



[2019] UKFTT 354 (TC)

TC07182

VAT – Exemption – welfare services – item 9 group 7 sch 9 VATA 1994 – payroll service – whether “closely linked to welfare”

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2013/3955

BETWEEN

CHESHIRE CENTRE FOR INDEPENDENT LIVING Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS Respondents**

**TRIBUNAL: JUDGE PETER KEMPSTER
 MR SIMON BIRD**

Sitting in public at Centre City Tower, Birmingham on 30-31 January 2019

Ms Charlotte Brown of counsel (instructed by Excello Law) for the Appellant

Mr Raymond Hill of counsel (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the Respondents

DECISION

INTRODUCTION

1. The Appellant is a charity which provides a range of support services for disabled people, their families and carers. One such service is a payroll service (described fully below) (“**the Payroll Service**”). On 11 January 2013 the Respondents (“**HMRC**”) ruled that the Payroll Service was standard rated for VAT purposes, and did not qualify for the welfare services exemption in item 9 group 7 sch 9 VAT Act 1994. That ruling was upheld by formal internal review on 13 May 2013, and the Appellant appeals against the ruling to this Tribunal. No assessments have yet been issued by HMRC.

2. Disabled persons may be eligible for financial assistance to assist them in their welfare needs. For care and support costs these needs are the responsibility of local authorities who provide a personal budget, which is a sum of money to support the person’s identified care and support needs. For health and wellbeing costs these needs are the responsibility of clinical commissioning groups who provide a personal health budget, which is a sum of money to support the person’s identified health and wellbeing needs. In practice the two processes are often run together.

3. A personal budget/personal health budget may be managed in one of three ways:

- (1) A notional budget where the money is held by the local authority/NHS.
- (2) A third party budget where the money is paid to an organisation that holds the money on the person's behalf.
- (3) Via a direct payment made to the disabled person or their representative (“**Direct Payments**”).

4. Disabled persons often require services in order that they are able to remain in their own homes and live independently. These are usually provided by a carer or a **Personal Assistant**, who visits the disabled person in their own home and assists them with everyday tasks.

5. Direct Payments enable the disabled person to take control of and pay for their own care and support/health and wellbeing services, thus enabling them to live independently in their own homes. This requires the disabled person to act as an employer of the Personal Assistant, which entails legal and administrative requirements, including payroll requirements - such as calculating wages, deducting PAYE and NICs, registration and filing with HMRC, auto enrolment for pension contributions and redundancy, sick and holiday payment calculations.

6. One of the services provided by the Appellant is a Payroll Service. The Appellant enters into contractual arrangements with both local authorities and individuals to provide the Payroll Service. The VAT position of supplies by the Appellant to local authorities is not before the Tribunal. The dispute before the Tribunal is whether the Payroll Service provided by the Appellant to recipients of Direct Payments is exempt for VAT purposes.

LEGISLATION

The legislation concerning direct payments by local authorities

7. Section 1 Care Act 2014 (“CA 2014”) sets out the general responsibilities of local authorities relating to care and support for adults:

“Promoting individual well-being

- (1) The general duty of a local authority, in exercising a function under this Part in the case of an individual, is to promote that individual's well-being.

(2) “Well-being”, in relation to an individual, means that individual's well-being so far as relating to any of the following—

- (a) personal dignity (including treatment of the individual with respect);
- (b) physical and mental health and emotional well-being;
- (c) protection from abuse and neglect;
- (d) control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided);
- (e) participation in work, education, training or recreation;
- (f) social and economic well-being;
- (g) domestic, family and personal relationships;
- (h) suitability of living accommodation;
- (i) the individual's contribution to society.

(3) In exercising a function under this Part in the case of an individual, a local authority must have regard to the following matters in particular—

- (a) the importance of beginning with the assumption that the individual is best-placed to judge the individual's well-being;
- (b) the individual's views, wishes, feelings and beliefs;
- (c) the importance of preventing or delaying the development of needs for care and support or needs for support and the importance of reducing needs of either kind that already exist;
- (d) the need to ensure that decisions about the individual are made having regard to all the individual's circumstances (and are not based only on the individual's age or appearance or any condition of the individual's or aspect of the individual's behaviour which might lead others to make unjustified assumptions about the individual's well-being);
- (e) the importance of the individual participating as fully as possible in decisions relating to the exercise of the function concerned and being provided with the information and support necessary to enable the individual to participate;
- (f) the importance of achieving a balance between the individual's well-being and that of any friends or relatives who are involved in caring for the individual;
- (g) the need to protect people from abuse and neglect;
- (h) the need to ensure that any restriction on the individual's rights or freedom of action that is involved in the exercise of the function is kept to the minimum necessary for achieving the purpose for which the function is being exercised. ...”

8. Section 8 CA 2014 provides:

“How to meet needs

(1) The following are examples of what may be provided to meet needs under sections 18 to 20—

- (a) accommodation in a care home or in premises of some other type;
- (b) care and support at home or in the community;

- (c) counselling and other types of social work;
- (d) goods and facilities;
- (e) information, advice and advocacy.

(2) The following are examples of the ways in which a local authority may meet needs under sections 18 to 20—

- (a) by arranging for a person other than it to provide a service;
- (b) by itself providing a service;
- (c) by making direct payments. ...”

9. Section 9 CA 2014 requires local authorities to carry out needs assessments:

“Assessment of an adult's needs for care and support

(1) Where it appears to a local authority that an adult may have needs for care and support, the authority must assess—

- (a) whether the adult does have needs for care and support, and
- (b) if the adult does, what those needs are.

(2) An assessment under subsection (1) is referred to in this Part as a “needs assessment”.

(3) The duty to carry out a needs assessment applies regardless of the authority's view of—

- (a) the level of the adult's needs for care and support, or
- (b) the level of the adult's financial resources.

(4) A needs assessment must include an assessment of—

- (a) the impact of the adult's needs for care and support on the matters specified in section 1(2),
- (b) the outcomes that the adult wishes to achieve in day-to-day life, and
- (c) whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes.

(5) A local authority, in carrying out a needs assessment, must involve—

- (a) the adult,
- (b) any carer that the adult has, and
- (c) any person whom the adult asks the authority to involve or, where the adult lacks capacity to ask the authority to do that, any person who appears to the authority to be interested in the adult's welfare.

(6) When carrying out a needs assessment, a local authority must also consider—

- (a) whether, and if so to what extent, matters other than the provision of care and support could contribute to the achievement of the outcomes that the adult wishes to achieve in day-to-day life, and
- (b) whether the adult would benefit from the provision of anything under section 2 or 4 or of anything which might be available in the community.

(7) This section is subject to section 11(1) to (4) (refusal by adult of assessment).”

10. Section 14 CA 2014 allows local authorities to charge for meeting needs, in which case they must carry out assessments of the financial resources of the individual (s 17). After the assessments s 24 requires:

“The steps for the local authority to take

(1) Where a local authority is required to meet needs under section 18 or 20(1), or decides to do so under section 19(1) or (2) or 20(6), it must—

(a) prepare a care and support plan or a support plan for the adult concerned,

(b) tell the adult which (if any) of the needs that it is going to meet may be met by direct payments, and

(c) help the adult with deciding how to have the needs met.

(2) Where a local authority has carried out a needs or carer's assessment but is not required to meet needs under section 18 or 20(1), and does not decide to do so under section 19(1) or (2) or 20(6), it must give the adult concerned—

(a) its written reasons for not meeting the needs, and

(b) (unless it has already done so under section 13(5)) advice and information about—

(i) what can be done to meet or reduce the needs;

(ii) what can be done to prevent or delay the development by the adult concerned of needs for care and support or of needs for support in the future.

(3) Where a local authority is not going to meet an adult's needs for care and support, it must nonetheless prepare an independent personal budget for the adult (see section 28) if—

(a) the needs meet the eligibility criteria,

(b) at least some of the needs are not being met by a carer, and

(c) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence.”

11. The care and support plan is described in s 25 CA 2014:

“Care and support plan, support plan

(1) A care and support plan or, in the case of a carer, a support plan is a document prepared by a local authority which—

(a) specifies the needs identified by the needs assessment or carer's assessment,

(b) specifies whether, and if so to what extent, the needs meet the eligibility criteria,

(c) specifies the needs that the local authority is going to meet and how it is going to meet them,

(d) specifies to which of the matters referred to in section 9(4) the provision of care and support could be relevant or to which of the matters referred to in section 10(5) and (6) the provision of support could be relevant,

(e) includes the personal budget for the adult concerned (see section 26), and

(f) includes advice and information about—

- (i) what can be done to meet or reduce the needs in question;
- (ii) what can be done to prevent or delay the development of needs for care and support or of needs for support in the future.

