to the company's deregistration on incorporation on 31 March 2013.

The partnership had used an agent to arrange transactions that turned out to be fraudulent; the agent was someone the partners had known for over 20 years, who was convicted of multiple offences of dishonesty in 2018. The Tribunal considered in detail the law on attribution of an agent's knowledge and actions to a partnership, and concluded that the firm had to be regarded as knowing what the agent knew.

That was enough to determine the appeal against the firm. However, the judge went on to consider in great detail whether the partners themselves had the means of knowledge that the transactions were connected with fraud. He considered that they would have done if the period had been longer; however, in the short period involved, they had been deceived by a plausible fraudster who they had no reason to suspect. HMRC had not satisfied the burden of proof in respect of the partners themselves.

First-Tier Tribunal (TC07065): *Nicholas and Charlotte Sandham*

A company appealed against a decision to deny input tax credit of £73,325 on purchases of plant, machinery and vehicles in its 06/16 period. The Tribunal examined the history of the transactions in great detail, and the explanations given by the director about his business and his contacts with HMRC, who warned him to carry out due diligence on suppliers. The Tribunal found that the transactions were part of an orchestrated fraud, but also held, on the basis of all the evidence, that the director

neither knew nor had the means of knowing that this was the case. The appeal was allowed.

First-Tier Tribunal (TC07141): *Clover Equipment UK Ltd*

5.8.2 Fictitious transactions

An Italian company that produces and distributes electricity was subject to an assessment and a 100% penalty in respect of input tax claimed in its 2009 and 2010 tax years. The authorities formed the view that the transactions on which the claims were based did not take place. The authorities considered that the transactions were circular arrangements within a group, with matching purchases and sales at the same prices between related companies, to make the accounts look healthier than might have been the case and so to secure bank financing.

Questions were referred by the Italian court, which was not sure if the apparent fiction would disallow the input tax claim in a situation where there was no tax advantage to the claimant and no loss to the public revenue. The problem was that the VAT law appears to provide for an effective penalty: the output tax would still be payable on a fictitious sale, because the tax had been entered on a tax invoice, while the equivalent input tax would not be deductible on that other side.

The court started by confirming that a fictitious transaction cannot be linked to taxed outputs, so there can be no right of recovery under art.168 PVD; and art.203 creates a liability for output tax entered on an invoice, even in the absence of a transaction.

The court referred to the case of *Stroy Trans* (Case C-642/11) which considered the right to deduct input tax on transactions alleged to be fictitious. In that case, the court held that a tax authority could require payment by the issuer of the invoice and deny input tax to the recipient as an anti-fraud measure. However, it must be possible for a person acting in good faith to regularise the situation: if the authorities have actually received the output tax, they should not deny the deduction, or else they should refund the output tax to the person who had incorrectly paid it.

In the present case, the taxpayer had not acted wholly in good faith, because the transactions were intended to distort the accounts. However, as there was no question of tax loss or tax fraud, the principles of proportionality and neutrality required the tax authority to allow the issuer of the invoice to correct the situation. It was for the referring court to ascertain whether the risk of any loss of tax revenue had been eliminated.

As the Advocate-General pointed out, a fine equal to the tax improperly deducted would make redundant the correction of the output tax – the appellant would still be liable for 100% of the tax improperly entered on the invoices (it appears that the Italian authorities were initially effectively demanding 200%). The court ruled that this was disproportionate in the circumstances, and could not be justified by reference to the PVD. No suggestion was made about the appropriateness of any other sanctions.

CJEU (Case C-712/17): *EN.SA. Srl v Agenzia delle Entrate — Direzione Regionale Lombardia Ufficio Contenzioso*

5.8.3 Invoices

HMRC disallowed input tax credit of £48,300 for a company's 01/15 return period, and raised assessments for other periods from 10/13 to 01/16 to recover £459,500 claimed on supplies of labour. The parties disagreed over the issue. The appellant argued that it was whether the company had obtained supplies of labour, human resources and related services from certain third parties so that it was entitled to deduct input tax on those supplies; HMRC argued that it was simply a question of the adequacy of the company's evidence to support a deduction. The judge agreed with HMRC that she had to consider first whether there were adequate invoices, and if not, whether HMRC's decision not to accept alternative evidence was a reasonable one.

The company ran three hotels, one of which closed during the period concerned. During 2013, the company decided to outsource the employment of its staff to another business. On a compliance visit in August 2014 an officer became concerned about the invoices for staff supplies. She discovered that the staff were unaware that their contracts of employment had been transferred to another company. The PAYE reference on their P60s for 2013/14 had ceased to exist in 2011.

In March 2015 HMRC issued a warning to the company stating that the supplier whose VAT number appeared on its invoices had been deregistered, and also issued Notice 726 covering fraud and due diligence. Further investigations followed, culminating in the assessments and the appeal.

The judge considered that the director's evidence was neither credible nor reliable. It was "riven with inconsistency". She noted that her task was defined by the Upper Tribunal in *Scandico Ltd* as limited to considering the decision before it, namely HMRC's decision that, in the absence of proper VAT receipts, they were not prepared to exercise their discretion to accept the alternative evidence provided by the taxpayer as to whether there had been a taxable supply. The judge was satisfied that the officer's decision, that there was no evidence that either of the alleged suppliers had made a taxable supply of labour to the appellant, was a reasonable one. The fact that the staff undoubtedly worked for the appellant was not nearly enough to demonstrate that it was entitled to input tax deduction in respect of them.

The appeal was dismissed.

First-Tier Tribunal (TC07160): *Symphony Hotels & Leisure Ltd*

6. ADMINISTRATION AND PENALTIES

6.1 Group registration

Nothing to report.

6.2 Other registration rules

6.2.1 Date of registration

In January 2016 an individual submitted a 2014/15 self-assessment return showing turnover (as a plumber) of £93,274. In December 2016 an officer of HMRC wrote to the appellant warning him of an intended visit. This was dealt with by an accountant. Following correspondence, the officer issued a decision that turnover had exceeded the limit in May 2014 because of a large receipt in that month, leading to registration from 1 July 2014 and an assessment to £9,232 on a "liable no longer liable" basis as well as a failure to notify penalty. The accountant then entered into a lengthy complaint about HMRC's handling of the matter, which led to a range of grounds of appeal before the Tribunal that included a number of unappealable matters.

The judge had to sort out a complicated procedural tangle. The assessments to VAT could not be appealed because no returns had been filed. The decision to register the appellant could be appealed, once the judge had given permission for the appeal to be made late.

The judge noted that, had the officer relied only on the self-assessment return, she probably would have registered the trader with effect from 1 October 2014 (based on his annual turnover to 31 August). It was the provision of detailed monthly figures by the accountant that led to the earlier EDR. He described his decision to revise the EDR to that original date, reducing the VAT payable, as the most generous thing he could do for the appellant within the law.

Half the decision is then taken up with an analysis and criticism of the behaviour of the accountant, who was a retired FCA acting pro bono for a friend. His complaints were wholly unjustified, and he appeared to have an out-of-date attitude and knowledge. The judge commended the officer for being fair and helpful to the taxpayer, and concluded with this comment:

"Finally to Mr Bridge we say that knowing him to be an honourable man we do not doubt than when he reads this decision and reflects on it he will apologise to Miss Fairhurst for what he has said. We suggest that after that reflection he should consider, should any contentious issues of this sort arise in relation to any of his clients, whether it would be better to pass them on to someone closer in touch with current practice in that field."

