TC02776

Appeal number: TC/2012/602 & TC/2012/604

PROCEDURE – striking out of proceedings –whether appellants' case had a reasonable prospect of succeeding – abuse of process – whether Court of Appeal decision in David Baxendale was per incuriam or otherwise inconsistent with EU law – powers of Tribunal to ignore otherwise binding decisions or make a reference to the CJEU

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID BAXENDALE LIMITED **Appellants**
SUSAN MURRAY

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ROGER BERNER
TOBY SIMON

Sitting in public at 45 Bedford Square, London WC1 on 26 April 2013

Alun James and Michael Collins, instructed by Gabelle LLP, for the Appellants

Brendan McGurk, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 31 July 2009 the Court of Appeal delivered its judgment in *David Baxendale Limited v Revenue and Customs Commissioners* [2009] EWCA Civ 831. That appeal concerned the VAT treatment to be applied to the sale to members of the public of the LighterLife weight loss programme. That programme, which was designed to achieve rapid weight loss for those who are seriously overweight, had two elements: a physical aspect which replaced normal food with LighterLife food packs, and counselling and advice in weekly group sessions.

2. In the VAT and Duties Tribunal it had been held that these two elements constituted separate supplies, in respect of which the consideration paid by the customer should be apportioned, so that part was zero-rated, as referable to supplies of the food packs, and part was standard-rated, as referable to the counselling services. That decision was reversed in the High Court, where Morgan J held that there was a single standard-rated supply of services. The Court of Appeal dismissed the appellant's appeal.

3. The Appellants in these appeals, David Baxendale Limited and Ms Susan Murray, for themselves and other LighterLife counsellors, now seek to make a new appeal to this Tribunal. Their principal ground, as set out in the notices of appeal, is that VAT has been overpaid as a direct result of a fundamental misunderstanding of the ECJ decision in *RLRE Tellmer Property sro v Finančni ředittelstvi v Ústí nad Labem* (C-572/07) [2009] STC 2006 by both HMRC and the Court of Appeal in *David Baxendale*; in particular that the decision of the Court of Appeal was *per incuriam* in the light of *Tellmer*, on the basis of which, it is said, the LighterLife counsellors are providing mixed supplies of counselling services and foodpacks (goods) which are standard-rated and zero-rated respectively. Alternatively, the grounds of appeal submit that the matter requires clarification by means of a reference to the CJEU.

Preliminary issue

4. It can thus be seen that the Appellants, and those they represent, are seeking to re-open a case where there has already been a decision of the Court of Appeal. Following receipt by the Tribunal of the notices of appeal they were considered by Judge Kempster who on 18 January 2012 directed that there should be a preliminary hearing to consider submissions on whether the Appellants' appeals had any reasonable prospect of success. In the directions, Judge Kempster said:

> "Tribunal Procedure Rule 8 enables the Tribunal to strike out proceedings if the Tribunal considers there is no reasonable prospect of the Appellants' case succeeding. I am concerned that allowing these proceedings to continue may not be an appropriate use of the Tribunal's jurisdiction. The Court of Appeal decision is relatively recent and it specifically considered *Tellmer*; whatever grounds were put to the Supreme Court by the Taxpayer were not sufficient to obtain

> permission to appeal; the earlier proceedings concerned the same taxpayer, the same products and the same dispute as to VAT liability as the current appeals. While it is understandable that the losing taxpayer may have considered the wrong conclusion to have been reached, the Court of Appeal was clear as to its decision. From my perusal of the current notice of appeal it seems to me that this Tribunal (and indeed the Upper Tribunal) would be bound to follow the precedent of the Court of Appeal by the doctrine of *stare decisis*. I consider that the first step in these proceedings should be a hearing to determine whether the Appellants have any reasonable prospect of succeeding if the proceedings are allowed to continue."

5. This is the decision on that preliminary hearing. Before us the Appellants repeated and expanded upon their submissions in their grounds of appeal, in particular to take account of more recent case law of the CJEU. For their part HMRC submitted that this Tribunal has no jurisdiction to hear these appeals, and that consequently the appeals should be struck out.

Is *David Baxendale* a binding precedent?

