TC02826

Appeal number: TC/2011/07214

VAT – exemption for medical care – whether applies to services provided by company acting as a principal in providing medical doctors on a locum basis to hospitals – no – Article 132(1)(c) Principal VAT Directive – Schedule 9 Group 7 Item 5 Value Added Tax Act 1994 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RAPID SEQUENCE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
SONIA GABLE

Sitting in public at 45 Bedford Square, London WC1 on 5 July 2013

Ian Hayes, Chartered Tax Adviser, for the Appellant

George Peretz, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant ("Rapid Sequence") appeals against a decision of the Respondents ("HMRC") contained in a letter dated 19 January 2012 and subsequently upheld on review in a letter dated 15 June 2012. HMRC decided that Rapid Sequence's business involved the making of standard rated supplies of employment agency services and not exempt supplies of medical care, specifically the provision of deputies for registered medical practitioners.

2. Rapid Sequence, as a principal, provides the services of overseas based anaesthetists to hospitals in the National Health Service (NHS) as locums and receives fees for the services of the anaesthetists it procures based on the number of hours worked. As a principal, it pays the anaesthetists concerned a separately agreed hourly rate, the difference between the two rates representing the gross profit of its business.

3. Rapid Sequence contends that the services it provides are exempt from VAT under Item 5 of Group 7 of Schedule 9 to the Value Added Tax Act 1994, which provides an exemption for the provision of a deputy for a person registered in the register of medical practitioners. HMRC contend that in order to obtain the benefit of this exemption Rapid Sequence needs to be making supplies of medical care and in this case the supplies at issue are supplies of staff by Rapid Sequence to NHS bodies, not supplies by Rapid Sequence of medical care.

4. We consider below the relevant law and guidance in relation to the exemption for medical care in the context of the supplies made by Rapid Sequence. We then make findings of fact based on the evidence before us as to the manner in which Rapid Sequence's business operates. We then set out our decision on how Rapid Sequence's business is to be characterised for VAT purposes in the light of our findings of fact, the relevant legal principles and the submissions of the parties.

Relevant legislation, guidance and authorities

5. Article 131 of Council Directive 2006/112/EC ("the Principal VAT Directive") introduces the scope for Member States to make exemptions from the requirement to charge VAT as follows:

> "The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse."

6. Article 132 of the Principal Directive sets out various exemptions from VAT for "certain activities in the public interest" which Member States are required to implement. Article 132(1)(c) provides that Member States shall exempt:

"the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned".

7. This exemption is given effect to in Group 7 of Schedule 9 to the Value Added Tax Act 1994 ("VATA"). Items 1(a), 4 and 5 of Group 7 provide exemptions which are relevant to this appeal as follows:

> "1. The supply of services [consisting in the provision of medical care] by a person registered or enrolled in …
>
> (a) the register of medical practitioners
>
> 4. The provision of care or medical or surgical treatment and, in connection with it, the supply of any goods, in any hospital or state regulated institution.
>
> 5. The provision of a deputy for a person registered in the register of medical practitioners."

The words in square brackets in Item 1(b) were added by amendments which came into force on 1 May 2007.

8. When Rapid Sequence first sought clarification of its VAT position from HMRC in 2005 VAT Notice 701/57, issued in March 2002, provided non-statutory guidance on the application of VAT to health professionals. Paragraphs 3.4 and 3.5 of that Notice provided guidance on the VAT treatment of the services of health professionals as follows:

> "3.4 Can a business that employs or engages health professionals or unregistered care staff exempt their supplies?
>
> Yes, provided that the business:
>
> - acts as a principal (rather than an agent) in the supply of care; and
> - …
>
> 3.5 Can an agent arranging the supply of services by a health professional or an unregistered carer exempt their agency or arrangement fees?
>
> No, if you are an agent, your commission, fee or any other charge that you make for arranging and administering the supply is standard-rated."

9. The Notice also provided guidance in paragraphs 6.1 and 6.2 on the position of deputising doctors as follows:

> "6.1 Are the services of deputising doctors exempt?
>
> Yes. If you are a deputy medical practitioner, your services are exempt in the same way as those provided by a normal practice GP…
>
> 6.2 Is VAT due on other charges made in connection with the supply of a deputising doctor?

No. The exemption also applies to:

- agency registration and administration fees;
- charges for transport;
- telephone and stationery costs; and
- any other charges integral to the supply of a deputy medical practitioner's services;

when these charges are made in connection with the provision of services by the deputising doctor."