First-Tier Tribunal (TC07076): *Daniel Potts*

6.2.2 More late registration

An individual appealed against an assessment for VAT of £21,334 and a failure to notify penalty of £5,525. An enquiry commenced in November 2015 because the self-assessment returns for 2012/13 and 2013/14 showed turnover above the registration threshold. After investigation, the EDR was established as 1 December 2012, and the VAT was calculated using the FRS rate of 9.5% applicable to a builder who provided materials.

The appellant initially employed one accountant to provide self-assessment returns, but he was replaced by another one who filed VAT returns and advised the trader to join the FRS. The judge noted that neither accountant appeared to have served his client very well. In particular, it appeared that the trader's actual expenditure on materials was higher than the sector average and his profit margin was lower; as a result, the FRS appeared to produce a liability about 2/3 higher than he would have had to pay under the normal rules of VAT. However, there was nothing that the Tribunal could do about that. The only remedy would be for the trader to request that HMRC should remove him from the FRS with retrospective effect to 1 December 2012, and if they refused, he would have to appeal again.

The evidence was enough to establish that 1 December 2012 was correct as the EDR, and the assessment had been made to best judgement in the absence of detailed figures that were never provided by the first accountant. The penalty for late notification was corrected for a small arithmetical error, but was upheld in principle. The appeal was dismissed.

First-Tier Tribunal (TC07109): *Peter Hartigan*

6.2.3 Small business

A Lithuanian individual bought some land and built a house which was sold. The tax authorities ruled that she should have been registered for VAT and assessed for output tax, net of an allowance for inputs, of €21,915, as well as interest and a fine. She appealed, and the first instance court held that she had made two separate sales, one of which benefited from the exemption for small businesses.

The questions referred to the CJEU noted that the sale of the building and the land were separate transactions in Lithuanian law, and they were mentioned separately in the contracts for sale. However, they were part of a single economic transaction. Given that the small business exception in articles 282 to 292 PVD should be interpreted strictly, the court was not sure whether it was appropriate to tax just the excess over the exemption threshold, or the whole of both parts of the transaction.

Predictably, the CJEU ruled that the single transaction had to be taxed as such. As the total exceeded the exemption threshold, the whole transaction had to be charged to VAT.

CJEU (Case C-265/18): *Valstybinė mokesčių inspekcija prays Lietuvos Respublikos finansų ministerijos v Akvilė Jarmuškienė*

6.2.4 Updated Notices

HMRC have published an update to their Notice *Who should register for VAT* with revised 'fit and proper' criteria for UK VAT representatives of non-established taxable persons.

Notice 700/1

A Budget supplement has been published to Notice 700/1 and 700/11 to set out the current registration and deregistration limits – however, there are no changes to the limits from April 2019.

The supplement includes the surprising statement: "Before 21 March 1990 the rules were different. You had to look at your past and future taxable turnover when deciding whether you needed to register. There was also a yearly limit and a 3-monthly limit. If you think you should have been registered before 21 March 1990 you should contact our VAT Registration Service."

Notice 700/1 and 700/11

6.3 Payments and returns

6.3.1 Interest assessment

G4S entered into contracts with the government to provide various services in relation to asylum seekers. Between 2012 and 2016, the company entered into extended correspondence with HMRC and others in relation to the VAT status of the supplies. Both the company and the UK Border Agency believed, mistakenly, that supplies of "dispersal accommodation" were exempt from VAT; in March 2016, HMRC issued a decision that there was a single overarching supply and it was all standard rated. The company invoiced the Home Office for outstanding VAT due on the element that had been treated as exempt, and these invoices were settled. HMRC raised assessments under s.73 in June 2016, and the company paid them without dispute. However, HMRC then added an interest assessment under s.76 (over £1m); the company appealed, arguing that it should not be charged interest where it was late paying money to HMRC because it had not collected it from a different arm of government.

The Tribunal noted that s.83(1)(q) only allows an appeal against the amount of any interest assessment under s.76, not against the decision to charge interest. The judge considered that the appeal satisfied that condition.

The grounds of appeal included "commercial restitution" and "equivalence and neutrality" (which referred to the treatment of other suppliers of similar services), as well as the time that the VAT should properly have been paid. There was a procedural dispute about whether the grounds had been properly set out in the notices of appeal and skeleton arguments; the judge was satisfied that HMRC were not unduly prejudiced by any late changes to the company's position. However, one piece of evidence was not admitted because it was submitted after HMRC's counsel had closed his case.

In the event, the taxpayer only argued the "commercial restitution" point before the Tribunal. Its counsel put forward the following three propositions:

(1) Tax is imposed for the benefit of the government and VAT is a debt due to the Crown;

(2) The government retained the use of the VAT that was paid late by G4S and so it was not deprived of its VAT because of the default by G4S;

(3) Under s.74 VATA 1994, interest is compensation for a creditor being deprived of its money.

The Tribunal accepted the first proposition. HMRC argued that "the Home Office having the money" was not the same as "the government having the money"; the Tribunal agreed that a government department is not the same as "the Exchequer" for the purposes of VAT.

In respect of the third proposition, the Tribunal agreed with HMRC that s.74 and s.76 impose default interest in respect of a failure to account for VAT properly, rather than compensatory interest in the sense argued for by the company. This was consistent with EU principles of proportionality and fiscal neutrality. There could be significant distortions if taxpayers were entitled to deal with VAT differently because they were supplying a government department.

The appeals were therefore dismissed.

First-Tier Tribunal (TC07081): *G4S Corporate Services Ltd and another*

6.3.2 Article

In an article in *Taxation*, Neil Warren discusses a situation in which a farmer was instructed to file quarterly returns rather than monthly ones, and examines the regulations applicable to establish the taxpayer's right to file monthly and HMRC's power to refuse.

Taxation, 20 June 2019

6.4 Repayment claims

6.4.1 Validity of claim

In TC06483, the FTT had to consider the validity of one of many claims that the company had made. The FTT decision opened with a summary of earlier claims, showing in a table that HMRC had accepted three "bingo" claims and paid out £98m, representing overpaid output tax net of overclaimed input tax.

HMRC had rejected a fourth claim as being made out of time. This related to the periods from 12/96 to 12/02, and the net amount involved was £67m. An appeal against the refusal of this claim was rejected. In June 2013, and followed up in June 2014, the company made a further claim for this amount, arguing that it should not have had to reduce its earlier repayment claims by so much input tax – £67m – when it was effectively "in credit" to that amount. The company argued that this was

the application of the principles of the *Birmingham Hippodrome* case, and the claim was made under s.80(1B).

The argument continued that s.81(3) was the relevant operative provision of VATA 1994 that permitted HMRC to set off sums that the appellant was "liable to pay" to HMRC against the gross amount of output tax that fell to be repaid. Ordinarily, the appellant would only be "liable to pay" HMRC an amount in respect of input tax wrongly credited if HMRC made an assessment to recover that input tax and, at the time HMRC dealt with the three claims they had settled, they were out of time to make such an assessment. However, even though HMRC were out of time to assess the appellant for overclaimed input tax, s 81(3A) required HMRC to set that overclaimed input tax off against the appellant's claim for repayment. According to the *Birmingham Hippodrome* case, HMRC should then take into account all the consequences of the same mistake, and deal together with all other overdeclarations and underdeclarations whenever they had occurred.

HMRC had therefore been wrong to offset all the input tax overclaimed in the periods relating to the three claims – £68.8m. They should have given credit for the overpayment for the period covered by the fourth claim, and only offset £1.8m, leaving a further £67m to be repaid. The company claimed that the incorrect offset amounted to a "payment" by the company at the times HMRC made the repayment (May 2010, February 2011 and March 2011), so the claim made in June 2013 was in time.