6. The essence of the Appellants' primary case is that the judgment of the Court of Appeal in *David Baxendale* was *per incuriam* the decision in *Tellmer*, and that in those circumstances national rules, including the doctrine of binding precedent (*stare decisis*), are displaced in an EU context where there is serious doubt whether the prior UK decision is correct in terms of EU law. On this basis the Tribunal should refuse to follow *David Baxendale*.

7. This argument has two strands, the first of which, namely whether the Court of Appeal's judgment was *per incuriam*, we shall consider first.

8. We were not taken to any authority on what is meant by "*per incuriam*", but a useful summary, in the context of whether the Court of Appeal is bound to follow its own decisions, can be found in *Halsbury's Laws*, Volume 11 (2009) at para 96 under the heading (11) Judicial Decisions:

> A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force, or when, in rare and exceptional cases, it is satisfied that the earlier decision involved a manifest slip or error and there is no real prospect of a further appeal to the House of Lords. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the court had not the benefit of the best argument, and, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority. Even if a decision of the Court of Appeal has misinterpreted a previous

> decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake.

9. The reference in *Halsbury* to cases of manifest slip or error merits some further elaboration. It derives in particular from *Williams v Fawcett* [1985] 1 All ER 787, a case concerning the requirement of a notice to show cause why a person should not be committed to prison for contempt of court. In his judgment Sir John Donaldson MR referred (at pp 794-795) to the earlier cases of *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 and *Morelle Ltd v Wakeling* [1955] 2 QB 379. In both cases the Court of Appeal had emphasised that cases outside the category of decisions given in ignorance or forgetfulness of statute or authority are "of the rarest occurrence". This includes cases where there has been a manifest slip or error; such cases must be exceptional. In *Williams v Fawcett*, the circumstances were held to be exceptional: the development of the error could be clearly detected, the cases concerned the liberty of the subject and the maintenance of the authority of the courts, they were by no means unusual (so could affect many people), and they were cases that were unlikely to reach the House of Lords (where the error might be corrected).

10. With these principles in mind we turn to the Appellants' primary argument.

Tellmer

11. Tellmer was the owner of rented apartment blocks. In addition to rent it claimed from its tenants separately invoiced sums for cleaning of the common parts carried out by caretakers. Tellmer contended that letting and services related to the letting of apartments constituted indivisible transactions, that would accordingly be a supply of letting exempt from VAT.

12. The ECJ referred, at [17], to its case law to the effect that every transaction must normally be regarded as distinct and independent. It then went on, at [18] and [19], to recite the two exceptions to that rule, namely, on the one hand where one or more elements of a composite supply are regarded as the principal service, and other elements are ancillary so that they share the tax treatment of the principal supply (*Ministero dell'Economia e delle Finanze v Part Service Srl* (C-425/06) [2008] STC 3132; *Card Protection Plan Ltd v Customs and Excise Commissioners* (C-349/96) [1999] STC 270; and *Levob Verzekeringen BV v Staatssecretaris van Financiën* (C-41/04) [2006] STC 766, and on the other where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (*Part Service*; *Levob*).

13. At [21], the Court stated that even if cleaning services of the common parts went along with the use of the property, they would not necessarily fall within the concept of letting for VAT purposes. The Court referred, at [22], to the fact that there were a number of ways in which cleaning services could be supplied, for example by a third party invoicing the cost of the service direct to the tenants or by the landlord employing his own staff for the purpose, or using a cleaning company.

14. The Court then found at [24]:

> "Also, since the letting of apartments and the cleaning of the common parts of an apartment block can, in circumstances such as those at issue in the main proceedings, be separated from each other, such letting and such cleaning cannot be regarded as constituting a single transaction within the meaning of the case law of the court."

David Baxendale

15. In *David Baxendale* in the Court of Appeal Patten LJ (with whom Lord Clarke MR and Goldring LJ agreed) made, at [19] to [26] of his judgment, extensive reference to the ECJ judgment in *Tellmer*. He quoted from *Tellmer* at some length. Pausing there, it is plain that the court cannot be said to have decided *David Baxendale* in ignorance of *Tellmer*; *David Baxendale* is not *per incuriam* on that basis.