10. The current version of Notice 701/57 issued in November 2012 does not contain the guidance referred to in paragraph 9 above but it does contain the following in paragraph 6.4 of the Notice:

> "6.4 **Supplies of self-employed locum GPs**
>
> When self-employed locum GPs supply their services to an employment business which makes an onward supply to a third party who is legally responsible for providing health care to the final patient, both the supplies to and from the employment business are taxable. The fact that the locum GPs may be supplied to a prison or other institution where they may not be supervised by any medical staff does not mean that the employment business supplying the locum doctor to the third party is legally responsible for providing healthcare to the final patient."

This reflects the terms of Revenue & Customs Brief 12/10 issued in April 2009 which aimed to clarify HMRC's policy on the VAT treatment of supplies of health professionals by employment businesses and which stated:

> "**Supplies of locum GPs**
>
> Where an employment business supplies a locum GP to a practice, the employment business' only responsibility is to make a taxable supply of staff to the practice, not exempt healthcare to the final patient."

11. It is common ground that the exemptions in Group 7 of Schedule 9 to VATA are intended to implement the requirement for Member States to provide exemptions for the provision of medical care, as required by Article 132(1) (c) of the Principal Directive. The European Court of Justice ("ECJ") has interpreted the meaning of "medical care" in *Case C-307/01 d'Ambrumenil v CEC* [2005] STC 560 in paragraphs 58 to 60 of its judgment in the following terms:

> "While it follows from [the] case law that the 'provision of medical care' must have a therapeutic aim [although] it does not necessarily follow therefrom that the therapeutic purpose of a service must be confined within an especially narrow compass … medical services effected from prophylactic purposes may benefit from the exemption under Article 13A(1)(c). Even in cases where it is clear that the persons who are the subject of examinations or other medical interventions of a prophylactic nature and not suffering from any

> disease or health disorder, the inclusion of those services within the meaning of 'provision of medical care' is consistent with the objective of reducing the cost of healthcare …
>
> On the other hand, medical services effected for a purpose other than that of protecting, including maintaining or restoring, human health may not, according to the Court's case law, benefit from the exemption under Article 13A(1)(c) of the Sixth Directive. Having regard to their purpose, to make those services subject to VAT is not contrary to the objective of reducing the cost of healthcare and of making it more accessible to the individuals.
>
> … it is the purpose of a medical service which determines whether it should be exempt from VAT. Therefore, if the context in which a medical service is effected enables it to be established that its principal purpose is not the protection, including the maintenance or restoration, of health … the exemption under Article 13A (1) (c) does not apply to the service."

Thus it can be seen that in order to qualify for the exemption the service must have a "therapeutic aim".

12. The Upper Tribunal has recently considered whether the provision of the services of health professionals can amount to the exempt provision of medical care. In *Moher v HMRC* [2012] STC 1356, the facts were that the taxpayer, who was a qualified dental nurse, established an employment business. Her principal activity was the supply to dentists of temporary staff ("temps"). The dentists being supplied such staff were charged fees arrived at by multiplying an hourly rate by the number of hours worked. The fees exceeded the cost to the taxpayer of engaging the temps, and the difference represented her commission. The taxpayer added VAT to the entirety of her charge to the dentist but later came to the view that her supplies were exempt so made a claim for repayment of overpaid output tax. HMRC refused the claim on the basis that the services had been correctly treated as standard rated. Once the temp had been supplied to the dentist it was the dentist who gave instructions to, and controlled, the temp during the period of the assignment. The sole issue was whether the taxpayer's supplies could benefit from the exemption in Item 2(a) of Group 7 of Schedule 9 to VATA which exempted, *inter alia*, the supply of services by a person registered in the dentists' register, or a person registered in any roll of dental auxiliaries, or where the services concerned were wholly performed or directly supervised by a person who was so registered or enrolled.