(2) Where some or all of the needs are to be met by making direct payments, the plan must also specify—

- (a) the needs which are to be so met, and
- (b) the amount and frequency of the direct payments.

...”

12. The personal budget is described in s 26 CA 2014:

“Personal budget

(1) A personal budget for an adult is a statement which specifies—

- (a) the cost to the local authority of meeting those of the adult's needs which it is required or decides to meet as mentioned in section 24(1),
- (b) the amount which, on the basis of the financial assessment, the adult must pay towards that cost, and
- (c) if on that basis the local authority must itself pay towards that cost, the amount which it must pay. ...”

13. Section 29 CA 2014 requires the local authority to keep an up-to-date record of the adult’s accrued costs, called a “care account”.

14. Direct Payments are described in s 31 CA 2014:

“Adults with capacity to request direct payments

(1) This section applies where—

- (a) a personal budget for an adult specifies an amount which the local authority must pay towards the cost of meeting the needs to which the personal budget relates, and
- (b) the adult requests the local authority to meet some or all of those needs by making payments to the adult or a person nominated by the adult.

(2) If conditions 1 to 4 are met, the local authority must, subject to regulations under section 33, make the payments to which the request relates to the adult or nominated person.

(3) A payment under this section is referred to in this Part as a “direct payment”.

(4) Condition 1 is that—

- (a) the adult has capacity to make the request, and
- (b) where there is a nominated person, that person agrees to receive the payments.

(5) Condition 2 is that—

- (a) the local authority is not prohibited by regulations under section 33 from meeting the adult's needs by making direct payments to the adult or nominated person, and
- (b) if regulations under that section give the local authority discretion to decide not to meet the adult's needs by making direct payments to the adult or nominated person, it does not exercise that discretion.

(6) Condition 3 is that the local authority is satisfied that the adult or nominated person is capable of managing direct payments—

(a) by himself or herself, or

(b) with whatever help the authority thinks the adult or nominated person will be able to access.

(7) Condition 4 is that the local authority is satisfied that making direct payments to the adult or nominated person is an appropriate way to meet the needs in question.”

15. Further provision is made in the Care and Support (Direct Payments) Regulations 2014 (SI 2014/2871).

The legislation concerning direct payments by clinical commissioning groups

16. The National Health Service (Direct Payments) Regulations 2013 (SI 2013/1617) make provision for the making of direct payments for health care to secure the provision of certain health services under the National Health Service Act 2006 by a clinical commissioning group and other persons.

17. Regulations 3 to 7 define who may receive direct payments. Regulations 8 & 9 provide:

“8 Care plan and care co-ordinator

(1) Before a health body may make a direct payment, the health body must—

(a) prepare a care plan in respect of the services to be secured for a patient by way of direct payments;

(b) advise the patient, representative or nominee of significant potential risks arising in relation to the making of direct payments in respect of the patient, the potential consequences of the risks and any proportionate means of mitigating the risks;

(c) agree with the patient, representative or nominee the procedure for managing any significant potential risk, and include the agreed procedure in the care plan; and

(d) be satisfied—

(i) that the health needs identified in the care plan of the patient can be met by the services specified in the care plan, and

(ii) that the amount represented by the direct payments will be sufficient to provide for the full cost of each of the services specified in the care plan.

(2) The risks mentioned in paragraph (1)(b) may in particular include—

(a) risks to the patient’s health;

(b) medical or surgical risk arising from the procurement of a particular type of service;

(c) risks arising from the employment relationship where direct payments are used to secure services from an employee;

(d) risks arising from a provider of services secured by means of direct payments operating under an inadequate or no procedure for the investigation of complaints arising from the provision of the services;

(e) risks arising from a provider of services secured by means of direct payments operating under inadequate or no insurance or indemnity cover for the services to be provided; or

(f) a risk that monies paid by way of a direct payment may go missing, be misused or be subject to fraud.

(3) A health body must nominate a care co-ordinator who is to be responsible for the following functions in respect of the patient—

(a) managing the assessment of the health needs of the patient for the care plan;

(b) ensuring that the patient or their representative has agreed to the matters listed in paragraph (7);

(c) monitoring or arranging for the monitoring of—

(i) the making of direct payments, and

(ii) the health conditions of the patient in respect of which the direct payments are made;

(d) arranging for review of the direct payments; and

(e) liaising between the patient or the representative or nominee and the health body in relation to the direct payments.

(4) A health body must in the care plan specify—

(a) the health needs to be met by services secured by means of direct payments, and the health outcomes intended to be achieved through the provision of the services;

(b) the services to be secured by means of direct payments that the health body considers necessary to meet the health needs of the patient;

(c) the amount to be paid by way of direct payments, and the intervals at which monies are to be paid;

(d) the name of the person who is the care co-ordinator in respect of the patient;

(e) who is to be responsible for monitoring each health condition of the patient in respect of which direct payments may be made;

(f) the anticipated date of the first review mentioned in regulation 14(2)(a) (monitoring and review of direct payments) and how it is intended to be carried out; and

(g) the period of notice that is to apply if, following a review under regulation 14(2)(a), a health body decides to reduce the amount of the direct payments or to stop making the direct payments.

(5) The services that may be secured by means of direct payments exclude services—

(a) arranged or provided under sections 83 (primary medical services), 84 (general medical services contracts) or 92 (arrangements by the Board for the provision of primary medical services) of the 2006 Act;

(b) in respect of which a charge is otherwise payable by virtue of sections 172 (charges for drugs, medicines or appliances, or pharmaceutical services), 176 (dental charging) or 179 (charges for optical appliances) of the 2006 Act;

(c) planned surgical procedures;

(d) providing vaccination, immunisation or screening, including population-wide immunisation programmes;

- (e) provided under the National Child Measurement Programme;
 - (f) provided as part of an NHS Health Check;
 - (g) which consist of the supply or procurement of alcohol or tobacco;
 - (h) which consist of the provision of gambling services or facilities; or
 - (i) to repay a debt otherwise than in respect of a service specified in the care plan.
- (6) If a health body has considered including a particular service in the care plan as a service to be secured by means of direct payments but decides not to include that service—
- (a) the patient, representative or nominee may request the health body to inform them of the reason for the decision; and
 - (b) the health body must inform them of the reason for the decision.
- (7) Before a health body may make a direct payment, the patient or their representative must agree—
- (a) that the patient's specified health needs can be met by the services specified in the care plan;
 - (b) that the amount of the direct payments is sufficient to provide for the full cost of each of the services specified in the care plan; and
 - (c) that the patient's requirements may be reviewed in accordance with regulation 14(2).

9 Information, advice and other support

- (1) A health body must make arrangements for a patient, representative or nominee to whom direct payments are made to obtain information, advice or other support in connection with the making of direct payments.
- (2) The arrangements for information, advice or other support mentioned in paragraph (1) may include—
- (a) specifying the amount of a patient's direct payment and how this payment is calculated;
 - (b) how a patient, representative or nominee can request a review of the patient's direct payment and care plan;
 - (c) the circumstances in which a patient may no longer qualify for a direct payment;
 - (d) the restrictions on how a direct payment may be spent;
 - (e) the process involved in drawing up and agreeing the care plan;
 - (f) provision for advocacy services, whereby a third party assists a patient, representative or nominee in relation to the terms of a care plan, or the management of any contract under which services secured by means of direct payments are provided, or otherwise;
 - (g) provision for commissioning services, whereby a person assists the patient, representative or nominee in procuring services that may be secured by means of direct payments;
 - (h) provision for payroll, training, sickness cover or other employment related services to assist a patient, representative or nominee where an employee provides services secured by direct payments for the patient; or

(i) where the patient is also in receipt of a direct payment to secure relevant services for social care, information on integration of both direct payments and the arrangements between a health body and a local authority for joint working and co-operation.

(3) If the care plan specifies a requirement for information, advice or other support, that support may be a service in respect of which direct payments may be made.”

The legislation concerning welfare services exempt from VAT

18. Article 132 VAT Directive 2006 (Dir 2006/112/EC) provides, so far as relevant:

“Exemptions for certain activities in the public interest

1. Member States shall exempt the following transactions:

...