16. Having cited relevant passages from *Tellmer*, Patten LJ made (at [21] to [22]) the following observations:

> "[21] Before turning to the facts of the present case it may be useful to make one or two general points about the ECJ decisions. All these cases including *Tellmer* are simply applications of a now well-established principle to the transaction in issue in the particular case. Where the transaction under consideration prima facie involves more than one identifiable supply neither of which can be regarded merely as ancillary to the other the correct tax treatment will still depend on whether, from an objective view, they form a single indivisible economic supply which it would be artificial to split.
>
> [22] The determination of this question will depend upon a global assessment of all facts relevant to the transaction under which the supply or supplies took place. That is the taxable event. This will obviously include a consideration of the terms upon which the supply or supplies were made; how they were invoiced for; and what the consumer in fact acquired under the contract …"

17. For the taxpayer, relying largely on *Tellmer*, it was submitted that as part of the process of determining whether there were separate supplies or a single, indivisible supply, it may be relevant to consider whether the different component elements could have been supplied separately or in a different way from other sources. Patten LJ rejected that submission as wrong in principle. He referred (at [23]) to the fact that the question would arise only in a case where supplies would otherwise be separate supplies. The fact that the supplies could have been made separately was therefore a given, and could not be a factor in determining a particular case. The issue was both fact and transaction specific; the fact that the same or similar goods or services could be provided separately from different sources is irrelevant to the question whether, in the particular transaction under consideration, their combination produced a different economic result (Patten LJ, at [24]).

18. In so finding, Patten LJ did not accept that *Tellmer* had the significance contended for on behalf of the taxpayers. That argument had rested in particular on the reference in [22] of the *Tellmer* judgment to the various ways in which cleaning

services of the common parts of an apartment block could be provided. But Patten LJ explained that this was because the reference to the ECJ had asked for guidance in general terms, taking into account the different possible scenarios about the cleaning of the common parts (Patten LJ, at [25]). He then went on (at [26]):

> "The ECJ therefore considered the question of economic divisibility in relation to lettings in general terms which included cases where the lease did not oblige the landlord to carry out the cleaning and the tenant to pay for it. The comments in paras 21 to 22 of the judgment have to be read in this context and I think explain why the court felt able to conclude that letting and cleaning could not be regarded as economically indivisible given the absence of any necessary contractual link between the letting and the cleaning arrangements. I do not regard the reasoning of the court as going any further than that."

19. The Court of Appeal thus explicitly rejected the argument that the ability, in theory, for the counselling and the foodpacks supplied by the counsellors to be separated from each other and supplied by different persons, had the consequence that those elements could not be regarded as a single supply. *Tellmer* was not authority for such a proposition.

20. Mr James, appearing for the Appellants, argued that the passage quoted from [26] of Patten LJ's judgment shows that the argument was rejected on a misreading of the facts in *Tellmer*. He submitted that the Court of Appeal rejected the argument on the basis that in *Tellmer* the tenants had a choice whether to receive cleaning from the landlord or a third party, whereas *in David Baxendale* the customers had no choice to receive counselling or foodpacks from a third party. However, he submitted, the facts in *Tellmer* were different: they were that the tenants had no choice but to receive cleaning from the landlord.

21. We do not accept these submissions. We do not read Patten LJ's analysis of *Tellmer* as in any way fact-specific. In referring to the absence of "any *necessary* contractual link", it is quite clear that Patten LJ was not making any reference at all to the facts of the taxpayer's own case in *Tellmer*. What he was saying was that, according to *Tellmer*, in the absence of any necessary contractual link between letting and cleaning services in general terms, those services cannot be regarded as economically indivisible. *Tellmer* was not laying down any broad principle that the ability to obtain supplies separately would mean that they cannot be economically indivisible; that, as Patten LJ clearly describes, depends on an analysis of the particular supplies in question. *Tellmer* is an example of the CJEU itself applying well-established principles; it is not a case that has established or introduced any further principle.

22. In any event, although (for the reasons given in the preceding paragraph) it is not material to our decision, we do not accept Mr James' submissions as to the true factual position in *Tellmer*. Mr James relied on [41] and [46] of the Advocate-General's (Trstenjak) opinion in *Tellmer*. At [41] the Advocate-General described the current practice in the Czech Republic for the organisation of cleaning of the common parts of apartment blocks in three different ways: (1) the tenants themselves assume

the task; (2) cleaning services are supplied by a third party which subsequently invoices the tenants for that supply; and (3) the landlord ensures the cleaning of the common parts, whether through his own employees (for example, caretaking staff) or a cleaning firm commissioned to perform the task. At [46], the Advocate-General goes on to describe the third set of circumstances as those applicable in the *Tellmer* case. The only distinction between that and the second example is said to be that it is the landlord who is providing the services. There is no reference to the contractual position.