13. The Upper Tribunal dismissed the claim for exemption, its reasoning was set out in paragraph 14 of its decision as follows:

> "… it is difficult to see how one could rationally conclude that the appellant was making supplies of medical care, once it is accepted that the nurses and auxiliaries were under the control of the dentist to whom they were assigned. This is so even if (assuming, in the appellant's favour) that the nurses were to be regarded as employees of the appellant. The appellant did not control – or even know- whether, and if so, the extent to which, the dentist directed a nurse or auxiliary to carry out other duties which themselves were not exempt supplies,

> such as acting as receptionist or assisting with cosmetic dentistry. Even in relation to dental services which are exempt, the appellant did not dictate the treatment offered to the patients, or play any part at all in determining what treatment was offered or how it was provided, nor did she supervise the nurses and auxiliaries. She had no relationship, contractual or otherwise, with the patients to whom the medical care was provided. It is our view beyond argument that her supply was of staff to dentists, who (as the tribunal found) assumed all the responsibility for directing the nurses as to what they should do, and for determining the treatment to be offered to the patients and the manner of its delivery. That the staff (and, indeed, the appellant herself) had a medical qualification cannot affect the nature of the supply. The tribunal correctly concluded that the appellant could not benefit from the exemption, and that the respondents were right to refuse the repayment."

14. A key issue for determination in this appeal is whether the provisions of Item 5 of Group 7 to Schedule 9 to VATA ("Item 5") go beyond the scope of the exemption for medical care permitted by Article 132(1) (c) of the Principal Directive, or if they did, whether it was necessary to construe Item 5 so as far as possible so as to be consistent with EU law.

15. Mr Hayes referred us to Cases C-253/96 and C-258/96 *Kampelmann and Others v Landschaftsverband* [1997], where the question was whether an individual might rely on provisions laid down in a Directive relating to the matters to be contained in an employment contract directly before the national courts following the transposition of that Directive into national law. The essential elements of the ECJ's decision are contained in paragraphs 40 to 42 of its judgment as follows:

> "40. The provisions in question here are unconditional and sufficiently precise to enable individuals to rely on them directly before the national courts either where the Member State has failed to transpose the Directive into national law within the prescribed period or where it has not done so correctly.
>
> 41. In the present case, the Directive was transposed into German law by a Law of 20 July 1995. Between the date by which it should have been transposed and 20 July 1995, individuals were entitled to rely on the relevant provisions of the Directive directly before the national courts in order to enforce, as a minimum level of guarantee, the rights which the Directive attaches to one or other of the categories of information to be notified to the employee by virtue of Article 2(2) (c).
>
> 42. Since the date on which it was transposed, individuals can no longer rely on those provisions unless the national implementing measures are incorrect or inadequate in the light of the Directive."

16. Mr Hayes relies on this case for the proposition that once the relevant provisions of the Directive have been transposed into national law, it is the domestic legislation of the Member State which applies to the matter in question unless the implementing measures are incorrect or inadequate.

17. Mr Peretz referred us to *Revenue and Customs Commissioners v IDT Card Services Ireland Limited* [2006] EWCA Civ 29 where the Court of Appeal considered the extent to which the domestic courts must interpret the provisions of VATA in the light of the Principal Directive so as to be consistent with EU law.

18. IDT was a supplier of phone cards from Ireland to distributors and retailers within the UK. Customers who purchased those cards in the UK obtained telecommunications services from another company in Ireland. In general Ireland imposed VAT on the supply of the phone cards to non-business users or to traders in Ireland and avoided double taxation by providing that no further VAT was due when access to the telecommunications services was obtained on redemption of the card. The UK did not impose VAT on the supply of the phone card, but charged it on the supply of the telecommunications services when the card was redeemed. As the telecommunications services were provided by a supplier established in Ireland, the UK could not impose VAT on these services so in effect there was an escape from any charge to VAT, which HMRC contended was contrary to the UK's duty under the Sixth Directive to prevent non-taxation.

19. The Court of Appeal decided that the UK domestic legislation had to be construed so as to give effect to the UK's duty to prevent non-taxation. The court achieved this by reading into the relevant legislation an exception to the domestic legislation which disregarded the consideration paid for the phone cards for VAT purposes, a disregard which had the effect of thus making the supply of the phone cards in the UK free of VAT.

20. Arden LJ gave the leading judgment. After reviewing the relevant ECJ authorities she set out the guiding principle in paragraph 81 of her judgment as follows:

> "The approach described above makes it clear that, while under European Union law the member states are bound to interpret national legislation so far as possible in conformity with the wording and purpose of a directive, it is for domestic law to determine how far the domestic court can change other provisions of purely domestic law to fulfil this obligation. Thus in this situation the national court is not concerned to ask what interpretative approach is adopted by the courts of the other member states of the European Union. The question how far it can go under the guise of interpretation, and whether it can for instance adopt what would otherwise be regarded as a strained construction, is a matter for domestic law."