The judge noted that there was no agreement between HMRC and the taxpayer about the "architecture" of s.80 and s.81. Following a detailed examination of the law, Judge Jonathan Richards concluded that the offset of input tax against output tax when settling a s.80 claim did not constitute "payment" of the input tax to HMRC by the claimant. If there had been no "payment" in 2010/11, there could be no s.80(1B) claim, and the appeal had to be dismissed.

The judge declined to express a firm opinion on the implications of the *Birmingham Hippodrome* case, although it was argued extensively by both sides. He considered that the effect could be significant, so it would be better if it was only ruled on by a Tribunal where it had a bearing on the outcome.

The company appealed to the Upper Tribunal, which opened by analysing the contrasting positions of HMRC and the company in relation to the various claims. The decision went on to consider three issues:

- whether it was correct that HMRC had underpaid the first three claims by £67m;
- whether that constituted a "payment" by Rank to HMRC for the purposes of s.80(1B);
- whether the further claim represented an illegitimate re-opening of the first three claims.

In relation to the first question, the UT considered the operation of s.81(3A) VATA 1994 in detail. The company argued that HMRC were not allowed to "cherry-pick" out-of-time liabilities; once they had decided to bring one out-of-time liability into a set-off calculation, that effectively

re-opened all other liabilities that arose from the same mistake. This was illustrated by the following example:

Row	Description	Over-declared OT	Associated IT	Net position	Amount payable by HMRC
a	Claim	£100	(£25)	£75	£100*
b	Out of time P1	£100	(£100)	£0	
c	Out of time P2	£150	(£100)	£50	
d	Out of time P3	£75	(£100)	(£25)	
	Totals	£425	(£325)	£100	

* no reduction because there is no "liability" to set off.

(a) In this hypothetical case, a taxable person makes a claim for over-declared output tax in the amount of £100. The associated input tax of £25 cannot be set off by HMRC because HMRC is out of time to make an assessment.

(b) HMRC therefore relies upon s.81(3A) VATA to bring the out-of-time liability of £25 into account, which HMRC are entitled to do.

(c) However, that brings into play all of the cross-claims between the taxable person and HMRC. In this case, the net position – taking account of all transactions – is that the sums owed to the taxable person by HMRC exceed (by £100) the sums owed by the taxable person to HMRC. The taxable person cannot, of course, claim these sums, but the effect is to reduce HMRC's set off to nil. As a result, the taxable person recovers £100, the full amount of his or her over-declared output tax.

HMRC argued that the legislation required a different construction: that only liabilities to HMRC should be considered for the offset. The argument is complex, but their view of the above table was that they would be able to offset the £25 in the claim period and the net £25 from period 3 while ignoring the £50 from period 2. They did not regard this as "cherry-picking" but simply the operation of the law.

The UT rejected HMRC's first contentions about the operation of the law: Rank was correct that s.80(1) considered only the overpaid output tax, without at that stage taking input tax into account; and s.80(2A) requires set-off of liabilities due under *other* provisions of the VAT Act, rather than containing any set-off requirement itself.

Turning to the offset rules, the UT considered that *Birmingham Hippodrome* was not of direct assistance because of the significant difference between the two situations – the offset in the earlier case led to the taxpayer's claim failing in full, whereas the result in the present case would be to create a larger credit for the taxpayer.

Analysing the earlier decision of the Court of Appeal, the UT concluded that Rank's approach was to be preferred. HMRC's argument amounted to "asymmetric set-off", in that it took into account underpayments by the taxpayer but left out of account overpayments. That seemed contrary to principle and wrong. As a result, the UT concluded that HMRC had indeed made an underpayment in respect of the first three claims amounting to £67.05m.

The FTT had concluded that the outstanding amounts were not a "payment" for the purposes of s.80(1B) because "set-off was not payment". The UT disagreed: there was no set-off at all. Rather, the underpayments were simply unpaid debts of HMRC that could only have been extinguished by HMRC litigating to show that they were not due.

After all that, the UT gave a very brief decision that the s.80(1B) claim failed because there were no payments that it could apply to. If there had been such payments, the UT did not believe that a claim would have constituted an illegitimate re-opening of the earlier claims. However, the appeal was dismissed.

Upper Tribunal: *The Rank Group plc v HMRC*

6.5 Timing issues

6.5.1 Tax point issue

PVD art.63 provides for the "basic tax point" for a supply: when the goods or services are supplied. Art.66 provides that member states may derogate from that provision in respect of certain transactions or certain categories of taxable person, to move the tax point to:

(a) no later than the time the invoice is issued;

(b) no later than the time the payment is received;

(c) where an invoice is not issued, or is issued late, within a specified time no later than on expiry of the time-limit for issue of invoices imposed by the member state in accordance with art.222, or where no such time-limit has been imposed, within a specified period from the basic tax point.

Art.222 imposes a 15-day limit on the issue of invoices for supplies of goods covered by art.138 (despatches) and supplies of services where a reverse charge applies under art.196 (purchase of services from a taxable person established outside the member state). For other types of supply, it is up to the member state to impose time limits.

Polish law imposed a requirement for suppliers of construction or installation services to issue a tax invoice (triggering a tax point) no later than 30 days from the date of the supply of the services. If an invoice had not been issued by that time, the output tax liability arose anyway.

A Polish company asked for a ruling on how this applied in a situation in which the contract provided for the customer to accept that it had been satisfactorily carried out. In the taxpayer's view, it should not have to issue an invoice or incur an output tax liability until after the contract was satisfied. The Polish tax authorities issued a ruling that the contractual terms were irrelevant; an invoice should be issued not later than 30 days after the actual performance of the work. The company appealed against the ruling, and in due course questions were referred to the CJEU.

The essence of the question was whether art.63's reference to "the services being supplied" meant "physically supplied" or "supplied in accordance with the terms of the contract". The CJEU noted that it was one of the objectives of the VAT law to harmonise the date on which

liability arose throughout the member states; it was also fundamental that economic and commercial realities should be considered in deciding whether a taxable transaction had taken place. In *Newey* (Case C-653/11), the contractual terms were relevant to the consideration of who the supplier and recipient of the supply were; it was therefore conceivable that the contract should also be relevant in determining whether a supply had taken place.

The taxpayer argued that it could not tell what the taxable amount would be until the customer accepted the work. There might be adjustments to the value of the supply. The court noted that a supply required a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient; if the taxable amount could not be ascertained, a liability to output tax could not be established.

The court drew a distinction between a fundamental condition that would determine whether the supply had taken place (acceptance by the client) and mere formalities that would not have the same effect (drawing up a breakdown of expenses or a final payment certificate). These formalities would not form part of the service supplied, and they would therefore not affect the question of whether the service had been supplied.

The CJEU's formal answer was that the PVD "did not preclude" regarding the date of acceptance by the customer, in accordance with a contract, as the date that services were supplied; the effect of that decision appears to be that the taxpayer has won, because Poland has implemented the derogation in art.66. The decision appears to be relevant to any interpretation of art.63, which has a consequent effect on the interpretation of art.66.