23. On this basis, there is, in our respectful view, no manifest slip or error in the judgment of the Court of Appeal in *David Baxendale*. It follows from this that we do not accept that it is arguable that the Court of Appeal's judgment in *David Baxendale* is *per incuriam*. The judgment of the Court of Appeal is binding on this Tribunal.

The EU law position

24. The position of rules of national law, including rules of binding precedent, has been considered by the ECJ in a number of cases. In *Elchinov v Natsionalna zdravnoosiguritelna kasa* (C -173/09) [2011] All ER (EC) 767, the ECJ held (at [32]) that EU law precludes a national court which is called upon to decide a case referred back to it by a higher court from being bound, in accordance with national procedural law, by legal rulings of the higher court, if it considers, having regard to the interpretation which it has sought from the Court, that those rulings are inconsistent with EU law.

25. In considering the question before it in *Elchinov*, the ECJ provided guidance on the position where a lower court is faced with binding precedent that it does not consider enables it to give effect to EU law. As regards the making of references to the CJEU, the Court said (at [25]):

> "… the existence of a rule of national procedure such as that applicable in the case in the main proceedings cannot call into question the discretion of national courts not ruling at final instance to make a reference to the court for a preliminary ruling where they have doubts, as in the present case, as to the interpretation of European Union law.
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> 26. It is settled case law that art 267 TFEU gives national courts the widest discretion in referring matters to the court if they consider that a case pending before them raises questions involving interpretation of provisions of European Union law, or consideration of their validity, which are necessary for the resolution of the case (see, to that effect, *Rheinmühlen-Düsseldorf v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* Case 166/73 [1974] ECR 33 (para 3), *Mecanarte-Metalúrgica da Lagoa Lta v Chefe do Serviço da Confêrencia Final da Alfândega, Oporto* Case C-348/89 [1991] ECR I-3277 (para 44), *Palmisani v Istituto nazionale della previdenza sociale (INPS)* Case C-261/95 [1997] ECR I-4025 (para 20), *Civil proceedings concerning Cartesio Oktató és Szolgáltató bt* Case C-210/06 [2009] All ER (EC) 269, [2008] ECR I-9641 (para 88) and *Criminal proceedings Melki* Joined cases C-188/10 and C-189/10 (2010) Transcript (judgment), 22

> June (para 41)). National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate (see, to that effect, *Melki*'s case (paras 52, 57)).”

26. The Court also considered the position where a lower court is in the position of being inhibited by binding authority from giving full effect to provisions of EU law. In such a case, the CJEU stated that the rule of national law must be disregarded. The Court said (at [31]):

> “In addition, it is appropriate to point out that, in accordance with settled case law, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, that is to say, in the present case, the national procedural rule set out in para 24 of this judgment, and it is not necessary for the court to request or await the prior setting aside of that national provision by legislative or other constitutional means (see, to that effect, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* Case 106/77 [1978] ECR 629 (para 24) and *Filipiak v Dyrektor Izby Skarbowej w Poznaniu* Case C-314/08 [2010] All ER (EC) 168 (para 81)).”

27. Mr James also referred us to *Ministero dell'Industria, dell Commercio e dell'Artigiano v Luccini SpA* (C-119/05). However, we derived no further assistance from that case (which preceded *Elchinov*) as it was concerned with the special circumstances of State aid, where the ECJ held that the Italian courts had no jurisdiction to determine whether the State aid sought by Luccini was compatible with the common market, and that consequently those courts could not have invalidated the decision of the European Commission that the aid was incompatible. That, and not any more general principle, was the basis of the Court's conclusion that the principle of *res judicata* under Italian law could not prevent the recovery of State aid that had been paid in breach of EU law (see *Luccini*, at [57] et seq).