21. Arden LJ held that the approach taken by the UK courts in adopting an interpretation of legislation that would make the legislation concerned compatible with rights under the European Convention could be applied. She relied on the speech of Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, a case under Section 3 of the Human Rights Act 1998, in paragraphs 89 and 90 of her judgment as follows:

> "89. The critical point made by the House of Lords in the *Ghaidan* case can be found in the passage from the speech of Lord Nicholls

which I have set out above. Lord Nicholls accepts that the effect of interpretation in accordance with s3 of the 1998 Act may be to change the meaning of the legislation but, as he explains, the meaning adopted by the court must not conflict with a fundamental feature of the legislation. He adopts the words of Lord Rodger that the interpretation chosen by the court must 'go with the grain of the legislation'. Lord Nicholls, Lord Steyn and Lord Rodger all accepted that there would be occasions when the courts could not adopt an interpretation that would make the legislation compatible with Convention rights because that would involve making policy choices which the court was not equipped to make (see paras.33-35 per Lord Nicholls, para.49 per Lord Steyn and para.115 per Lord Rodger). It is also clear from the *Ghaidan* case that the interpretation of legislation under s3 or the *Marleasing* principle may involve a substantial departure from the language used though it will not involve a departure from the fundamental or cardinal features of the legislation. It is possible to read the legislation up (expansively) or down (restrictively) or to read words into the legislation. The question of whether s3 can be applied does not depend on whether it is possible to solve the problem by a simple linguistic device.

90. Lord Nicholls also makes it clear that there is no need to find that the statutory language should be ambiguous before interpreting the legislation so as to be compatible with Convention rights. He does not deal expressly with the possibility of Parliament making express provision in contravention of Convention rights. Mr Lasok refers to such a possibility in the context of legislation designed to implement Community legislation in his argument before us (para.60, above). So he submits that Parliament might use language which made it clear that it did not intend VAT to be imposed in a situation in which it was chargeable under the Sixth Directive. The situation which he postulates is not one in which Parliament has specifically stated that it is legislating in a manner which departs form the Sixth Directive. In the situation postulated, as it seems to me, the court's interpretative duty, whether arising under Community law or arising under s3, is not excluded. In determining whether the solution is one of interpretation or impermissible law-making, the relevant test remains whether the interpretation that would be required to make the statute in question Convention-compliant or in this case, EU law-compliant, would involve a departure from the fundamental feature of the legislation. As I see it, the latter cannot be the case where the effect of the interpretation would be to bring the statute into conformity with the objectives of the Sixth Directive in the absence of clear statutory language to the effect that Parliament intended that there should not be such conformity."

22. Arden LJ recognised that in seeking to conform to the principles of the Sixth Directive the principle of legal certainty must be borne in mind. She deals with this issue in paragraph 110 of her judgment as follows:

"I accept that under the principle of legal certainty the person affected by legislation must be able to foresee the manner in which it is to be applied and I would also accept that must particularly be so where the

> legislation has financial consequences for him such as flow from the imposition of the requirement of account for VAT. A taxpayer has a legitimate expectation that this principle will be observed. Moreover, a taxpayer is entitled to structure his business so as to limit his liability to tax and to take advantage of any loopholes that he can find. These principles can be found in the judgment of the Court of Justice in *Gemeente Leusden and Holin Groep BV v Staatssecretaris van Financien* [2004] ECR I-5337. However, in the present case, it is well-known that the provisions of VATA 1994 have to be interpreted in conformity with the Sixth Directive and that the supply of telecommunications services constitutes a taxable supply for the purposes of the Sixth Directive. I therefore agree with the judge that the principle of legal certainty is not infringed in this case."

23. She also finds that it is not an objection that the imposition of a civil liability may arise where such a liability would not otherwise have been imposed under domestic law: see paragraph 111 of the judgment.