(g) the supply of services and of goods closely linked to welfare and social security work, including those supplied by old people's homes, by bodies governed by public law or by other bodies recognised by the Member State concerned as being devoted to social wellbeing; ...”

19. Article 134 VAT Directive 2006 provides, so far as relevant:

“The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1), in the following cases:

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

...”

20. Section 31 VAT Act 1994 provides, “A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9 ...”. Group 7 of sch 9 VATA provides, so far as relevant:

“Group 7 — Health and welfare

Item No

...

9 The supply by—

(a) a charity,

...

of welfare services and of goods supplied in connection with those welfare services.

...

NOTES

(6) In item 9 “welfare services” means services which are directly connected with—

(a) the provision of care, treatment or instruction designed to promote the physical or mental welfare of elderly, sick, distressed or disabled persons,

(b) the care or protection of children and young persons, or

(c) the provision of spiritual welfare by a religious institution as part of a course of instruction or a retreat, not being a course or a retreat designed primarily to provide recreation or a holiday,

and, in the case of services supplied by a state-regulated private welfare institution, includes only those services in respect of which the institution is so regulated.”

EVIDENCE

21. We had documentary evidence bundles, and took oral evidence from three witnesses for the Appellant:

(1) Mrs Lynne Turnbull confirmed and adopted a formal witness statement dated 19 January 2017. Mrs Turnbull is CEO of the Appellant.

(2) Ms Amelia Shemilt confirmed and adopted a formal witness statement dated 18 January 2017. Ms Shemilt is a former chair of trustees of the Appellant, and uses the Payroll Service herself.

(3) Mr Michael Donnan is a chartered accountant and was formerly a partner in Howard Worth, who advise the Appellant.

22. Mrs Turnbull’s evidence included the following.

(1) The Appellant is a registered charity, established in 1992. The mission statement of the Appellant is, “To empower local disabled people to have independence, choice and control over their lives and to remove the barriers which exist within society.” It provides a range of support services driven by the needs and aspirations of people with impairments.

(2) Disabled people and their supporters, including the Appellant, have campaigned for a system of social service that enables them to lead a full and independent life. This is the essence of independent living which underpins the purpose of the Appellant. It is about having the support to gain access to the choices in everyday life that non-disabled people have, and sometimes take for granted.

(3) Health bodies (mainly local authorities and clinical commissioning groups) must undertake an assessment of care needs for any qualifying individual within their catchment area, and have a duty to offer the option of Direct Payments to disabled people. Direct Payments are payments made directly to a person in need of support from the community in lieu of more traditional forms of care – for example, a residential care home.

(4) Direct Payments are an intrinsic feature of independent living and the duty to promote wellbeing. They are the means by which disabled people are able to purchase the support they need to care for themselves, go to work, support their families and engage in everyday activities. Their object is to give vulnerable people control over the services they receive, enabling them to live independently in their own homes.

(5) Many disabled people require the services of a person to assist them in areas of personal and domestic need, and to act as an escort and aid to the disabled person’s social and day-to-day activities – a Personal Assistant. The needs of individual disabled people vary and therefore so do the duties of a Personal Assistant. An example of a job description of a Personal Assistant is:

“A Job Description for a Personal Assistant

It is the job of the personal assistant to assist the employer in all areas of personal and domestic need and to act as an escort and aid to the employer's social and day to day activities. The employer is a disabled person who receives funding from the Local Authority in order to employ their own care staff.

By providing assistance at the right time, the employer is enabled to lead an individual and independent lifestyle, in their own home, within the community. The personal assistant should understand their role in facilitating the selfdefined needs of the employer. They should feel confident to ask what the employer's needs are, always to listen to their requests and to interpret them correctly.

Assistants should be able to handle the physical skills of lifting, handling, pushing and bending. The personal assistant does not have to be a strong person physically to do the job well. However, general good health is important.

Personal requirements

- Assistance with dressing and undressing.
- Assisting with personal care
- Helping in and out of bed when necessary.
- Assisting with shopping and other associated tasks. .
- Preparing and cooking of meals. Serving and cutting of food as required.
- General domestic duties/housework
- Making and changing of beds.
- Assistance in and out of car.
- Maintenance to exterior of house: i.e. Clearance of snow from paths, cleaning windows etc.
- Upkeep and maintenance of equipment; i.e. Wheelchairs, hoists and other technical aids.
- Escorting to appointments and social meetings and events.
- Some driving required.
- Enabling the Employer to carry out any chosen activity, whether inside or outside their home, by carrying out any other requests which they may reasonably make.

Note: All needs will vary daily and the personal assistant's duties and tasks will fluctuate accordingly.”

(6) The consequence of a disabled person in receipt of Direct Payments engaging a Personal Assistant, is that the disabled person necessarily becomes an employer and must accordingly comply with all legal requirements attaching to that role.

(7) For a number of years the Appellant has provided a Payroll Service, aimed at disabled people who are in receipt of Direct Payments. The aims of the Payroll Service are to empower disabled people to direct their own care; to simplify the Direct Payments responsibilities; to increase uptake of Direct Payments; and to alleviate any additional stress for the individual.

(8) For provision of the Payroll Service the Appellant receives payments from individuals out of their personal budgets. It also receives payments from certain local government bodies but the VAT treatment of the latter is not before the Tribunal. The current dispute related only to fees received by the Appellant from the disabled individuals.

(9) The Payroll Service provides a fully comprehensive payroll solution which includes:

- (a) Initial registration with HMRC
- (b) Compliance with auto enrolment for pension purposes
- (c) Starter and leaver processing
- (d) Calculating wages
- (e) Producing payslips
- (f) Generating PAYE forms P45s, P46s and P60s
- (g) Calculation and payment of PAYE and NIC to HMRC
- (h) Redundancy payment calculations
- (i) Secure data storage.

(10) A disabled person becoming the employer of a Personal Assistant was unlike a business person who chooses to engage employees for commercial reasons. It is a position the disabled person must adopt if they wish to achieve independence and inclusion within their community; it is another burden for the disabled person within an already burdensome world and one which they may be ill-equipped to take on without the services of the Appellant.

(11) Government guidance required local authorities to inform Direct Payment recipients of the risks of becoming an employer, which carries with it certain responsibilities and obligations, in particular to HMRC.

(12) Mrs Turnbull was aware that HMRC had informed another body, Glasgow Centre for Inclusive Living, in August 2006 that VAT exemption was applicable to the payroll services offered by that body, which were similar to the Payroll Services.

(13) In response to questions in cross-examination:

- (a) A Personal Assistant would not usually deal with the disabled person's financial affairs, other than opening and reading out bills, or transporting the person to a bank. Operating a payroll was certainly not with the job description of a Personal Assistant.
- (b) Because its Payroll Service clients were variously impaired, the Appellant provided information in friendly formats such as large print or audiotape; also, home visits could be arranged. This would not be available from a commercial payroll provider. A recipient of Direct Payments was not obliged to use the Appellant's Payroll Service, or that of a similar charity or a commercial provider; however the requirements of running a payroll would be very demanding for most Direct Payment recipients, and were getting more complicated – there were now pensions auto enrolment requirements, and shortly real time PAYE reporting was being introduced. Mistakes could attract penalties from HMRC. People who used the Payroll Service did so because they needed it; they had already been assessed as having an impairment and care

and support needs. Using the Payroll Service was a necessary part of making the care package a reality.

(c) Government guidance required local authorities to provide “explanation of responsibilities that come with being an employer” and “signposting to direct payment support and support organisations available in the area (for example, employment, payroll, admin support, personal assistants, peer support)”.

(d) There was a general move towards Direct Payments being the preferred manner of delivering a personal budget, and it was now the usual first offer, as it was generally more cost effective for local authorities and afforded greater independence.

(e) If a person chose not to take Direct Payments then the personal budget would be managed by the local authority, which would use its block contracts to provide carer visits. However, such visits were typically short and for essential care needs only, and not generally comparable to the availability of a Personal Assistant. Alternatively, a recipient of Direct Payments could engage a care agency to provide the carers; because of overheads that was generally more expensive than direct employment of the Personal Assistant and so resulted in less care time available to the disabled person.

(f) If VAT was chargeable on the Payroll Service fees then that would be a cost to the disabled person unless the personal budget was revised to include a “plus VAT” amount for the service; packages were unlikely to be reassessed within twelve months, and all local authorities faced austerity measures.