28. In *Condé Nast Publications Ltd v Customs and Excise Commissioners* [2006] STC 1721, the Court of Appeal considered an argument that it should treat the Court of Appeal decision in *Fleming (t/a Bodycraft) v Customs and Excise Commissioners* [2006] STC 864 as inconsistent with EU law. Chadwick LJ (with whom Arden and Smith LJJ agreed) said in this connection (at [44]):

> “I am content to assume that there may be circumstances in which the obligation imposed on courts by s 3(1) of the European Communities Act 1972 would require this court to refuse to follow its own earlier decision as to the meaning and effect of a Community instrument—including, in the present context, the effect of a judgment of the Court of Justice. Those circumstances would, I think, include a case in which the judgment of the Court of Justice under consideration by this court in the earlier case had been the subject of further consideration—and consequent interpretation, explanation or qualification—by the Court of Justice in a later judgment. But, as it seems to me, one constitution in this court should not substitute its own view as to the effect of a

> judgment of the Court of Justice for the view which has been reached by another constitution in this court in an earlier case on consideration of the same judgment in circumstances in which there has been no opportunity for the Court of Justice to review that judgment. In those circumstances, if persuaded that there are strong grounds for thinking that the earlier decision is wrong (as a matter of Community law) this court may think it right to refer the point to the Court of Justice for a preliminary ruling. Or it may follow the earlier decision and give permission to appeal. But it should not refuse to follow the earlier decision merely because, on the same material and the same arguments, it is satisfied that a different conclusion should have been reached."

29. In this respect Mr James argued that the Court of Appeal in *Condé Nast* did not have the benefit of the ECJ decision in *Elchinov* that a court has not just the right but the duty to give full effect to EU law, even if that means disregarding what would otherwise be binding precedent. If it had, he submitted, the court would surely have acknowledged at least the possibility that in clear cases of error a court would have no option but to refuse to follow the prior authority. He submitted further that if the previous decision was *per incuriam* or clearly in conflict with a previous decision of the ECJ (or CJEU), then a lower court, such as this Tribunal, can refuse to follow the prior decision of the higher court.

30. Despite Mr James' submissions to the contrary, we consider, in common with the Upper Tribunal in *S&I Electronics plc v Revenue and Customs Commissioners* [2012] STC 1620, that nothing in *Elchinov* undermines, or indeed is inconsistent with, what Chadwick LJ said in *Condé Nast*. *Elchinov* presupposes that any lower court refusing to follow binding authority would be doing so only in circumstances where it is satisfied that to follow the earlier case would result in it failing to give effect to EU law. That is entirely consistent with the approach in *Condé Nast*, which recognises that in certain circumstances, including (but not limited to) cases where there has been further consideration by the CJEU, the Court of Appeal may refuse to follow its own earlier decision. But in order for a lower court to be satisfied to the degree sufficient to oblige it not to follow the earlier authority, it must be clear that the earlier judgment does not reflect the prevailing state of EU law. That would not be the case were the lower court merely to consider that it would have reached a different conclusion. That, according to *Condé Nast*, would not be sufficient for the Court of Appeal to refuse to follow an earlier decision of that court; and in common with what the Upper Tribunal said in *S&I* (at [18]), it is not open to this Tribunal to substitute its own view for that of the Court of Appeal in *David Baxendale*.

31. We accept that in a case where it is shown that an earlier judgment was reached *per incuriam*, such as by reason of failure to consider an earlier judgment of the CJEU which clearly contradicts the conclusion reached in the later judgment, *Elchinov* is authority for the lower court or tribunal to disregard the otherwise binding authority if following it would result in a failure to apply EU law. However, we have found that the Court of Appeal cannot be said to have reached its decision in *David Baxendale per incuriam*. Accordingly, this Tribunal remains bound by *David Baxendale*, unless there is clear later higher authority which shows that it is wrongly-decided.

CJEU case law subsequent to *David Baxendale*

32. We were referred to two more recent judgments of the CJEU on the question whether more than one supply may be treated as a single supply.

Field Fisher Waterhouse

33. In *Field Fisher Waterhouse LLP v Revenue and Customs Commissioners* (C-392/11) [2013] STC 136, the CJEU addressed certain questions referred by the First-tier Tribunal. The facts were that premises were let in consideration of three "rents". The first was for the occupation of the premises, the second for the tenant's share of the buildings insurance and the third (services charges) was for various services that the landlord was obliged under the lease to provide. The principal question was:

> "… whether the services provided by landlords under a lease agreement with their tenants ("the Services") should be regarded as an element of a single exempt supply of a lease of land, either because the Services form objectively a single indivisible economic supply together with the lease or because they are "ancillary" to the lease, which forms the principal supply ("the Principal Supply"). In determining this question and in the light of the [Court of Justice's] decision in Case C-572/07 [*RLRE*] *Tellmer* [*Property* [2009] ECR I-4983], how relevant is it that the Services could be (but are not in fact) supplied by persons other than the landlords, albeit under the terms of the present leases in question the tenants had no choice but to receive the services from the landlords?"