24. Consequently she concludes in paragraphs 112 and 113 of the judgment as follows:

> "112. It follows that the fact that if ICSIL is correct in its interpretation of para.3(3) of Sch 10A, the VAT treatment of the distribution of the phonecards for Interdirect's services infringes the principles of the Sixth Directive. It further follows that the United Kingdom is acting in a way which is incompatible with its Community obligations if the effect of para.3 of Sch 10A is to relieve any supplier from VAT under the guise of granting relief to a supplier from the double taxation on telecommunications services. Therefore the court is under an obligation to interpret para.3 as far as possible in the light of the wording and purpose of the Sixth Directive and specifically to prevent the non-taxation of the supplies to the UK distributors of ICSIL's phonecards, or other taxpayers in the same position.
>
> 113. This is not beyond the bounds of permissible interpretation because there is no indication that Parliament specifically intended to depart from the Sixth Directive in this respect. The provisions of Sch 10A are equally consistent with Parliament not having foreseen the particular problem that has arisen in this case. It follows from the *Ghaidan* case that the court's duty arises even if Mr Lasok is correct in submitting that the correct interpretation of Sch 10A is that VAT is not imposed on the United Kingdom distributors of ICSL's phonecards in the circumstances of this case. It also arises even if Parliament did not intend to limit relief in the way for which Customs & Excise now contend. The provisions of Sch 10A do not contain any fundamental feature inconsistent with reading into para.3(3) a further disapplication of the disregard in para.3(2) to make para.3 conform to the objectives of the sixth Directive: it is simply a case of widening the existing provision in para.3(3). Indeed the existing provision is directed to a not dissimilar situation, that is where VAT which is due is not accounted for. Moreover, this is not a case, in my judgment, where it is not possible for the court to interpret para.3(3) of Sch 10A 'so far as possible' in conformity with European Union law because the

> provision, as so interpreted, would raise policy issues as to its effect which the court cannot, in performance of its role, resolve. Such issues might arise for instance (to take a very different case) if the interpretation of a statute in conformity with a European Union directive the court to limit a provision of domestic law which had been inserted to protect third parties, such as creditors or consumers, and some equivalent protection would have to be provided. In those circumstances, the task of interpretation might go beyond the judicial role of interpretation … However, the interpretation in the present case does not raise any such consequential issues. Any consequential issues which it raises are inherent in the provision as it stands."

25. Finally, Mr Peretz referred us to Case C-363/05 *J P Morgan Claverhouse v HMRC* [2008] STC 1180 as authority for the proposition that the power for Member States to define the scope of the exemption may be exercised only in accordance with the principle of fiscal neutrality: see paragraph 43 of the ECJ's judgment. Paragraph 46 of the judgment states that principle in the following terms:

> "… the principle of fiscal neutrality, on which the common system of VAT established by the Sixth Directive is based, precludes economic operators carrying out the same transactions from being treated differently in relation to the levying of VAT. That principle does not require the transactions to be identical. According to settled case law that principle precludes, in particular, treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes …".

26. We make the following observations on our review of the legislation, the guidance and the authorities:

(1) Group 7 of Schedule 9 to VATA implements the obligation of the UK under Article 132(1) (c) of the Principal Directive to provide exemptions for the provision of medical care in the exercise of the medical and paramedical professions. Consequently, we must interpret its provisions so far as possible so as to be consistent with the provisions of the Directive;

(2) Article 132(1)(c) only permits exemptions for the provision of medical care which only includes services which have a therapeutic aim (*d'Ambrumenil*);

(3) Items 1(a) and 4 of Group 7 of Schedule 9 VATA confine the exemptions there provided to the direct supply of services which consist of the provision of medical care whereas Item 5 exempts the provision of a deputy rather than the direct provision of the deputy's services;

(4) The provision of paramedical professionals who are under the control of the medical professionals to whom they were assigned does not amount to the supply of medical care and therefore cannot benefit from the exemption (*Moher v HMRC*);

(5) An individual cannot rely on the provisions of the Directive once it has been transposed into national law unless the national implementing measures are incorrect or inadequate (*Kampelmann*);

(6) If a provision of national law is inconsistent with the principles of a Directive it must, so far as possible, be interpreted in the light of the Directive and so as to be consistent with EU law, unless it is clear that Parliament specifically intended to depart from the Directive. This may involve a substantial departure from the language used although not from the fundamental or cardinal features of the legislation. It is possible to read the legislation up (expansively) or down (restrictively) or to read words into the legislation (*IDT)* and;

(7) The exercise of the power to define exemptions must be exercised in accordance with the principle of fiscal neutrality (*J P Morgan Claverhouse*).

27. We therefore approach our findings of fact in this case in the light of this analysis.

Findings of Fact

28. We heard no oral evidence. We were provided with various documents as well as correspondence between Rapid Sequence and HMRC which contained brief descriptions of Rapid Sequence's business from which we find the following facts.

29. Rapid Sequence was incorporated in December 2000 and commenced trading in England in 2001. Its majority shareholder is Dr Simon Krige, a consultant anaesthetist, whose practice is in South Africa and who acts as clinical director for the company. Mr Krige also provides his services as a deputy in the manner described later. Mrs Jenny Paterson is responsible for all administrative tasks.