(g) She accepted that she was not a party to the detailed discussion between HMRC and Glasgow Centre for Inclusive Living, and had not seen the information provided to HMRC by the charity.

(h) She accepted that other expenditure included in the personal budget might carry VAT.

23. Ms Shemlit’s evidence included the following.

(1) She is in receipt of a personal budget and used it to employ Personal Assistants. Employing staff was a daunting prospect which she would find difficult to realise without outside assistance. She did not have the capability or skills to operate a payroll herself, and using a payroll service was critical to her being able to use her choice of caring staff, which promoted and assisted her integration into the wider community.

(2) If VAT was added to the fees then that would result in less of the personal budget to pay for Personal Assistants and thus fewer hours available.

24. Mr Donnan’s evidence included the following.

(1) His former firm runs a commercial payroll bureau service for approximately 450 clients, with up to 200 employees each.

(2) The charges made are greater than those charged by the Appellant to its users. The service is standardised; in contrast the Appellant’s service must cater for the requirements of individual users, such as use of large print, particular colours of paper, braille etc.

GOVERNMENT GUIDANCE

25. Within the evidence bundles were copies of two Government documents. First, “**Care and support statutory guidance**”; issued by the Department of Health, it addresses local authorities - in 2018 the department was renamed the Department of Health and Social Care. Secondly, “**Guidance on Direct Payments for Healthcare: Understanding the Regulations**”; issued by NHS England.

“Care and support statutory guidance”

26. It explains the desirability of Direct Payments:

“12.2 Direct payments have been in use in adult care and support since the mid-1990s and they remain the Government’s preferred mechanism for personalised care and support. They provide independence, choice and control by enabling people to commission their own care and support in order to meet their eligible needs.

12.3 Direct payments, along with personal budgets and personalised care planning, mandated for the first time in the Care Act, provide the platform with which to deliver a modern care and support system. People should be encouraged to take ownership of their care planning, and be free to choose how their needs are met, whether through local authority or third-party provision, by direct payments, or a combination of the 3 approaches.”

27. It states:

“10.46 In developing the [care and support] plan, the local authority must inform the person which, if any, of their needs may be met by a direct payment (see chapter 12). In addition to this, the local authority should provide the person (and/or their independent advocate or any other individual supporting the person, if relevant and if the person wishes this) with appropriate information and advice concerning the usage of direct payments, how they differ from traditional services, and how the local authority will administer the payment (for example an explanation of the direct payment agreement or contract, and how it will be monitored). This advice should also include detail such as:

- the ability for someone else (such as a carer) to receive and manage the direct payment on behalf of the person
- the ability to request to pay a close family member to provide care and/or administration and management of the direct payment if the local authority determines this to be necessary
- the difference between purchasing regulated and unregulated services (for example regarding personal assistants)
- explanation of responsibilities that come with being an employer, managing the payment, and monitoring arrangements and how these can be managed locally without being a burden
- signposting to direct payment support and support organisations available; in the area (for example, employment, payroll, admin support, personal assistants, peer support)
- that there is no curtailment of choice on how to use the direct payment (within reason), with the aim to encourage innovation
- local examples and links to people successfully using direct payment in similar circumstances to the person (providing these groups agree)

- the option to have needs met by a mixed package of direct payments and other forms of support or arrangements

10.47 This information provided upfront should assist the person to decide whether they wish to request a direct payment to meet some or all of their needs and should also be available at various points in the process to ensure people have the best opportunities possible to consider how direct payments may be of benefit to them. However the person chooses to have their needs met, whether by direct payment, by the provision of local authority-arranged or directly provided care and support, or third-party provision, or a mix of these, there should be no constraint on how the needs are met as long as this is reasonable. The local authority has to satisfy itself that the decision is an appropriate and legal way to meet needs, and should take steps to avoid the decision being made on the assumption that the views of the professional are more valid than those of the person. Above all, the local authority should refrain from any action that could be seen to restrict choice and impede flexibility.”

28. In relationship to becoming an employer, it states:

“Becoming an employer

12.48 Local authorities should give people clear advice as to their responsibilities when managing direct payments, and whether the person in receipt of direct payments needs to register with HM Revenue & Customs (HMRC) as an employer. Becoming an employer carries with it certain responsibilities and obligations, in particular to HMRC and people need to be aware of these before agreeing to take up a direct payment. Disability and tax – a guide provides information on being an employer.

12.49 The local authority should consider using the proportionality principle, whether to carry out checks to make sure any PAYE income tax and National Insurance contributions deducted from an employee’s pay is in turn paid over to HMRC, and that employment payments do not breach the national minimum wage and conform to pension requirements if eligible. Some people may not need this check to be performed, but it may be more appropriate in other cases and conform to pension requirements if eligible.

Where it becomes clear that payments, or returns detailing employee information deductions, have not been made, or that the individual is failing to meet their obligations as an employer generally, the direct payment scheme should be reviewed and consideration given to whether alternative arrangements that result in the direct payment recipient no longer acting as the employer need to be made. Not doing so may result in the individual building up arrears of tax and National Insurance due to HMRC, which may then lead to enforcement action to recover any debt. This situation should be able to be avoided by effective monitoring where appropriate, and by providing clear, accessible upfront information about the responsibilities of becoming an employer. Many local authorities have commissioned voluntary and charity organisations to provide support to direct payment holders on these matters.

12.50 Many people are interested in using the direct payment to become an employer, for example, directly employing a personal assistant (PA). In these instances, the local authority should ensure that the person is given appropriate information and advice that explains the difference between a regulated and unregulated provider to help the person make a fully informed decision on how best to meet their needs. Where a direct payment is made under section 32 of the Act and to comply with the regulations, the local authority must also ensure that the authorised person is aware of how to access Disclosure and

Barring Service Checks (DBS – previously CRB checks) on individuals they wish to employ, for example by ensuring that a check has been made by the agency providing the service, the local authority, or by another body. Individuals cannot apply for DBS checks on other individuals, and the local authority should make people aware of this, and the importance of thorough checks and employment references in the recruitment process.

12.51 Where a person wishes to directly employ their own PA, the local authority should also have regard to the guidance published by Skills for Care detailing minimum levels of support for individual employers and PAs. This guidance recommends local authorities should provide on-going support through access to training activities in a variety of ways and promote the Workforce Development Fund. It also proposes that local authorities promote apprenticeships for PAs.”

29. It includes a case study:

“Case Study: Making direct payments support accessible

Abdul is a deafblind man; to communicate he prefers to use Braille, Deafblind Manual and email. He directly employs several staff through direct payments. He receives payroll support from his local direct payments support service. Abdul suggested ways to make direct payments management accessible to him. He communicates with the support service mainly via email but they also use Typetalk.

At the end of the month, Abdul emails the support service with details of the hours that his staff have worked. The support service work out any deductions from pay (such as National Insurance and Income Tax) and email him to tell him how much he should pay the staff via cheque. They then send him pay slips to be given to staff. The envelope that the payslips are sent in has 2 staples in the corner so that he knows who the letter is from. The payslips themselves are labelled in Braille so that he knows which staff to give them to.

Each quarter, the support service tells him how much he needs to pay on behalf of his employees in National Insurance and Income Tax. The service also fills in quarterly Inland Revenue paperwork. At the end of the year, the support service sends relevant information to the council, so that they are aware of how the direct payments are being spent.

Abdul has taken on only some of the responsibilities of employing people; he has delegated some tasks to the support service. Control still remains with Abdul and confidentiality is maintained by using accessible labelling. In terms of the wellbeing principle, the local authority has promoted Abdul’s control over his day-to-day life.”

Guidance on Direct Payments for Healthcare: Understanding the Regulations

30. In relation to information, advice and support, it states:

“63 Many local authorities have already commissioned support services for people with social care direct payments, and CCGs [clinical commissioning groups] may find it helpful to work with them to develop joint or integrated support services. CCGs may also want to consider consulting with and using the expertise of voluntary, user led, community, carers or peer support organisations when discussing or developing their ideas.

64 While support may be provided directly by the CCG, it may also be appropriate for people to purchase their own support, for example purchasing a payroll service to help when employing a care worker. This should be discussed within the care planning process and the care plan should specify

any requirement for information, advice or other support. This can then be funded as part of the care plan, within which it must be costed and agreed in the same way as for any other service to be purchased by the individual.”