34. A further question elaborated on the principal question: on the basis that the possibility of third parties providing the Services direct to the tenant was held to be relevant, the CJEU was asked whether that was merely a contributory factor in determining whether the Services were either a single, indivisible economic supply, which it would be artificial to split or an ancillary supply to the Principal Supply, or whether it was a determining factor.

35. The CJEU examined all the questions together. Its answer, in [28], having considered the relevant law, was as follows:

> "In the light of the above considerations, the answer to the questions is that the VAT Directive must be interpreted as meaning that the leasing of immovable property and the supplies of services linked to that leasing, such as those at issue in the main proceedings, may constitute a single supply from the point of view of VAT. The fact that the lease gives the landlord the right to terminate it if the tenant fails to pay the service charges supports the view that there is a single supply, but does not necessarily constitute the decisive element for the purpose of assessing whether there is such a supply. On the other hand, the fact that services such as those at issue in the main proceedings could in principle be supplied by a third party does not allow the conclusion that they cannot, in the circumstances of the dispute in the main proceedings, constitute a single supply. It is for the referring court to determine whether, in the light of the interpretative guidance provided by the court in this judgment and having regard to the particular

> circumstances of the case, the transactions in question are so closely linked to each other that they must be regarded as constituting a single supply of the leasing of immovable property."

36. Mr James sought to argue that *Field Fisher Waterhouse* had not provided the clarification that had been hoped for in relation to mixed supply cases such as the present. He submitted that it had essentially addressed the question of principal/ancillary supplies.

37. We do not agree. In our view, what *Field Fisher Waterhouse* demonstrates is that, as we described earlier, and which the Court of Appeal in *David Baxendale* said, *Tellmer* is not a decision that creates any new principle. It is particularly telling, we consider, that despite the First-tier Tribunal's question being deliberately phrased in terms of *Tellmer*, the CJEU does not refer to *Tellmer* at all in its judgment. Rather, it proceeds, in the same way that the Court in *Tellmer* itself did, to analyse the question before it by reference to the established authority.

38. Furthermore, that established authority was not, as submitted by Mr James, confined to the question of principal/ancillary supplies, but reference was equally made to the single, indivisible economic supply test (mixed supplies) (see [15] to [17]). At [18] the Court contrasts the requirements that, firstly, every supply must normally be regarded as distinct and independent and, secondly, that a transaction which comprises a single supply from an economic point of view should not be artificially split. That is a reference, not to principal/ancillary supplies, but to mixed supplies.

39. Mr James sought support for his argument by referring to part of what the CJEU said at [23] of its judgment, namely:

> "Obtaining the services concerned cannot be regarded as constituting an end in itself for an average tenant of premises such as those at issue in the main proceedings, but constitutes rather a means of better enjoying the principal supply, namely the leasing of commercial premises."

However, when examined in context, a different picture emerges. Paragraph [22] and the preceding part of [23] are as follows:

> "22. In those circumstances, for it to be possible to consider that all the supplies which the landlord makes to the tenant constitute a single supply from the point of view of VAT, it must be examined whether in the present case the supplies form a single, indivisible economic supply which it would be artificial to split, or whether they consist of a principal supply in relation to which the other supplies are ancillary.
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> 23. For the purposes of that examination, the content of a lease may be a factor of importance in assessing whether there is a single supply. In the main proceedings, it appears that the economic reason for concluding the lease is not only to obtain the right to occupy the premises concerned, but also for the tenant to obtain a number of services. The lease accordingly designates a single supply agreed between the landlord and the tenant. Moreover, it should be observed

> that the leasing of immovable property and the supply of associated services, such as those mentioned in paragraph 8 above, may objectively constitute such a supply…"

40. Furthermore, at [24] the Court made the point that, although the services of insurance and other services covered by the service charges were not necessarily covered by the concept of the leasing of immoveable property, that did not mean that there could not be a single supply, by reference to either of the principal/ancillary test or the single, indivisible economic supply test. Similarly, at [25], in confirming that the mere inclusion of the services in the lease cannot be decisive, the Court also refers to both tests. And finally, in its answer to the questions referred, at [28], the Court describes the function of the national court clearly in terms of the closeness of the links between the transactions as potentially resulting in a single supply.