30. Rapid Sequence's report and accounts for the year ended 31 December 2012 describe its principal activity as that of a brokerage for the placement of medical personnel in various NHS Trusts.

31. Rapid Sequence, primarily through Mr Krige, identifies overseas based consultant anaesthetists, through meeting them at medical conventions, who may be interested in providing their services as locums or deputising doctors to NHS Trusts who have a need for such locums to cover gaps in the services that their permanent staff can provide.

32. Before engaging doctors Rapid Sequence performs checks to ensure they meet the standards required in the UK and specifically that they are registered with the General Medical Council and have their own medical insurance. Rapid Sequence then makes these doctors available as required to the engaging NHS Trust.

33. The doctors concerned either operate as self-employed individuals or through an offshore company which the relevant doctor controls. The doctor or company, as the case may be, contracts to provide his services to Rapid Sequence as a principal and an

hourly rate is agreed for his services. Rapid Sequence then, again as a principal, makes the doctor's services available to the relevant NHS Trust on terms agreed between Rapid Sequence and that Trust. Again these services are charged at an agreed hourly rate, the rate charged to the trust being higher than that paid by Rapid Sequence to the doctor the difference between the two effectively being in the nature of a commission retained by Rapid Sequence.

34. The details of a doctor who has been accepted by Rapid Sequence are sent to the hospital which is looking for a deputising doctor. If the doctor is accepted by the relevant NHS Trust Rapid Sequence emails the doctor setting out the services he is contracted for, for example by reference to a number of sessions paid at a rate per session. Accommodation and travel within the UK to the hospital is paid by the NHS Trust. It appears that there are no other written terms of engagement between the doctor and Rapid Sequence and no written terms of engagement between the NHS Trust and Rapid Sequence.

35. At the end of each week, the doctor provides a weekly log of the work he has performed from which Rapid Sequence prepares a timesheet which is emailed to the hospital for a counter signature. Once the timesheet has been countersigned and returned to Rapid Sequence an invoice for the doctor's services is generated and sent to the hospital. This will disclose the number of sessions worked and the session rate which will be multiplied to produce the total invoice value. VAT is not added to the invoice amount, although those invoices produced after the time when HMRC and Rapid Sequence became in dispute as to whether VAT was payable on the provision of the doctor's services bore the legend "might be subject to VAT".

36. The deputising doctor then invoices Rapid Sequence for his work at the rates agreed between them and he is paid.

37. Although Rapid Sequence provides the services of the deputising doctor as a principal it carries no insurance of its own in respect of any liabilities that might arise as a result of the doctor performing his duties for the NHS Trust concerned.

38. It is clear that when the doctor carries out his work he is not under the direction or supervision of Rapid Sequence. The doctor, who as mentioned above is self-employed or employed by a company which provides his services, will exercise his own professional judgment when performing his duties, his medical services being of course provided directly to the patients concerned. It will be for the NHS Trust to deal with all administrative matters relating to the provision of the services in the hospital, such as informing the doctor where he will be working and which patients to attend. Insofar as there is any to day control over the doctor's activities, such control will therefore be exercised through the medical or administrative staff of the hospital concerned.

39. Nevertheless, on occasion Rapid Sequence does get involved in issues concerning the performance by the doctors it provides of the services contracted. Rapid Sequence set out some examples in a letter it wrote to HMRC on 5 June 2013 which can be summarised as follows:

(1) investigating concerns expressed by NHS Trusts about the competence and performance of staff supplied by Rapid Sequence;

(2) making representations to NHS Trusts about matters capable of affecting the performance of such staff;

(3) organising the replacement of such staff in response to performance or other issues; and

(4) checking the suitability, competence and professional qualifications of such staff.

40. Very responsibly, Rapid Sequence sought guidance from HMRC from time to time on whether the services it provided were exempt from VAT. The initial response given by HMRC shortly after Rapid Sequence commenced business was not helpful in addressing the issue and, based on advice it received, Rapid Sequence took the view that the services it provided fell within Item 5.

41. It wrote again in August 2005, and received confirmation that the provisions of paragraph 6.2 of Notice 701/57 referred to in paragraph 9 above applied, HMRC's response noting that paragraph 3.5 of the Notice, also referred to in paragraph 9 above, relates to supplies made by suppliers that are not enrolled on a statutory professional register.