CJEU (Case C-224/18): *Budimex SA v Minister Finansow*

6.6 Records

6.6.1 Making Tax Digital

HMRC have updated their guidance on Making Tax Digital for VAT, which is now mandatory for most VAT-registered businesses with turnover above the registration threshold. Sole traders and landlords can also take part in the MTD pilot for income tax; that system will not become mandatory before 2021 at the earliest, and depends on the success of MTD for VAT.

www.gov.uk/government/publications/making-tax-digital-how-vat-businesses-and-other-vat-entities-can-get-ready

There is a great deal of other information available on the HMRC website about MTD, including "overview guidance"...

www.gov.uk/government/publications/making-tax-digital

...and the rather more technical detail of a direction specifying the 'relevant ancillary metadata' which software compatible with MTD must

capture and transmit to HMRC along with the relevant tax information, as required by regulations for anti-fraud purposes. Software suppliers who fail to comply with this requirement may face a penalty of £3,000.

www.gov.uk/government/publications/direction-under-regulation-22-of-the-delivery-of-tax-information-through-software-ancillary-metadata-regulations-2019-si-2019360

HMRC's step-by-step guide to preparing to join MTD emphasises that it is necessary to sign up at least 72 hours before their next VAT return is due. Those who pay by DD should allow at least 7 days.

www.gov.uk/guidance/making-tax-digital-for-vat-as-an-agent-step-by-step

HMRC have updated their guide to when businesses must join MTD to confirm that users of the VAT 'GIANT' online service (NHS trusts, government departments and the Royal Household) will not be able to join MTD for VAT from 1 October 2019 as part of the deferral group. The guide also reminds businesses who pay by direct debit to wait until their last direct debit has been taken before signing up.

www.gov.uk/guidance/check-when-a-business-must-follow-the-rules-for-making-tax-digital-for-vat

6.6.2 MTD Notice

HMRC have updated their Notice *Making tax digital for VAT*, parts of which have the force of law under the regulations. The latest version includes confirmation that HMRC will accept a simplified form of recording, allowing multiple supplies to be combined in a single total, in relation to supplier statements, petty cash transactions and charity fundraising events.

It still contains the contentious statement "The time of supply is the date that you must declare output tax on. Typically this is when you send a VAT invoice or, if you are on cash accounting, when you receive payment for the supply." As the time of supply has to be recorded in the digital records, the imprecision in this statement is more important than it might be.

Notice 700/22

6.6.3 Article

In an article in *Taxation*, Paul Oldridge answers some FAQs on MTD – but from the point of view of a software provider, for whom presumably the new rules are quite welcome.

Taxation, 2 May 2019

6.7 Assessments

6.7.1 Assessment of public authority

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

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

It was true that VAT claimed under s.41 was not "input tax" and was not within the normal rules of EU VAT. The UK's scheme for refunds was not authorised by the Directive, but neither was it forbidden. The judge agreed with HMRC that the answer to the question had to lie within the scope of s.73 itself. The words of that section are quite clear: "where there has been paid or credited to any person an amount of VAT that ought not to have been paid or credited", HMRC had the power to raise an assessment. Although the Trust attempted to make something of the special nature of VAT under s.41, the judge was satisfied that it fell squarely within s.73.

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

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

First-Tier Tribunal (TC07158): *Milton Keynes Hospitals NHS Foundation Trust*

6.7.2 Best judgement

A trader appealed against an assessment of £89,119 in overdeclared input tax and underdeclared output tax during the period from 08/12 to 05/16, together with penalties totalling £31,191.

When an enquiry started in May 2016, the officers noted that the business appeared to be making a loss, and every VAT return for the last four years had been a repayment claim. They were told that all the records had been destroyed. It was agreed that the return for 05/16 would be used as a representative period to assess the likely purchases for earlier periods.

The trader produced no evidence to support the claims, and the Tribunal did not accept that he could have been unaware that he was trading at a loss. The assessments satisfied the conditions for "best judgement", and the basis for them had been agreed with the appellant. In the absence of a

any detailed submission by the appellant to show why they were flawed, they had to stand. On the evidence, it appeared that the conduct had been deliberate, and the penalties were also upheld.

First-Tier Tribunal (TC07095): *Simon Mark Pettit*

6.8 Penalties and appeals

6.8.1 Default surcharge

An individual appealed against a surcharge of £9,601 for his 05/14 period, and another of £5,337 for his 08/14 period (reduced by HMRC to £2,187). Both charges were calculated at 15%. The trader had suffered a significant bad debt when a customer went into liquidation in August 2014, and had taken steps such as remortgaging his house in an attempt to settled income tax and VAT debts. He had been on 15% surcharges from 02/10 onwards.

The judge expressed sympathy for the appellant, but his evidence was incomplete: he could not explain the correspondence in timing between the bad debt and the particular late payments, and he did not produce bank statements or other supporting documents to explain the position. He could have taken other steps, including operating cash accounting, and it was not clear whether he had claimed bad debt relief. He was consistently late paying, and had not satisfied the burden of proof to show that there was a reasonable excuse. The appeal was dismissed.

First-Tier Tribunal (TC07086): *Jeremy Alan Hanson*

A company appealed against a surcharge of £28,075 for its 12/17 period. The company had a much higher liability than in any previous period, and its accountants decided to double check it without telling the directors the figure they had calculated. By the time they had confirmed it, it was too late to pay on time, because the bank restricted payments to £100,000 per day. The liability was paid in four instalments.

The essence of the company's defence was that it had relied on its accountants, but this could not be a reasonable excuse. The appeal was dismissed.

First-Tier Tribunal (TC07092): *Material Applications Ltd*

A company appealed against surcharges of £541 for its 04/16 period and £1,108 for its 07/16 period. The company had a number of excuses, including cash flow difficulties and unfairness, but none of these could be a reasonable excuse. A customer went into administration, but this happened after the due dates for the periods concerned, and that customer had actually made a substantial payment into the company's bank account on the due date for the 07/16 period. There was no unforeseeable shortage of funds that might engage the *Steptoe* principle, and the appeal was dismissed.

First-Tier Tribunal (TC07120): *Secco Muro Ltd*

A company appealed against a surcharge of £3,711 for its 07/17 period. It had been in the surcharge regime from 01/15 onwards, having registered

for VAT in 2014. The trader claimed not to have known that the VAT was due on 7 September; had he known that, he would have paid by online banking. The judge did not accept that this was a reasonable excuse, nor that the penalty was unfair. The appeal was dismissed.

First-Tier Tribunal (TC07121): *PVC Trade Supplies Ltd*

A company appealed against a 15% surcharge of £2,635 for its 12/17 period. The company had entered into Time To Pay arrangements during 2016 and had set up payments under the "NDDS" (National Direct Debit Service/System) to settle liabilities by weekly instalments. The directors had misunderstood that this was the same as a direct debit mandate that HMRC could use to collect the liability on a VAT return. They therefore believed that the liability for 12/17 would simply be collected after they filed the return on time; when it was not, they paid the outstanding VAT as soon as possible.

HMRC argued that the mistake, while honest and genuine, could not be a reasonable excuse. The judge (Greg Sinfield) disagreed. The directors had acted reasonably and the belief that there was a direct debit in place was also reasonable. They had taken steps to ensure that the money was available, and there was no reason for them to have done that if they did not believe it would be collected. The distinction between a normal DD and the NDDS is not clear in HMRC's own guidance.

A defence based on unfairness was rejected, but the appeal was allowed on the basis of reasonable excuse.

First-Tier Tribunal (TC07126): *Norfolk Premier Coachworks Ltd*

A company appealed against a 10% surcharge of £318 for its 08/18 period. 2% and 5% penalties had not been collected as they were below £400. The company had been late both filing and paying for four successive quarters.