31. On using Direct Payments, it states:

“7.2 Using a direct payment to employ staff

147 People may wish to use their direct payment to employ staff to provide them with care and support. CCGs should support them to do so whenever possible, while ensuring that there is appropriate practical support.

148 For some people who receive direct payments, it may be their first experience of being an employer, and it will be vital that there is good support available to them, if they want it. This support could include provision for payroll, training, sickness cover or other employment related services. There is further advice available from the Skills for Care personal assistant toolkit *Employing personal assistants*¹. The personal health budgets toolkit includes guides and best practice examples including:

- Options for managing the money
- Personal assistants: delegation, training and accountability

149 Where direct payments are being used to employ one or more people, the person receiving care, the representative or the nominee, should be made aware of their legal responsibilities as employers. CCGs should ensure that individuals are fully aware of their responsibilities, and of any potential risks and should be supported to manage them (see paragraphs 106 to 113).

150 Concern about becoming an employer should not discourage people who would otherwise be willing and able to manage a direct payment. People should be informed of the local support available in relation to being an employer and the different options in relation to taking on staff, such as use of agencies. This should be done accurately and responsibly, making recipients aware of what is involved without overstating the extent and complexity of these responsibilities.

151 There will also be costs associated with employing a member of staff directly, such as National Insurance, training, insurance costs and emergency cover. When setting the budget and agreeing the care plan, CCGs should ensure that the full cost of employing someone is included, and people must not be expected to bear any of these costs themselves.

152 As one of a range of support services, individuals or CCGs may wish to include payroll services, which will take responsibility for administering wages, tax and National Insurance for direct payment recipients. If it is agreed that this should be paid for via the direct payment, the cost should be factored in when setting the budget.”

PARTIES’ SUBMISSIONS

Appellant’s case

32. For the Appellant Ms Brown submitted as follows.

33. The Appellant contended that the Payroll Service provided by the Appellant to recipients of Direct Payments is exempt for VAT purposes. The Payroll Service was “the supply of services ... closely linked to welfare and social security work” within art 132(1)(g) VAT

Directive 2006. Further, there was a supply by a charity of welfare services as defined in Note 9 to group 7 sch 9 VATA 1994: “services which are directly connected with ... the provision of care, treatment or instruction designed to promote the physical or mental welfare of elderly, sick, distressed or disabled persons ...”.

34. The supplies in dispute were Payroll Services supplied to disabled persons who were in receipt of Direct Payments, and who used those funds to employ a Personal Assistant. Thus the Payroll Services were supplied in the context of a supply by a charity to a disabled person whose care and support needs have been formally and rigorously assessed under the Care Act 2014. The Payroll Services were part of the care plan and were budgeted as such. The individuals were employers by reason of their disabilities, not out of choice.

35. The Government guidance to local authorities (at 10.46) stated (emphasis added):

“... the local authority should provide the person ... with appropriate information and advice concerning the usage of direct payments, how they differ from traditional services, and how the local authority will administer the payment (for example an explanation of the direct payment agreement or contract, and how it will be monitored). *This advice should also include detail such as: ...*

- *explanation of responsibilities that come with being an employer, managing the payment, and monitoring arrangements and how these can be managed locally without being a burden*
- *signposting to direct payment support and support organisations available in the area (for example, employment, payroll, admin support, personal assistants, peer support)*

36. The Government guidance to clinical commissioning groups (at 64) stated (emphasis added):

“... it may also be appropriate for people to purchase their own support, for example *purchasing a payroll service to help when employing a care worker. ... This can then be funded as part of the care plan*, within which it must be costed and agreed in the same way as for any other service to be purchased by the individual.”

37. Thus it was clear that if use of a payroll service was assessed as required as part of a care plan, then that would be costed and funded within the personal budget.

Article 132 and EU caselaw

38. Article 132(1)(g) did not require that the Payroll Services were themselves welfare work; rather, that they were closely linked to welfare work. It was clear that the work of the Personal Assistants constituted welfare work. Whilst there is no statutory definition of “closely linked”, it is clear from settled case law that although the terms used to specify the exemption in art 132 are to be interpreted strictly, the interpretation of those terms must be consistent with the objectives underlying the exemptions and must comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Consequently, the requirement of strict interpretation does not mean that the terms used to specify the exemption must be construed in such a way as to deprive the exemptions of their intended effects (see inter alia, to that effect, *Haderer v Finanzamt Wilmersdorf* [2008] STC 2171 at [18] and the case law cited; *Don Bosco Onroerend Goed BV v Staatssecretaris van Financiën* [2010] STC 476 at [25] and the case law cited; and *CopyGene A/S v Skatteministeriet* [2010] STC 1799 at [26], as reaffirmed in *Finanzamt Steglitz v Zimmermann* [2016] STC 2104 at [122]). The objective and aim of art 132(1)(g) is to reduce the cost of the services falling within the welfare exemption

and to make them more accessible to the individuals who may benefit from them: *Kingscrest Associates Ltd and another v CCE* [2005] STC 1547.

39. Although the CJEU cases of *Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I in Berlin* (Case C-141/00) [2004] 3 CMLR 1175 and *Les Jardines de Jouvence SCRL v Etat belge* (Case C-335/14) [2016] All ER (D) 212 (Jan) both concerned the welfare exemption in art 132(1)(g), neither was of assistance as the “closely linked” point was not scrutinised by the Court. CJEU cases on other exemptions within art 132 examined the phrase “closely related”.

40. *Christoph-Dornier-Stiftung für Klinische Psychologie v Finanzamt Gießen* (Case C-45/01) [2005] STC 228 concerned the medical exemption in art 132(1)(b) & (c). The Court held (at [35]) that psychotherapeutic treatment given in an out-patient facility by qualified psychologists who are not doctors is an activity closely related to hospital or medical care only when such treatment is actually given as a service ancillary to the hospital or medical care received by the patients in question and constituting the principal service. The psychotherapeutic treatment was apparently unconnected to any other medical supplies: it was not provided within the framework of hospital care; nor could it be regarded as supplementary to any medical care provided by licensed doctors – per AG at [36]. Here the Payroll Services could not constitute a stand-alone service or an end in themselves; they were required only because the individual employed a Personal Assistant. Rather, they were ancillary as being a means of better enjoying the services of the Personal Assistant. This was also borne out by the example of “Abdul” in the Government guidance to local authorities.

41. *Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE v Ipourgos Ikonomikon* [2006] STC 1349 also concerned the medical exemption in art 132(1)(b) & (c), and the provision of telephones and televisions to in-patients. The question was the purpose for which the services were carried out (at [22]). The Payroll Service is an integral part of the care plan (meeting the individual’s physical and mental wellbeing), and imposing VAT on the cost would impede the access of individuals to use of Personal Assistants. Using the terminology of the AG (at [37]) it is not just that the Payroll Service improves the services of the Personal Assistant, but instead that the Payroll Service is essential or necessary to the possibility of engaging a Personal Assistant; without the Payroll Service the disabled person could not realistically enjoy the services of a Personal Assistant – as was clear from the evidence of Ms Shemilt – and each individual had been formally assessed as requiring the care and support services provided by the Personal Assistant.

UK legislation and caselaw

42. The domestic legislation in Item 9 must be interpreted, as far as possible, in the light of the wording and purpose of the directive which it seeks to implement, and therefore cannot be construed more narrowly than the domestic legislation from which they are transposed: Supreme Court in *Swift v Robertson* [2014] 1 WLR 3438 at [20-221].

43. The recipients were clearly disabled persons. The Payroll Service is directly connected to the provision of care or instruction; per s 8 CA 2014 one of “the ways in which a local authority may meet needs under sections 18 to 20 ... [is] by making direct payments.”

44. This was all entirely in accordance with HMRC’s own views in Notice 701 (emphasis added):

“2.1.1 Care, treatment or instruction

Care, treatment or instruction includes the protection, control or guidance of an individual when this is provided to meet their medical, physical, personal or domestic needs.

Any instruction must relate to the care or treatment of the individual for example showing them how to dress or bath themselves. It does not include the supply of information in the form of advice or help to enable them make an informed decision.