42. Rapid Sequence then wrote again in 2011, having noticed that HMRC's published guidance had changed and this correspondence led to HMRC's decision which is the subject of this appeal. We note the following paragraphs in HMRC's letter of 19 January 2012, notifying Rapid Sequence of its decision:

> "It is appreciated that the wording of Item 5 of Group 7, Schedule 9 can be problematic. It is HMRC's view is that the provision of a deputy doctor is not exempt but rather a standard rated supply of employment agency services. It is the medical care provided by the doctor that is treated as exempt.
>
> This is in keeping with the scope of the exemption in Article 132(1) (c) of the Principal VAT Directive. The wording of Item 5 is unfortunate, and it is not entirely clear why it is necessary as deputising services would seem to be covered by Item 1 of Group 7".

Discussion

43. It appears to us that we need to ask ourselves the following questions in order to determine the issues in this appeal:

(1) Whether the services provided by Rapid Sequence came within the plain meaning of the provisions of Item 5;

(2) If the answer to question (1) is positive, bearing in mind the requirement of Article 132(1)(c) of the Principal Directive to confine the exemption to the provision of medical care, whether Rapid Sequence's services amount to the provision of medical care; and

(3) If the answer to question (2) is in the negative, as a result of which the UK would have made provision for an exemption that went beyond the powers given in the Principal Directive, whether it is necessary to give Item 5 a construction so as to restrict its application to services which amount to the provision of medical care or whether there is a clear intention on Parliament's part to legislate for a provision that goes beyond the permitted scope of the exemption.

44. With regard to the first question, we have no doubt that the business of Rapid Sequence, in the manner in which we have found it operates, consists of the provision of deputies for registered medical practitioners, whether that provision amounts to the provision of medical care or the provision of staff in the manner of an employment agency. The activity of arranging, as a principal, the placement of doctors seeking locum positions with NHS Trusts who Rapid Sequence have engaged themselves as principal, in the manner described in paragraphs 32 to 38 above, clearly falls within the plain meaning of Item 5.

45. Were Item 5 purely domestic legislation not enacted in order to meet one of the UK's obligations under an EU Directive we would have no hesitation in determining the appeal in favour of Rapid Sequence. As Mr Hayes submits, Item 5 is written in plain English and lends itself to no other interpretation when construed in isolation. It is in clear contrast to the wording of Items 1(a) and 4 which refer to the direct supply of services of medical care; it is clear that those items relate to the direct supplies of medical services, such as by an NHS Trust who employs the doctor concerned, either under an employment contract or a contract for services, whereas on its face Item 5 goes further and extends the exemption to the provision of the person who supplies the medical services.

46. Without that extension it is hard to see why Item 5 would be necessary; the provision of the services of the deputising doctor, assuming he was a registered medical practitioner, would be covered by Item 1(a). It is also the fact, as we have observed, that Item 5 does not restrict the services provided by the deputy to those constituting medical care, as Item 1(a) does.

47. We therefore turn to the second question. Mr Hayes submits that the services provided by Rapid Sequence do amount to medical care. He submits that there is a therapeutic aim in the provision of a locum anaesthetist which is a direct action necessary for the smooth continuance of the programme of operations central to the protection of and health of individuals, which is consistent with the objectives of the exemption for medical care contained in Article 132(1) (c). He distinguishes *Moher v HMRC* on the basis that the doctors provided do not work under supervision in the hospitals where they perform their services as they exercise their own professional judgment. As shown by the examples referred to in paragraph 39 above, Rapid Sequence takes responsibility for the actions of the doctors it provides; the doctors are merely providing their services in facilities provided by the relevant NHS Trusts.

48. We reject these submissions. We do not believe the factual scenario is any different in substance to that in *Moher v HMRC*; in both cases the medical care in question was provided by the medical professional concerned, not by the person who

made the arrangements for those services to be provided by a locum. Rapid Sequence provides its services to the relevant NHS Trust. The doctor provided by Rapid Sequence, whilst exercising his own judgment as to how to perform his services does so in the hospital under the direction and control of the relevant NHS administrators or medical staff. As far as the patient is concerned, he is receiving services from a doctor working under the supervision of the NHS Trust, not Rapid Sequence. Rapid Sequence plays no part in deciding how the doctor concerned provides his services. The matters referred to in paragraph 39 above are, as submitted by Mr Peretz, no more and no less than one would expect of a business providing temporary staff and do not indicate any measure of control by Rapid Sequence over how the doctors provided perform their services. Our conclusion on the second question is therefore that the services provided by Rapid Sequence do not amount to medical care within the meaning of Article 132(1) (c).