The trader did not attend the hearing and was not represented. He had provided little evidence to explain why he had been late paying or filing; rather, he appeared to question why he was being charged at 10% when he had not been charged at 2% or 5%, and to be complaining about unfairness. None of this could be a reasonable excuse, and the appeal was dismissed.

First-Tier Tribunal (TC07150): *Lundhill Agriculture Ltd*

A company appealed against a 15% surcharge of £605 for its 06/18 period. This was adjusted to 10% and £404. The company had been in default in 7 periods from 09/15 onwards, but HMRC had withdrawn the first notices (because the returns were repayment claims) and had not charged the 2% or 5% penalties as they were below £400.

The director's defence appeared to be that he was a sole trader and had been away for three weeks. It was not reasonable for a trader to go away for an extended period and not to put arrangements in place for liabilities to be settled on time. The judge was satisfied that the charge had been properly levied, and the appeal was dismissed.

First-Tier Tribunal (TC07152): *Gravitas Group Ltd*

A company appealed against surcharges of £6,892 and £7,953 for its 05/17 and 08/17 periods. The company had had a number of difficulties with HMRC, including cancelled TTP arrangements (because of the company's default) and disputed CIS repayments, and had suffered an unexpected late payment that it argued led to the second of these defaults; it also dealt mainly with government customers who took 85 days' credit on monthly invoices, while the company paid its workers weekly.

The judge considered each of the various excuses in turn, and decided that all were simply examples of a cash-strapped business choosing to pay one liability rather than another. The late receipt was not immediately used to settle the outstanding VAT liability, but used as working capital instead. There was no reasonable excuse.

The judge noted two of HMRC's arguments with which he disagreed: one relating to the fact that the late receipt would still have left the company short of funds to settle its VAT in full (he did not regard that as relevant to reasonable excuse), and the other relating to the use of "late receipts" as an excuse for a second time. In his view, that did not prevent the trader using the same excuse again; although a trader would be expected to learn from previous experience, it would still be possible for a similar occurrence to meet the tests in *Steptoe*.

First-Tier Tribunal (TC07175): *SDI-Unistride (Southern) Ltd*

A sole trader appealed against surcharges of £271, £285 and £407 for his periods 08/15, 11/15 and 02/16. Every quarterly payment had been late from 12/14 onwards. The trader claimed that he had not received SLNs, and had only found out about the penalties after HMRC had contacted his ex-wife and she had passed the message on.

The judge accepted HMRC's evidence that SLNs had been sent to the trader's principal place of business. He might not have realised what they were because the early ones would not have demanded a payment (being below £400 at 2% and 5%). The rest of his defence constituted "unfairness" and normal cash flow difficulties, and the appeal was dismissed.

First-Tier Tribunal (TC07189): *Shane Brown t/a Monkey Pine*

6.8.2 Penalties

A sole trader appealed against an assessment for VAT of £49,857 covering the period 05/11 to 11/14, together with a penalty of £47,364, levied on the "deliberate and concealed" scale. The assessment required deliberate conduct to be valid, because it was out of time under the normal time limits; extended time limits apply to deliberate conduct and dishonesty under s.77 VATA 1994.

The taxpayer did not appear and was not represented, but the Tribunal proceeded without him because there had already been numerous delays and postponements. The main point of interest was the consideration of the Court of Appeal's judgment in *HMRC v Tooth* (2019); the Tribunal decided that the analysis of what was dishonest applied to validate the extended time limit assessments in the same way as in *Tooth*, but the test was different when considering FA 2007 Sch.24 penalties. Nevertheless, the conclusion was similar: the penalties were upheld, with approval of HMRC's 5% discount for disclosure.

The appellant had been involved in a number of businesses over the years, but the only one extant during the relevant period was a sole trade. It had submitted repayment returns every quarter for several years. This finally prompted a control visit in February 2015, where the trader claimed that he routinely destroyed his records after submitting the VAT return, and denied being aware that he was supposed to retain them. Subsequent attempts to reconstruct records for past periods, and the construction of records for current periods for which documentation was retained, suggested that the input tax claimed in earlier periods was significantly overstated.

The trader's explanations were inconsistent and evasive, and the Tribunal was satisfied that this was evidence that he had deliberately overstated his reclaims and attempted to conceal that by destroying the records. In *Tooth*, the CA had considered (in obiter dicta) what was meant by a "deliberate inaccuracy in a return", and concluded that a purely mechanical error, made intentionally, in part of a document was a deliberate inaccuracy, even if the document was not misleading when read as a whole; and this would cause the return to be insufficient if it was processed by a computer, even if the return contained a narrative explanation elsewhere. These principles certainly justified the ETL assessment, which was based on different but similarly worded legislation to that considered in *Tooth*.

As regards the penalty, the Tribunal agreed with the judge in the *Auxilium* case in holding that "a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document." The small discount given by HMRC did not appear to be unreasonable; there were no special circumstances, and the penalty was not disproportionate. The appeal was dismissed.

First-Tier Tribunal (TC07180): *Anthony Leach*

An individual appealed against a s.61 penalty of £46,876 in relation to a evasion, between June 2004 and January 2007, by a company of which he was a director. HMRC issued the decision in October 2008 that the penalty should be collected from the appellant. The appeal did not challenge the amount of the underlying VAT assessment, nor the 40% mitigation allowed by HMRC.

The judge reviewed the history of the appeal, which came to a hearing nearly 10 years after the decision was issued. Both sides had applied for postponements; the appellant pleaded ill health on a number of occasions. When at last it reached the Tribunal, there was a dispute about the admission of late evidence, which was in breach of an "unless order" made in January 2017. The Tribunal decided to hear the evidence and consider what weight should be attached to it.

The company had gone into liquidation owing £431,000, of which £279,000 was due to the Crown, including £86,000 in undeclared VAT. The Tribunal reviewed the history of the investigation and the raising of the penalty. It identified the issues to be determined as:

- whether the delay in bringing the proceedings had infringed the appellant's human rights;

- whether the conduct leading to the penalty was indeed attributable to the dishonesty of the appellant;
- if so, whether any apportionment was due, or whether the whole penalty should be attributed to him.

In respect of the delay, the Tribunal was satisfied that it was mainly occasioned by the appellant, and by HMRC allowing him "great latitude". There was prejudice to HMRC's case from the delays as well as to the defendant, but overall the Tribunal was satisfied that it was still possible to assess the evidence as a whole, even after so many years.

The Tribunal discussed the credibility of the various witnesses, holding the appellant to be "wholly incredible and unreliable". His attempt to blame a deceased employee for the fraud did not convince the judge. HMRC had shown to the required standard that his dishonest conduct led to the loss of tax, and the onus was then on him to produce evidence to show that the penalty should be apportioned to other people; this he had failed to do in any convincing way.

The appeal was dismissed and the penalty notice confirmed in full.

First-Tier Tribunal (TC07138): *Karl Byers*

An individual registered for VAT in 2008 but filed no returns before deregistering on cessation of trade in 2012. HMRC raised central assessments totalling £14,036; the trader eventually filed returns for various periods during 2016. He showed a net liability of £1,492, with repayment claims made for many of the periods.

When HMRC enquired into the repayment returns, the trader explained that he had no records for the business. HMRC reduced all the repayment returns to zero and issued assessments for VAT that had been repaid by offset against output tax liabilities. The amounts on the payment returns were not challenged as HMRC had nothing on which to base an alternative assessment.