41. The clear message from *Field Fisher Waterhouse* is the same as can be derived from the Court of Appeal judgment in *David Baxendale*, namely that the established authorities must be applied to each case according to its own facts. Thus, at [19], referring to *Card Protection Plan*, the Court said that there is no absolute rule for determining the extent of a supply for VAT purposes; all the circumstances must be taken into consideration.

42. Equally, the Court in *Field Fisher Waterhouse* expressed (at [26]) the same view as that of Patten LJ in *David Baxendale*, namely that the existence of a possibility that a third party could in principle supply certain services is not in itself decisive. The reason, which again accords with what Patten LJ said in *David Baxendale* at [23], is that such a possibility is inherent in the concept of a single composite transaction.

43. Accordingly, and contrary to Mr James' submissions, we regard *Field Fisher Waterhouse* as supportive of the judgment of the Court of Appeal in *David Baxendale*.

BGŻ Leasing

44. In *BGŻ Leasing sp. z o.o v Dyrektor Izby Skarbowej w Warszawie* (C -224/11) [2013] All ER (D) 273 (Jan), the CJEU was asked to consider whether a service of leasing certain items and the re-invoicing of the cost of insurance taken out by the lessor for those items amounted to a single supply.

45. The Court again referred to the established principles. Notably, as with *Field Fisher Waterhouse*, it once more made no reference to *Tellmer*. Having considered those principles, and having made the point, at [32] and [33], that all the circumstances in which the transaction concerned took place must be taken into account, and that it is a matter for the national court to make definitive findings of fact in that regard (with guidance from the CJEU on the interpretation of EU law), the Court considered the characteristics of the transaction at issue. It identified (at [35]) that the two elements of leasing and insurance were likely to be supplied together, and that there was a link between them. The Court then went on to say (at [36]):

> "It must be stated, in that regard, that any insurance transaction has, by nature, a link with the item it covers. It follows that there is necessarily a connection between the leased item and the relevant insurance. Nonetheless, such a connection is not sufficient in itself to determine whether or not there is a single complex transaction for VAT purposes. If any insurance transaction were subject to VAT because the services relating to the item it covers were subject to VAT, the very aim of Article 135(1)(a) of the VAT Directive, that is the exemption of insurance transactions would be called into question."

46. Mr James argued that if a necessary, or intrinsic, connection between insurance and the item it covers cannot in itself establish a single inseparable supply of both because, in particular, it would undermine the integrity of the separate (exempt) taxation of insurance services, then it should be clear that a conclusion – referring here to the summary by Patten LJ at [43] in *David Baxendale* of the description of the foodpacks and counselling services given Morgan J in the High Court (borrowing the language of the Chancellor in *Revenue and Customs Commissioners v Weight Watchers (UK) Ltd* [2008] EWCA Civ 715) as "re-enforcing each other which is what they are intended to do" – that a mere complementary or re-enforcing connection between a supply of food and services that complement (but are not directly applied to) it cannot establish a single supply, not least because that again undermines the integrity of the separate (zero-rated) taxation of food.

47. With respect to Mr James, we consider that misconstrues both what the CJEU was saying in *BGŻ* and the reasons for the conclusion in *David Baxendale*. As to *BGŻ*, the CJEU was, consistently with the established authority, merely making the point that the cases do not point to any particular decisive principles; every case is essentially fact-dependent. A necessary or inherent link between a supply of insurance and the item insured did not render that supply as one with the supply of the item. In *David Baxendale*, the conclusion, on the facts of the case, was that the single package of foodpacks and support services was not economically divisible. The mere fact that the supply of foodpacks was connected to the supply of the counselling services was not a decisive factor. The economic reality was that the customer wished to use both the foodpacks and counselling in combination with each other, the typical consumer regarded the two as complementing each other and values them both, the product was promoted on the basis that the customer would be supported by the counselling services which were an essential aid in re-enforcing the diet. It was the circumstances as a whole that persuaded the court to conclude that it would be artificial to split up what anyone wishing to use the programme would regard as a single economic supply.

48. In our judgment, nothing in *BGŻ* throws any doubt upon the Court of Appeal decision in *David Baxendale*. There is accordingly no basis for the Appellant's argument that this Tribunal should disregard it.