For a service to be exempt under this heading the following must be satisfied:

- the recipient must be an elderly, sick, distressed or disabled person
- the care, treatment or instruction must be part of an specific individual care plan and the service must relate to it
- an assessment of the recipient's health condition and medical needs has been carried out by an appropriately trained person

Examples include:

- personal or nursing care (including assistance with bathing, dressing, toileting and other personal hygiene)
- *general assistance and support with everyday tasks such as form filling, letter reading or writing, bill paying*
- certain routine domestic tasks, see paragraph 2.1.2
- counselling
- looking after or supervising vulnerable people
- support or instruction designed to develop or sustain a person's capacity to live independently in the community
- protection, control, guidance or companionship that is required to meet an individual's personal or domestic needs
- residential care, including accommodation, board and other services provided to residents as part of a care package"

45. Regulation 9 SI 2013/1617 provided (so far as relevant):

“Information, advice and other support

(1) A health body must make arrangements for a patient ... to whom direct payments are made to obtain information, advice or other support in connection with the making of direct payments.

(2) The arrangements for information, advice or other support mentioned in paragraph (1) may include—

...

(h)provision for payroll, training, sickness cover or other employment related services to assist a patient ... where an employee provides services secured by direct payments for the patient; ...”

46. That certainly seemed to be the view expressed by HMRC to Glasgow Centre for Inclusive Living in relation to the similar service provided by that charity.

47. The welfare exemption has been applied broadly and is not only applicable to supplies which are welfare services themselves; for example home help services to elderly persons under contracts with local authorities (*Watford & District Old People 's Housing Association Ltd (t/a Watford Help in the Home Service) v C & E Comrs* [1998] V & DR 477 (VAT Decision 15660)) and more recently, the provision of housing support services provided by the YMCA (*YMCA Birmingham; YMCA Black Country Group; YMCA Leicester; YMCA Burton upon Trent District v HMRC* [2018] UKFTT 458 (TC)). It is irrelevant that the services are not

specific to disabled persons. In *Watford* home help services provided to elderly people in defined categories were held exempt, and in *YMCA* services such as instructing a young person how to vacuum or how to fill in a claim for housing benefit were held to be exempt. What mattered was the context in which the services were actually provided and the actual recipients of the services. The fact that payroll services may be used by non-disabled people does not prohibit the Appellant's Payroll Service from falling within the welfare exemption.

48. The evidence of Mrs Turnbull and Ms Shemilt was clear that a disabled person becoming an employer was not a deliberate choice as it would be for a business person expanding their staff; instead it was a necessary part of being independent and requiring support because of impairment. Also, the Payroll Service was not comparable to commercial payroll services because of the availability of facilities such as large print copies of advice.

Respondents' case

49. For the Respondents Mr Hill submitted as follows.

50. The services provided by the Appellant under the Payroll Service are not exempt under item 9 group 7 sch 9 VATA 1994, as interpreted in accordance with arts 132(1)(g) and 134(a) of the Directive, since they are not "closely linked to welfare" and nor are they essential to such transactions.

51. Item 9 could be considered to be more restrictive than art 132(1)(g) in that the former required "services which are directly connected with the provision of care", while the latter required "services ... closely linked to welfare". HMRC accepted that art 132(1)(g) was mandatory with no discretion afforded to member states (either to widen or narrow the scope), and that the domestic provision must be interpreted in accordance with art 132(1)(g).

52. The exemptions in art 132 do "not provide exemption from VAT for every activity performed in the public interest, but only for those which are listed therein and described in great detail" - *Les Jardins de Jouvence* (at [41]). Therefore, the provisions of art 132 are to be strictly interpreted, albeit "nevertheless that the interpretation that the Court gives to 'welfare' should not be such as to deprive the provision in which it appears of any practical effect" – AG in *Les Jardins* (at [37]).

53. HMRC accepted that the Appellant was an eligible body for the purposes of art 132(1)(g). Also, that the services of the Personal Assistants to their disabled employers were welfare services (and thus themselves exempt).

54. The Payroll Service is one step removed from the actual care received by the recipient of care. The supplies relate to the administration of the Direct Payments necessary to fund the care – and not to the actual care itself. Direct Payments are not themselves restricted to the purchase of supplies of exempt care - they can be used by the disabled person to purchase a wide range of goods and services, many of which are themselves VATable.

55. The care and support needs which may be met are broad, and the ways in which they may be met are varied. Government guidance to local authorities states (at para 10.48): "It is important that people are allowed to be very flexible to choose innovative forms of care and support, from a diverse range of sources, including quality providers but also "non-service options" such as ... ICT equipment, club membership and massage." Specific examples given include: personal trainer time at a local gym to promote wellbeing of a disabled person; support to help a disabled person who enjoys dancing to be able to visit nightclubs; the purchase of a laptop to allow a disabled person to be in more regular contact via Skype with family abroad; a course of relaxation classes; training on stress management; gym or leisure centre membership; adult learning, development of new work skills or refreshing existing skills (so

they might be able to stay in paid employment or return to paid work); pursuit of hobbies such as the purchase of a garden shed; or purchase of a laptop so that they can stay in touch with family and friends. Spending on many of those items would incur VAT.

56. Direct Payments is one way in which a personal budget may be provided, allowing the individual to purchase their own care and support, and the local authority is obliged to assist the individual in making an informed choice. Such assistance includes providing the disabled person with appropriate information and advice concerning the usage of Direct Payments, how they differ from traditional services, and how the local authority will administer the payment (Guidance paras 10.46 & 12.7). One of the conditions for making a Direct Payment is that the local authority must be satisfied that the individual is capable of managing Direct Payments either by him or herself or with whatever help the authority thinks he or she will be able to access (Guidance para 12.17). The guidance specifies that, to comply with this condition, “many local authorities have contracts with voluntary or user-led organisations that provide support and advice to direct payment holders, or to people interested in receiving direct payments”. The guidance recognises (paras 12.21, 12.37 & 12.48) that “The management and administration of a large payment, along with organising care and support can be a complex and time-consuming task”. In particular, where a Direct Payment is used to employ staff, the disabled person will then be responsible for carrying out the duties of an employer, including payment of PAYE income tax and National Insurance contributions.”

57. The individuals have different needs that would be reflected in the reasons why they wanted to use the Payroll Service. That may be not directly because of their disability but instead just because of the complexity of being an employer.

58. The only CJEU case specifically to interpret the meaning of services “closely linked to welfare” in art 132(1)(g) is *Les Jardins de Jouvence*. The Court’s judgment in *Les Jardins de Jouvence* does not provide any significant assistance here because the reasoning in that case was based on a comparison between the services provided by serviced residences and those provided by old people’s homes, in circumstances where the latter services are expressly stated to be exempt by art 132(1)(g). In the present case, none of the relevant services are expressly mentioned in art 132(1)(g), so the same reasoning cannot be applied.

59. In his Opinion in *Les Jardins de Jouvence* Advocate General Bot pointed out (at [34]) that the Court had not given a definition of “welfare” in the context of the VAT Directives and “The furthest it has gone, in the judgment in *Kügler*, is to indicate that ‘the provision of general care and domestic help by an outpatient care service to those in a state of physical or economic dependence ... is in principle linked to social assistance, so that it falls within the concept of “services closely linked to welfare and social security work” referred to in [art 132(1)(g)]”. The present case does not involve the provision of either general care or domestic help, but support with the administration of Direct Payments to purchase, inter alia, general care and domestic help – and therefore it is not closely linked to welfare on that definition.

60. *Ygeia* concerned the exemption in art 132(1)(b) for activities “closely related” to hospital and medical care. The Court of Justice made a distinction between hospital and medical care services themselves and supplies one step removed from such services – in that case, the provision of telephone services and the hiring out of television sets to hospital inpatients and the provision of beds and meals to persons accompanying them. The Court held that services were only “closely related” to hospital and medical care “when they are actually supplied as a service ancillary to the hospital or medical care received by the patient” (at [18], applying *Christoph-Dornier-Stiftung* at [35]). This would only be the case if they fulfilled the same purpose as the principal services of hospital and medical care – “the diagnosis, treatment and, in so far as possible, cure of diseases” (at [22-24]). The Court then concluded (at [25]) that

“only the supply of services which are logically part of the provision of hospital and medical-care services, and which constitute an indispensable stage in the process of the supply of those services to achieve their therapeutic objectives, is capable of amounting to ‘closely related activities’ within the meaning of” art 132(1)(b). In coming to that conclusion, the Court also applied art 134(a), under which exemption is not to be granted “where the supply is not essential to the transactions exempted”. In that regard, services which simply improved the comfort and well-being of patients (such as providing them with televisions and telephones) did not qualify for exemption. Indeed, it was “not sufficient in order for the services provided in a hospital to be exempt from VAT that they be potentially or actually of assistance in the patient’s recovery”. Exemption only applied where “those services are essential to achieve the therapeutic objectives pursued by the hospital services and medical care in connection with which they have been supplied” – and that depended on “the content of the medical prescriptions drawn up for the patients concerned” – at [28-30] and see also AG Léger’s Opinion at [25, 36-38, 42 and 50-58].