The Tribunal considered the appellant to be a credible witness who seemed reluctant to give full details about another person who was involved in running the business. He argued that he had had no alternative but to file estimated returns, which he had done to the best of his ability, because the other person had not carried out the administration of the business in the way the appellant had expected. The Tribunal decided that the inaccuracies arose from carelessness on the part of the appellant, in relying on another person to deal with tax matters and keep tax records in respect of his business, rather than a deliberate action on the part of the appellant with regard to the returns themselves. The judge also concluded that, on the balance of probabilities, the appellant had contacted HMRC about the problems in filing accurate returns before they had contacted him; the disclosure was unprompted.

The end result was the dismissal of the appeal against all the assessments and denial of credits, but a reduction in the penalties to only 9% of PLR.

First-Tier Tribunal (TC07139): *Philip Norman Bagshaw*

HMRC issued a personal liability notice to a director of a company that should have been registered for VAT and was not. The director did not attend and was not represented; the hearing proceeded without him, as there had already been considerable delays. The Tribunal considered the history of the case and concluded that the conduct had been deliberate and had been attributable to the director. The appeal against the PLN was dismissed.

First-Tier Tribunal (TC07112): *Stanley John Chmiel*

An individual appealed against a personal liability notice in respect of a "failure to notify" penalty apportioned 50% to him in respect of a pizza franchise company. He claimed he was not an "officer" of the company as required for him to be made liable; he did not dispute the penalty that was levied on the company (£138,000).

The evidence about the appellant's role in the business was contradictory. The Tribunal had to decide on the balance of probabilities whether he was an officer and whether the company's failure to register was at least in part attributable to him.

The Tribunal examined the evidence and the history of the business and the investigation. Several different companies had run the pizza franchise; the appellant had been involved in several of them, and a director of two, but he claimed he was merely an employee of the company that was charged the penalty. Nevertheless, he was responsible for calculating and keeping track of the company's income and expenditure. Whether that was enough to make him a "shadow director" was debatable, but the Tribunal was satisfied that he was a "manager" within the dictionary definition of that word.

Given that he was the person responsible for keeping track of the finances, it was more probable than not that the failure to register was due to his deliberate conduct. There was evidence of attempted concealment. The reductions and allocation were appropriate, and the appeal was dismissed.

First-Tier Tribunal (TC07198): *Mohammed Abdul Malik*

6.8.3 Article

In an article in *Taxation*, Mike Thexton examines the burden of proof for "deliberate behaviour, prompted disclosure" penalties, in the context of the Tribunal decision in *Faux Properties*.

Taxation, 20 June 2019

6.8.4 Late appeal

An eBay trader applied to appeal late against decisions to register her and to issue a penalty. Her substantive ground of appeal was that HMRC had assessed the wrong person; the trader was a limited company that had been liquidated. The notification of liability was issued in March 2016 and the penalty in May 2016; the appeal was lodged in February 2018.

HMRC argued that they thought they had finality in the case in 2017; the appellant had been discussing payment terms. The judge noted that the reason for the delay appeared to be a letter from the appellant's accountant to HMRC in April 2016 that had never been received, and therefore had never been replied to. However, that was not itself an

appeal, and had not been adequately followed up. In spite of the serious consequences for the appellant, the delay (20 months) in bringing an appeal could not be excused, and the appeal was struck out.

First-Tier Tribunal (TC07075): *Bushra Saleem-Sadiq*

TC06149 concerned an individual who appealed against personal liability notices amounting to £490,000 issued to him as director of a company that had traded in metals. The trader had put his affairs in the hands of someone who claimed to be competent in such matters, but the representative had not filed an appeal. He appeared to have a number of outlandish views on how the law could be manipulated to avoid the liability, including declaring that the appellant was dead.

The trader changed adviser in July 2016. His new representatives addressed the outstanding notices of appeal by September 2016. He now applied for leave to appeal out of time. His representative argued that he had been totally reliant on the previous adviser, and although the delay (somewhere between 13.5 and 24 months) was admittedly serious, his reliance was understandable.

HMRC contested the application. They considered that the appellant should suffer the consequences of the actions of his adviser. They considered they would suffer prejudice as the officer involved in the case had left the service.

The judge considered that, on balance, the prejudice to the appellant from refusing the application outweighed the possible prejudice to HMRC and the seriousness of the delay. He would inevitably lose his home if he could not challenge the penalty notices. His first representative's actions were so far outside any reasonable brief that the appellant could have given, that he should be regarded as "on a frolic of his own".

The application was allowed by the FTT. The case, and the peculiar beliefs of the first adviser, were reviewed by Andrew Hubbard in his editorial comment in *Taxation*, 7 December 2017.

HMRC appealed to the UT against the FTT's decision. They put forward three grounds of appeal:

- *The FTT erred in law by failing to follow binding guidance from the Upper Tribunal, endorsed by the Supreme Court, in relation to the "stricter approach to compliance with time limits".*
- *The FTT erred in law by permitting the appellant to advance unpleaded allegations of dishonesty against his previous adviser and then making findings in relation to the same instead of holding the appellant to his pleaded case.*
- *The FTT gave too much weight to the appellant's complaints about his previous adviser in circumstances where he had not waived any privilege that existed between him and the adviser.*

The UT accepted the first ground: the FTT had failed to give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion.

The judges considered that HMRC had been given adequate notice of the appellant's reliance on the former adviser's dishonesty, and had not been

"ambushed". Although the adviser might feel aggrieved that a Tribunal had held him to have acted dishonestly without giving him an opportunity to explain himself, nevertheless the Tribunal was entitled to do so, and HMRC had less cause to complain about those findings. The second ground was dismissed.

The issue of privilege was not particularly relevant, as there was no suggestion that the adviser was someone whose advice benefited from privilege. The UT accepted HMRC's general point that, in most cases, failings by a litigant's advisers should be regarded as failings of the litigant. Therefore, in most cases, a litigant seeking permission to make a late appeal on the grounds that previous advisers were deficient will face an uphill task and should expect to provide a full account of exchanges and communications with those advisers. The appellant had given a full account of his dealings with the adviser, and the FTT had been entitled to come to the conclusions it drew on the conduct of that adviser. The third ground of appeal was also dismissed.

Because there was an error of law, the UT set aside the FTT decision and remade it. In the view of the judges, the adviser's conduct might be "rather more striking, if not spectacular, than one normally sees"; nevertheless, it was simply incompetent advice, and the incompetence of an adviser is not something that should normally constitute a reasonable excuse for a serious delay in making an appeal.

The overall conclusion was that there was not a sufficiently good reason for the delay, and leave to make a late appeal was refused.

Upper Tribunal: *HMRC v Muhammed Hafeez Katib*

6.8.5 Costs

HMRC withdrew assessments before a hearing in an appeal that had been categorised as complex. There was no dispute that the appellant was due an award of costs, but it applied for costs on the indemnity basis (in total £539,105). The total in dispute was about £3.4m.

The company made arrangements with individuals known as "property guardians" to occupy vacant properties owned by third party clients. These were tripartite arrangements involving property owners, the appellant and the property guardians, with property guardians paying fees to the appellant in return for a right to occupy the premises. HMRC had ruled that these supplies were not exempt, and the company was therefore liable to output tax.

The judge noted that costs were awarded on an indemnity basis where the litigation has been conducted in a way that is "unreasonable to a high degree" which takes the case "out of the norm". He went on to recite a number of precedent cases in which these terms have been considered and applied, and the circumstances of the present case. The question he had to decide was whether HMRC ought to have realised much earlier that the Tribunal was likely to allow the appeal and should therefore have withdrawn the assessments at that earlier stage, and whether that amounted to unreasonable conduct to a high degree. The judge was not satisfied that this was the case. HMRC's conduct was worthy of some criticism, but not enough to warrant an award of indemnity costs.