49. As a result of our conclusion on the second question, the inevitable consequence is that the exemption provided in Item 5, if construed in accordance with its plain words, goes beyond the scope of the exemption permitted in Article 132(1) (c). Mr Hayes submits that *Kampelmann* is authority for proposition that once the Directive has been implemented, we should look only to the wording of the national legislation and only back at the Directive if the implementation has been inadequate or incorrect. Clearly in this case the UK legislation has not failed to implement an exemption for medical care; the issue is whether it has gone beyond the scope of the exemption. We see *Kampelmann* as a case which is relevant to a situation where the national legislation fails to implement a Directive in full, not when it goes beyond it. The case therefore cannot assist Mr Hayes.

50. It is necessary for us to consider whether we have to give Item 5 a conforming construction so that it is consistent with the UK's obligation not to grant an exemption which goes beyond the permitted scope of the exemption in Article 132(1) (c).

51. Applying the principles laid down by Arden LJ in *IDT* we should not adopt an interpretation which amounts to a departure from the fundamental features of the legislation. In our view an interpretation that restricted the operation of the exemption to services that amounted to the direct provision of medical care would not depart from the fundamental features of the legislation, that is Group 7 to Schedule 9 which is designed purely to implement the exemption for medical care provided for in Article 132(1) (c). A conforming construction would merely bring the exemption in Item 5 in line with that provided in Items 1(b) and 4 which are clearly restricted to services consisting of the direct provision of medical care. Neither do we believe that a conforming construction would create legal uncertainty; the exemption in Article 132(1) (c) is in very clear terms. It is well known that the UK legislation is derived from this provision and must be interpreted in accordance with the provisions of the Principal Directive and thus be confined to services that constitute the provision of medical care.

52. It is clear that to achieve such a conforming construction it will be necessary to read words into the legislation. Paragraph 89 of Arden Ely's judgment referred to in paragraph 21 above makes it clear that we may do so. It is also clear from paragraph

111 of her judgment that we can do so even though the effect will be to put Rapid Sequence under a civil liability that it did not previously have.

53. Consequently we should only decline to adopt a conforming construction if there is an indication that Parliament specifically intended to depart from the Principal Directive. The parties have not been able to show us the policy that led to Item 5 being included. It apparently has been in the same form since 1972 whereas the other similar exemptions in Items 1(a) and 4 have been specifically amended to restrict them to direct supplies of medical care in the light of the development of the European jurisprudence. Neither party can point us to any compelling policy reason that shows why this exemption needs to go further than the other exemptions in Group 7 referred to above. We can therefore find no specific intention on Parliament's part to depart from the Principal Directive.

54. We therefore conclude that we must adopt a conforming construction to Item 5. Mr Peretz submits that this can be achieved by interpreting Item 5 as meaning:

> "the provision of [medical care services provided by] a deputy for a person registered in the register of medical practitioners"

The added words are shown in brackets. In our view such an addition would achieve a conforming construction; it leaves it open as to whether there is any specific need for Item 5 as well as Item 1(a) but that is a matter for Parliament.

55. For completeness, although not necessary for our decision, we accept Mr Peretz's submission that as the power to define the exemptions must be exercised in accordance with the principle of fiscal neutrality, there would be a breach of this principle if Item 5 had the effect that supply by Rapid Sequence of deputising doctors were exempt but supplies of other medical practitioners were not, with the result that there would be a different VAT treatment of supplies which from a customer's point of view were similar.

56. As we have concluded that Item 5 must be interpreted in the way set out in paragraph 54 above it follows that Rapid Sequence is not providing medical care services but supplying staff and its appeal must fail.

57. We would understand if Rapid Sequence finds this outcome highly unsatisfactory. It is clear that Item 5 could have been reviewed when the other changes were made to Group 7 in May 2007 but it was not. It appears simply to have been overlooked. Rapid Sequence responsibly sought guidance from time to time as to the VAT position and HMRC's position on the issue has changed. HMRC has accepted that the wording of Item 5 is "unfortunate" and "problematic": see paragraph 42 above. As Mr Peretz recognises, HMRC's stance has created legitimate expectation issues that HMRC needs to consider when examining the consequences of this decision, namely that Rapid Sequence will now have to register for VAT and may be subject to assessments in respect of its past supplies. Those are not matters that fall within the scope of this Tribunal's jurisdiction but we hope that HMRC will view Rapid Sequence's position sympathetically.

Disposition

58. The appeal is dismissed.

59. 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.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 14 August 2013