61. In *Commission v. Germany* Case C-287/00 the Court held that the exemption for the supply of services closely related to university education under art 132(1)(i) did not extend to university research projects carried out for consideration. The Court held (at [48]) that “although the undertaking of such projects may be regarded as of great assistance to university education, it is not essential to attain its objective, that is, in particular, the teaching of students to enable them to pursue a professional activity.”

62. In *Brockenhurst College* Case C-699/15 the Court considered whether restaurant and theatre services provided by students at a college were “closely related” to their education and thus exempt under art 132(1)(i). The Court again stressed (at [26]) that the relevant supplies had to be “essential” to the exempt activities. In order to meet that condition they had to be “of a nature and quality such that, without recourse to them, there could be no assurance that the education provided [by the college] and, consequently, the education from which their students benefit, would have an equivalent value”. The Court held (at [29]) that the practical training was exempt as it “was designed to form an integral part of the student’s curriculum and ... if it were not provided, students would not fully benefit from their education”.

63. Applying *Dornier* and *Ygeia* by analogy to the present case, the Appellant’s Payroll Service may be of great assistance to those needing care and those supporting them, but it cannot benefit from exemption as it is not “logically part” or an “indispensable stage” in the provision of care services. Rather, it is a logical part of the Direct Payment method of paying for such services – and is not essential to achieve the objectives of the care itself. Adapting *Brockenhurst* to the present case, the services provided by the Appellant are not of a nature and quality such that, without recourse to the Payroll Service, there could be no assurance that the care provided by the Personal Assistants to recipients would have an equivalent value. The Payroll Service improves the nature and quality of the Direct Payments service and *not* the care offered by the Personal Assistants. The disabled person could choose instead to use a local authority carer, or take Direct Payments but engage a care agency; becoming an employer was not an “indispensable stage” of receiving the care and support.

64. In relation to the letter from HMRC to Glasgow Centre for Inclusive Living, it was unclear what were the facts behind the taxpayer’s information provided to HMRC.

65. The guidance in HMRC’s Notices was only guidance but HMRC considered it was correct. The Payroll Service was not covered by the reference to “form filling”.

CONSIDERATION AND CONCLUSIONS

The dispute

66. HMRC issued a disputed decision to the Appellant stating that the Payroll Service does not qualify for the welfare exemption for VAT purposes. We understand that there is a number of other taxpayers in a similar position, and that HMRC have been engaged in a consultation exercise with certain interested bodies.

67. The relevant EU legislation is in art 132(1)(g) of the Principal VAT Directive which states, so far as relevant:

“Exemptions for certain activities in the public interest - 1. Member States shall exempt the following transactions: ... (g) the supply of services ... closely linked to welfare ... work, ... by ... bodies recognised by the Member State concerned as being devoted to social wellbeing; ...”

68. Article 132(1)(g) was incorporated into UK law by item 9 group 7 sch 9 VATA 1994, which states, so far as relevant:

“Group 7 — Health and welfare - ... 9 The supply by (a) a charity ... of welfare services ...

NOTES ... (6) In item 9 “welfare services” means services which are directly connected with (a) the provision of care, treatment or instruction designed to promote the physical or mental welfare of elderly, sick, distressed or disabled persons ...”

69. It is common ground that:

- (1) The Appellant is a “recognised body” for art 132(1)(g), and a “charity” for item 9.
- (2) The services of the Personal Assistants employed by the disabled people are “welfare work” for art 132(1)(g), and the “provision of care etc” for item 9.

70. The dispute concerns whether the Payroll Service constitutes a “supply of services closely linked to welfare work” for art 132(1)(g), and a supply of “services which are directly connected with the provision of care” for item 9.

Approach

71. In considering the legislation relating to exemption we have adopted the following approach, which is largely derived from the views of the Court of Appeal in *Revenue and Customs Commissioners v Brockenhurst College* [2016] STC 2145 (at [16]).

72. First, the exemption must be construed so as to be consistent with its objective and so as to ensure its intended effect: *Skatteverket v PFC Clinic AB* (Case C-91/12) [2013] STC 1253 (at [23]). The objective and intended effect of the welfare exemption was stated by the CJEU in *Kingscrest Associates* (at [30]):

“... the objectives pursued by the exemptions under [art 123(1)(g)], it is clear from that provision that those exemptions, by treating certain supplies of services in the general interest in the social sector more favourably for the purposes of VAT, are intended to reduce the cost of those services and to make them more accessible to the individuals who may benefit from them.”

73. Secondly, an especially narrow interpretation of the words “closely linked” is not appropriate, since the exemption is designed to ensure that the benefits of the principal supply are not hindered by the increased costs of providing it that would follow if the closely linked activities were subject to VAT: *EC Commission v Federal Republic of Germany* (at [47]). Although *Germany* was examining the words “closely related” (in the education exemption in

art 132(1)(i)) we consider the same approach should be followed for the words “closely linked” – certainly in all the caselaw to which we were referred there is no suggestion by the courts that there is any meaningful distinction to be drawn between the two similar phrases. We also see no reason to draw any distinction between the phrases “*closely linked to welfare work*” in art 132(1)(g), and “*directly connected with the provision of care*” in item 9, especially as the domestic legislation must be interpreted so far as possible in the light of the wording and purpose of the Directive which it seeks to implement – see the Court of Appeal in *Vodafone 2 v RCC (No 2)* [2009] STC 1480 (at [37-38]), approved by the Supreme Court in *Robertson v Swift* (at [20]).

74. Thirdly, to be closely linked to a principal exempt supply, the service in question must be an ancillary supply to the principal supply, that is one that does not constitute an end in itself but is a means for better enjoying the principal service supplied: *Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v Staatssecretaris van Financiën* [2008] STC 2145 (at [28-29]) (and see *Cristoph-Dornier* at [34-35] and *Ygeia* at [17-19]).

75. Fourthly, the closely linked supply must be essential to attain the objective of the principal supply (see art 134(a)). In order to satisfy that requirement, the ancillary supply should be of a nature and quality such that, without it, there could be no assurance that the principal supply would have an equivalent value to the recipients: *Horizon College* (at [39]).

The CJEU caselaw

76. Although the CJEU cases of *Kügler* and *Les Jardines* examine the welfare exemption, we consider (and we understand both parties hold the same view) that those cases do not offer assistance to us on the point at issue in the current appeal: whether the Payroll Service constitutes a “supply of services closely linked to welfare work”. *Les Jardines* considers what services can constitute welfare work, but here the Appellant does not contend that the Payroll Service is itself welfare work, only that the Payroll Service is closely linked to the welfare work provided to their employers by the Personal Assistants employed by the disabled people.

77. *Ygeia* is a CJEU case on the medical exemption (art 132(1)(b) & (c)) and whether the provision of telephones and televisions to in-patients constituted services closely related to hospital and medical care. We consider the conclusions in that case are entirely consistent with the principles described above in our adopted approach, without adding to them. The Court concluded (at [29]):

“It follows that the provision of services which, like those at issue in the main proceedings, are of such a nature as to improve the comfort and well-being of in-patients, do not, as a general rule, qualify for the [medical exemption]. It can be otherwise only if those services are essential to achieve the therapeutic objectives pursued by the hospital services and medical care in connection with which they have been supplied.”

78. *Cristoph-Dornier* also concerns the medical exemption and whether psychotherapeutic treatment provided in an out-patient facility (by qualified psychologists who were not medical doctors) was closely related to hospital or medical care. Again, we consider the conclusions in that case are entirely consistent with the principles described above in our adopted approach, without adding to them. The Court concluded:

“34. In this case, it is common ground that the psychotherapeutic treatment given in Dornier's out-patient facility by qualified psychologists generally constitutes services provided to the patients as an end in themselves and not as a means of better enjoying other types of services. In so far as that treatment

is not ancillary to hospital or medical care, it is not an activity closely related to services exempted under [the medical exemption].