The judge expressed surprise at some of the things claimed in the costs application; for example, 1,257 hours of lawyers' time dealing with documents, and 199 hours spent on a hardship application that was immediately accepted by HMRC. In the circumstances, he considered it appropriate to order a payment on account of costs of £50,000, with the actual award to be subject to assessment if not agreed.

The appellant was ordered to pay HMRC the costs of the costs hearing.

First-Tier Tribunal (TC07143): *Ad Hoc Property Management Ltd*

6.8.6 Procedure

TC06487 concerned a bingo company that sought to make an adjustment similar to that accepted by the FTT and UT in the *K E Entertainments* case (before the Court of Session disallowed it – see the April 2019 update). It had made an adjustment to its 12/11 VAT return but this was refused; its then tax agents had informed HMRC that, given the cost of disputing the decision, the company would not appeal (even though the amount in dispute was over £1.6m). In 2016, a new tax agent sought to take the matter up again, and asked for a late statutory review of the earlier decision. HMRC pointed out that the decision had been made years before and the company had chosen not to appeal it. The company then filed an appeal against that decision.

HMRC applied for the appeal to be struck out on the basis that their letter was not itself an appealable decision. The appealable decision had been taken in 2012 and not appealed. There was a right of appeal against that, but HMRC would strenuously object to the admission of a late appeal so long after the event, even though the case law showed that the company would probably succeed (at that time, before the CS reversal).

The judge did not accept various arguments put forward by the taxpayer to the effect that its amendment to its 12/11 return was still "live". He agreed with HMRC that there was effectively a time limit in reg.38 – the adjustment to the VAT account belonged in the period in which the company adjusted its accounting records, and that was at latest 12/11. He agreed that there was no separate appealable decision in the 2017 letter, and refused (on *Data Select* grounds) an application to appeal out of time.

The appeal was struck out; that decision was appealed to the Upper Tribunal. By the time the UT heard the case, the Court of Session had ruled against *K E Entertainments*; conversely, HMRC had accepted that there is no time limit on making reg.38 adjustments. The judges noted the possibility that the claim properly lay under s.80, but as the parties had agreed on the matters to be argued, they proceeded on the basis of the parties' common position.

The company's position was, in essence, that the absence of a time limit in reg.38 meant that it could make a claim for repayment at any time after the adjustment had been made, and could repeatedly ask HMRC to make a new appealable refusal on successive occasions. The UT did not consider that this could be what Parliament intended. The company argued that the FTT had erroneously concluded that there was a time limit in reg.38; the UT could not be sure exactly what the FTT had decided on that issue, but was satisfied that it did not affect the correctness of the conclusion that the 2017 letter was not a new appealable decision.

The company's second ground of appeal, that the FTT had failed to have proper regard to the overriding objectives of the FTT, could not succeed, because the FTT was deciding whether or not to exercise a statutory discretion to allow a late appeal. That left the third ground, which was that the FTT had failed to follow the correct principles in deciding whether or not to allow a late appeal to proceed. The company claimed that it should have followed the checklist in rule 3.9 of the CPR, rather than the tests set out in *Data Select*. The UT did not agree that this was correct, and was satisfied that the FTT had been entitled to exercise its discretion in the way that it did.

Even though there might have been errors of law in the way the FTT had described the effect of reg.38, its decision would inevitably have been the same because it had clearly come to the (correct) conclusion that the 2017 letter was not an appealable decision. The appeal therefore had to be struck out, as the FTT had no jurisdiction.

Upper Tribunal: *Buckingham Bingo Ltd v HMRC*

HMRC applied for disclosure of various classes of documents, which the appellant said were not relevant to the issues in dispute. HMRC argued that the documents were relevant to the question of whether the company made supplies of merchant acquirer services to retailers or to its related company; the company argued that this had not been part of the pleading by HMRC, and therefore HMRC were not entitled to ask for documents relating to it.

Judge Mosedale noted that the appellant's argument seemed to have reversed the roles of appellant and respondent: it was for the appellant to state on what it wished the Tribunal to rule, and it would then be for HMRC to state the extent to which it disputed the appellant's case.

The judge then considered the arguments that each party had to sustain and the relevance of the documents to those arguments. She ordered that certain categories should be disclosed, and declined to order disclosure of others. She noted that that it was the appellant's case that the Tribunal cannot look beyond the terms of the contracts, but that was a proposition HMRC clearly did not agree with; she therefore had to consider relevance by reference to the propositions of law both parties made, as it was not appropriate to decide such propositions in the interim hearing. She therefore answered the question of disclosure on the assumption that HMRC might be right to say that the Tribunal can look beyond the terms of the contracts. At the full hearing it would be open to the appellant to show that the Tribunal cannot look beyond the terms of the contract.

First-Tier Tribunal (TC07082): *Worldpay (UK) Ltd*

HMRC applied for a "sist" in an appeal – a delay – on the grounds that hearing the technical appeal might prejudice criminal proceedings against the appellant. who was being prosecuted for fraudulent evasion. Although he was arrested and charged in October 2015, no final decision had been taken on proceeding to trial by January 2019, so the appellant argued that he wanted the VAT appeal to be heard so that he could recover the working capital for his business that HMRC were withholding.

In a brief decision, Judge Anne Scott held that the risk of prejudice was hypothetical and not serious in the circumstances, as there was still no

decision on the prosecution. The application for sist was refused for six months and until further notice.

First-Tier Tribunal (TC07100): *Mohammad Ameen Mirza*

6.8.7 Strike-out

A company appealed against a number of assessments, arguing that they were made out of time and that its supplies were exempt. HMRC applied for the appeals to be struck out on the basis that they had no reasonable prospect of success. The matter came before Judge Mosedale. She noted that she would have to consider whether HMRC could show that the appeals were hopeless without the need for a consideration of the full facts and evidence.

The judge considered the applicable legal principles and whether there were genuinely arguable points in the appellant's case. As regards exemption, HMRC's argument was that the company made the same kinds of supply as *Bookit Ltd*, and the CJEU had held that these were taxable. The company put forward a number of distinctions between what it did and the *Bookit* arrangements; however, the judge considered that the CJEU decision in that case was one of broad principle that would apply to the slightly different facts. That appeal, covering assessments for periods in 2016, was struck out. For the same reason, an appeal about the backdating of registration was also struck out.

As regards the time limits, once again most of the appeals were hopeless because it was clear that evidence of facts was not provided to HMRC until within the 12 months before the assessments were raised. There was only one period (09/13) for which there was an arguable case, that HMRC ought to have raised an estimated assessment at an earlier date and had acted unreasonably in the *Wednesbury* sense by not doing so. Both the legal and factual case could be argued at trial.

As the great majority of its argument has been struck out, the company may decide that what remains is not worth pursuing.

First-Tier Tribunal (TC07176): *Ticket Arena Ltd*

6.8.8 Hardship

A company applied for its appeal against a £2.2m VAT assessment to be heard without depositing the tax on the basis that to do so would cause it hardship. HMRC resisted the application, arguing that the company's lack of funds was caused by its own actions.

The company was based in Jersey and sold tax avoidance schemes to UK residents through a connected entity, NT Advisers 2009 LLP. HMRC ruled that the LLP was a fixed establishment of the Jersey company in the UK, and was therefore liable for output tax in respect of any fee income generated. HMRC also considered that a late registration penalty would be due.