Reference to the CJEU

49. It follows from our conclusions above that we do not consider that there is any basis on which this Tribunal could be persuaded to come to the view that a reference

to the CJEU is the appropriate course. There is, as we have described, no arguable case that *David Baxendale* was decided *per incuriam*, nor that it has been undermined by subsequent case law of the CJEU. It is binding on this Tribunal, and there is in our view no reason to doubt the application of EU law in that respect, or to consider that to follow *David Baxendale* would lead the Tribunal to give a judgment that is contrary to EU law.

Abuse of process

50. For HMRC, Mr McGurk made further submissions, both in support of his arguments as to the binding nature of *David Baxendale*, and also as a separate argument that these appeals amount to an abuse of process as they seek to re-litigate the same matter a second time, and that principle cannot, in the circumstances, be inconsistent with or abrogated by any principle of EU law.

51. The basis for this submission is the fact that, following the judgment of the Court of Appeal in *David Baxendale* dismissing the Appellants' appeal, application was made, both to the Court of Appeal and to the Supreme Court, for permission to appeal to the Supreme Court. Those applications were not produced to the Tribunal, but Mr McGurk argued that logically the Appellants either did or did not contend in those applications that the Court of Appeal had been in error in so far as it causatively misinterpreted the *Tellmer* decision.

52. In each of those circumstances Mr McGurk submitted that it would be an abuse of process for the Appellants in this case to be permitted to proceed:

> (1) If the Appellants in *David Baxendale* did apply to the Supreme Court on the basis that the Court of Appeal had misinterpreted *Tellmer*, the Supreme Court must have concluded that the correct application of EU law was so obvious – being that reached by the Court of Appeal – that there was no scope for any doubt and thus no need or justification for a reference. If that was also the Supreme Court's view of *Tellmer* then, first, there is no reason why this Tribunal should come to a different conclusion; secondly, the matter is in any event *res judicata* since the Supreme Court have finally determined that the Court of Appeal's analysis was not causatively wrong; and thirdly, that it is an abuse of process for the same appellants to seek to re-litigate the same questions of VAT liability in relation to the same products and services a second time.
>
> (2) Alternatively, if the Appellants did not make application to the Supreme Court on this basis, the failure to raise this ground (or to seek a reference to the CJEU in relation to it) in circumstances where the Appellants claim that the Court of Appeal "fundamentally misunderstood" *Tellmer*, lay entirely with the Appellants. Again, Mr McGurk submitted, the matter has already been litigated once and is therefore *res judicata*; alternatively, it is an abuse of process for the Appellants to seek to re-open an appeal on a ground that plainly should have been put to the Supreme Court in the previous proceedings.

53. We have already stated our conclusions on the decision of the Court of Appeal in *David Baxendale*, its binding effect on the tribunal, and the consequence that it

cannot be ignored and neither would it be appropriate for this Tribunal to make a reference to the CJEU. We are here concerned only with the question of abuse of process.

54. On that we accept the submissions of Mr McGurk to the limited extent that this appeal is by David Baxendale Limited. We draw that distinction, because David Baxendale Limited was, as we understand the position, the sole appellant in the earlier case. We do not consider that the principles of *res judicata* or issue estoppel could apply to Ms Murray, even if she had been one of the taxpayers whose affairs were effectively regarded as determined by the earlier case. Ms Murray would have been unable to have any involvement in the application for permission to appeal *David Baxendale* to the Supreme Court, and consequently it would be unjust to prevent her on the ground of abuse of process from appealing a decision of HMRC to this Tribunal.

Conclusions

55. For the reasons we have given, we conclude:

(1) There is no arguable case that the decision of the Court of Appeal in *David Baxendale* was *per incuriam* or otherwise inconsistent with EU law.

(2) This Tribunal is bound by *David Baxendale* and there is no basis under EU law why that decision should be ignored by the Tribunal.

(3) There is no arguable basis on which this Tribunal should make a reference to the CJEU.

(4) There is accordingly no reasonable prospect of the Appellants' case succeeding.

(5) In addition, in the case of David Baxendale Limited, an appeal by that Appellant would have been an abuse of process, such that the Tribunal would have no jurisdiction in relation to those proceedings.

Decision

56. Accordingly, these appeals are struck out.

Application for permission to appeal

This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 4 July 2013