35. Accordingly, the Court of Justice finds that psychotherapeutic treatment given in an out-patient facility of a foundation governed by private law by qualified psychologists who are not doctors is an activity closely related to hospital or medical care within the meaning of under [the medical exemption] only when such treatment is actually given as a service ancillary to the hospital or medical care received by the patients in question and constituting the principal service.”

Direct Payments and employment of Personal Assistants

79. The Care Act 2014 requires local authorities to promote the wellbeing (as defined in s 1(2)) of individuals for whom they are responsible.

(1) In exercising that function the authority must assume that the individual is best placed to judge his/her own wellbeing, and have regard to the views, wishes, feelings and beliefs of the individual (s 1). One example of provision to meet needs is care and support at home or in the community (s 8(1)).

(2) The authority must carry out an assessment of the individual’s needs for care and support (s 9) and prepare a care and support plan for the individual (s 24). The plan must specify the individual’s needs; specify which needs the authority is going to meet and how; include a personal budget (as defined in s 26); and if needs are to be met by making Direct Payments, specify the needs to be so met and the amount and frequency of the Direct Payments (s 25).

(3) The ways in which an authority may meet needs include (s 8(2)): provision of services by the authority itself; arrangement for provision by a third party (these are what Mrs Turnbull called the block contracts); or by making Direct Payments.

(4) On Direct Payments, if an individual requests Direct Payments then (subject to certain stipulated safeguards) the authority is obliged to make them (s 31).

80. There is a parallel duty on health bodies to prepare a care plan in respect of the services to be secured for a patient by way of Direct Payments, specifying the health needs and intended outcomes, and the amount and frequency of the Direct Payments – reg 8 The National Health Service (Direct Payments) Regulations 2013 (SI 2013/1617). Reg 9 requires health bodies to “make arrangements for a patient, ... to whom direct payments are made to obtain information, advice or other support in connection with the making of direct payments [which arrangements] may include ... provision for payroll, training, sickness cover or other employment related services to assist a patient, representative or nominee where an employee provides services secured by direct payments for the patient ...”; and provides “If the care plan specifies a requirement for information, advice or other support, that support may be a service in respect of which direct payments may be made.”

81. Government guidance to local authorities and health bodies (see [25-31] above) states:

(1) Direct Payments are the preferred mechanism for delivery of personalised care and support. Mrs Turnbull explained that Direct Payments are the “first offer” to disabled people.

(2) “People should be encouraged to take ownership of their care planning, and be free to choose how their needs are met, whether through local authority or third-party provision, by direct payments, or a combination of the 3 approaches.”

(3) “In developing the [care and support] plan, the local authority ... should provide the person ... with appropriate information and advice concerning the usage of direct payments, how they differ from traditional services, and how the local authority will administer the payment (for example an explanation of the direct payment agreement or contract, and how it will be monitored). This advice should also include detail such as ...

- explanation of responsibilities that come with being an employer, managing the payment, and monitoring arrangements and how these can be managed locally without being a burden
- signposting to direct payment support and support organisations available; in the area (for example, employment, payroll, admin support, personal assistants, peer support) ...”

(4) “Local authorities should give people clear advice as to their responsibilities when managing direct payments, and whether the person in receipt of direct payments needs to register with HM Revenue & Customs (HMRC) as an employer. Becoming an employer carries with it certain responsibilities and obligations, in particular to HMRC and people need to be aware of these before agreeing to take up a direct payment.”

(5) “While support may be provided directly by the [health body], it may also be appropriate for people to purchase their own support, for example purchasing a payroll service to help when employing a care worker. This should be discussed within the care planning process and the care plan should specify any requirement for information, advice or other support. This can then be funded as part of the care plan, within which it must be costed and agreed in the same way as for any other service to be purchased by the individual.”

(6) “People may wish to use their direct payment to employ staff to provide them with care and support. [Health bodies] should support them to do so whenever possible, while ensuring that there is appropriate practical support. For some people who receive direct payments, it may be their first experience of being an employer, and it will be vital that there is good support available to them, if they want it. This support could include provision for payroll, training, sickness cover or other employment related services. ... Concern about becoming an employer should not discourage people who would otherwise be willing and able to manage a direct payment. People should be informed of the local support available in relation to being an employer and the different options in relation to taking on staff, such as use of agencies. ... As one of a range of support services, individuals ... may wish to include payroll services, which will take responsibility for administering wages, tax and National Insurance for direct payment recipients. If it is agreed that this should be paid for via the direct payment, the cost should be factored in when setting the budget.”

The Payroll Service

82. From the evidence presented to us we find that:

- (1) The services comprising the Payroll Service are as summarised at [22(9)] above.
- (2) The services included within the Payroll Service go beyond those generally expected of a commercial payroll bureau. We were shown an example of a letter introducing the Payroll Service to a new user, which as well as normal text also included a pictogram for each word, to assist users with a reading comprehension impairment. Also, the Appellant can make elements of the Payroll Service available in braille where

appropriate – this is similar to the case study of “Abdul” contained in the Government guidance (see [29] above).

(3) Individuals are encouraged to take their personal budgets through Direct Payments. Choosing Direct Payments and paying a Personal Assistant enables an individual to take greater control over their lives, compared to dependence on local authority provided services, or carers appointed by a care agency. An individual taking Direct Payments and choosing their own Personal Assistant (rather than using a care agency) will unavoidably become an employer for PAYE and other purposes.

(4) Many if not most users of the Payroll Service would find it difficult if not impossible to fulfil their employer payroll responsibilities without subscribing to the Payroll Service. This is because of their various impairments, which impairments have been formally assessed and found to constitute needs which may be met by Direct Payments.

(5) Provision of the Payroll Service is conducive to the Appellant’s aim to empower disabled people to have independence, choice and control over their lives; it simplifies the Direct Payment responsibilities and thereby increases the uptake of Direct Payments by disabled people.

(6) Government guidance from the Department of Health envisages that purchase of a payroll service by recipients of Direct Payments is appropriate, and is expected to be funded as part of the care plan and the personal budget. It is stated that “it will be vital that there is good support available to them, if they want it. ... Concern about becoming an employer should not discourage people who would otherwise be willing and able to manage a direct payment.”

Conclusions

83. Referring to the four principles which we have adopted as our approach (see [71-75] above), on the first principle we conclude that exempting the Payroll Service from VAT is consistent with the objective of reducing cost of care and support (which comes out of the individual’s personal budget) and increasing accessibility to individuals who can benefit therefrom (given especially the Government’s aim that people should be encouraged to take ownership of their care planning, with Direct Payments as the preferred mechanism of delivery).

84. On the second principle, we conclude that the benefits of the services required by the individual’s care and support plan would be hindered by the increased cost of incurring VAT on the Payroll Service; again, the cost of the Payroll Service comes out of the individual’s personal budget.

85. On the third principle, we conclude that the Payroll Service does not constitute an end in itself but is instead a means for better enjoying the services of the Personal Assistant, which is part of the services required by the individual’s care and support plan. Without the engagement of a Personal Assistant to deliver at least part of the disabled person’s care and support needs, there would be no employer role and thus no need to use the Payroll Service. Delivery of the care and support plan is better enjoyed by the individual by taking Direct Payments and employing a Personal Assistant – indeed, that route is actively encouraged by the Department of Health’s advice to both local authorities and health bodies. We agree with the VAT Tribunal in *Watford Help in the Home Service* and this Tribunal in *YMCA* that the Payroll Service must be viewed in the particular context of its provision to recipients of Direct Payments, rather than by comparison to employers generally who may choose to engage a payroll bureau.

86. On the fourth principle, the nature and quality of the Payroll Service is such that, without it, there would be a lesser value to the disabled person of the care and support package; without using the Payroll Service many disabled persons would have to forego taking a Personal Assistant (because they could not cope with the employer responsibilities) and that would be to the detriment of the chosen method of delivery of the care and support plan, despite the statutory assumption that the individual is best placed to judge their own wellbeing needs (s 1 Care Act 2014), and the insistence by the Department of Health that disabled people should take ownership of their care planning see [26] above).

87. From the above we conclude that the Payroll Service does constitute a “supply of services closely linked to welfare work” for art 132(1)(g), and a supply of “services which are directly connected with the provision of care” for item 9.

DECISION

88. The appeal is ALLOWED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

89. 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.

**PETER KEMPSTER
TRIBUNAL JUDGE**

RELEASE DATE: 03 JUNE 2019