The Jersey company had made a very substantial provision in its accounts for the cost of litigation in defence of its tax avoidance schemes. In May 2016 the company "redomiciled" to Anguilla, following which it released the provision, noting in its unaudited accounts that it had decided not to pursue the litigation but instead to negotiate with HMRC and with clients.

The release of the provision resulted in an accounting profit, which the company proceeded to pay to its new holding company, which was owned by the same individual that had owned the Jersey company before the 2016 reorganisation. He had repaid a loan of £3m to the company to enable it to pay that dividend.

Judge Kevin Poole examined the history of the company and its dispute with HMRC, and the sketchy accounting evidence and a witness statement from the owner (but not director) that he considered to be less than fully frank. He concluded that the company had rendered itself unable to pay the assessment, and it therefore did not qualify for hardship relief.

First-Tier Tribunal (TC07161): *NT ADA Ltd*

6.8.9 Information notice

HMRC issued an information notice under FA 2008 Sch.36 para.1 requiring production of certain information and documents. When the company did not do so, penalties were issued. There is no right of appeal against a notice to produce "statutory records"; the question before the Tribunal, on an appeal against the notice and the penalties, were whether the required documents were "statutory records".

HMRC had issued the notice in order to assist the Irish and Bulgarian tax authorities with an enquiry into cross-border supplies. The transactions had been reported on sales lists between November 2015 and July 2016. In relation to these particular transactions, the trader was required to produce:

(1) trade accounts for an Irish and a Bulgarian counterparty;

(2) bank statements which show payments received for goods supplied to those customers;

(3) confirmation of who arranged for collection, delivery and payment of the goods supplied; and

(4) proof of delivery of those goods (customer order, inter-company correspondence, travel tickets, delivery notes signed by customer) and the place to which they were delivered.

Judge Redston held that (1), (2) and (4) were included in the records required by SI 1995/2518 reg.31, and were therefore statutory records. The company had not complied, and had no right of appeal.

By contrast, item (3) did not appear to be a statutory record, and was not reasonably required for checking the taxpayer's tax position, as it did not appear to be relevant to any VAT requirement.

First-Tier Tribunal (TC07066): *CPR Commercials Ltd*

6.9 Other administration issues

6.9.1 Tax gap

HMRC have published the 2019 edition of ‘Measuring tax gaps’, containing estimates for 2017/18. This shows an overall tax gap of £35bn, representing 5.6% of total liabilities. HMRC say:

The tax gap provides a useful tool for understanding the relative size and nature of non-compliance. This understanding can be applied in many different ways:

- *it provides a foundation for HMRC’s strategy – thinking about the tax gap helps the department to understand how non-compliance occurs and how HMRC can address the causes and improve the overall health of the tax system*
- *drawing on information on how other countries manage their tax gaps, our tax gap analysis provides insight into which strategies are most effective at reducing the tax gap*
- *although the tax gap isn’t sufficiently timely or precise enough to set performance targets, it provides important information which helps us understand our long-term performance.*

The VAT gap is estimated at £12.5bn (9.1% of VAT due), slightly up on 8.9% in 2016/17, and considerably down on 12.2% for 2005/06. Corporation tax accounts for £5.2bn (8.1% of CT due), slightly up on 2016/17. The tax gap for self-assessed income tax and NIC stands at 17.0%, which seems a surprisingly high figure, but as the gap for PAYE income tax is very low, the overall income tax/NIC/CGT gap is only 3.9%.

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

6.9.2 Criminal investigation policy

HMRC have updated the document setting out the extent of their criminal investigation and surveillance powers under the legislation applicable in England & Wales, Northern Ireland and Scotland. It deals with:

- HMRC’s criminal investigation powers
- Governance and oversight
- Personal information charter
- Use of ‘open source’ material

www.gov.uk/government/publications/criminal-investigation

6.9.3 Prosecutions

HMRC have seized the winnings of a poker champion to compensate for money he obtained through a tax fraud. The individual was jailed for 28 months in 2015 for his involvement in a £40m money laundering operation and a major pan-European VAT fraud. At a subsequent confiscation hearing, it was calculated that he had benefited from his criminal conduct in the sum of £237,449, but as no assets could be identified, a nominal £1 confiscation order was made. After HMRC

discovered that he had won two poker tournaments, on 6 August 2018, the original £1 confiscation order was increased at Manchester Crown Court to the sum of £71,770, and on 20 March 2019 this was further increased at Manchester Crown Court by another £30,200.

HMRC Release 3 April 2019

HMRC has announced that the owner of a discount furniture store, was jailed for lying on his tax returns to ensure that the business paid almost no VAT, despite sales being £2,229,197. The scam ran between May 2011 and August 2016 and ensured that the business paid only £205 in VAT over five years, cheating taxpayers out of over £150,000. The owner was sentenced to two years and four months in jail and HMRC are now pursuing confiscation orders to recover the money owed.

HMRC Release 9 April 2019

A man has been jailed for helping a father and son leave the UK to escape sentencing for a £1m VAT scam. The man bought travel tickets for the pair and hired a van to transport their furniture to a hideout in Spain. During this time, £2,900 was deposited into his account. On 12 April 2019, the man was sentenced at Salisbury Crown Court to 15 months in jail after being convicted of perverting the course of justice at Winchester Crown Court on 14 March.

HMRC Release 15 April 2019

Two business partners and directors of a Chinese restaurant have received sentences after using an off-the-record card machine to avoid paying £180,000 in VAT over a four-year period. An HMRC investigation discovered two card reading machines at the restaurant, one linked to a business bank account and another linked to a bank account that the owner had opened in the name of one of the restaurant's chefs. The second account had not been declared to HMRC in order to avoid paying VAT. Despite efforts to burn business records after HMRC officers visited the restaurant, two documents and £12,000 in cash were uncovered at the owner's home.

HMRC Release 14 May 2019

HMRC has announced that the owner of a Derbyshire restaurant was jailed for three years for a tax fraud worth £480,000 following an investigation which uncovered a hidden sales book dating back five years. The trader was sentenced to three years at Birmingham Crown Court for evading VAT payments, Income Tax and National Insurance payments.

HMRC Release 24 May 2019

6.9.4 Extradition

A Polish woman was involved in a business with her husband, who was one of 15 people charged in Poland in connection with an £11m carousel fraud. The husband went back to Poland voluntarily to face trial; the wife dropped an appeal against a deportation order, but when she discovered that she was also to be extradited under a European Arrest Warrant, she appealed. A District Judge dismissed her appeal in December 2017, but when the matter came before the High Court, the judge held that the situation had changed. Her three children had to be taken into consideration; since December 2017, their Polish parental grandparents

had made it clear that they would not be able to look after them if they were sent to Poland with their mother. It also appeared that the wife would be tried separately from the 15 men, and their trial was unlikely to proceed for some time.

Because of the changes in circumstances, the judge concluded that the extradition order should be set aside. He noted that the Home Office was still pursuing deportation, but that was subject to different considerations.

High Court: *M v Circuit Court in Czestochowa, Poland*

6.9.5 Appointed days

The *Finance Act 2009, Sections 101 and 102 (Avoidance: Penalties) (Appointed Day) Order 2019* appoints 1 June 2019 as the date on which the FA 2009 provisions on late payment interest and repayment interest come into effect in relation to penalties under the DOTAS regime for VAT and other indirect taxes; enablers of defeated tax avoidance schemes legislation; and the promoters of tax avoidance schemes (POTAS) regime.

SI 2019/921