[2019] UKFTT 514 (TC)

VALUE ADDED TAX – whether Botox and other injectable treatments and nail fungus treatments are exempt under Group 7 of Schedule 9 – items 1, 2 and 4 considered – held that injectable treatments were not for the primary purpose of protecting, restoring or maintaining health and thus not "medical care" – held that permission granted by local council for D1 use insufficient to constitute "state-regulated" – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07310

Appeal number: TC/2017/05971

BETWEEN

SKIN RICH LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN
RAYNA DEAN

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 12 June 2019, with written submissions received from both parties on 26 June 2019

Gary Brothers, of The Independent Tax & Forensic Services LLP, for the Appellant

Gareth Hilton, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by Skin Rich Ltd ("SRL") against:

   (1) the decision of Officer Amies of HMRC dated 23 March 2017 that supplies of botulinum toxin ("Botox") and nail fungus treatment are not exempt under Group 7 ("Group 7") of Schedule 9 to Value Added Tax Act 1994 ("VATA 1994") (this being the "liability decision"); and

   (2) assessments issued under s73(1) VATA 1994 on 6 April 2017 for the periods 5/13 to 11/16 totalling £21,064.

2. HMRC had identified that there was a difference between the turnover in the accounts used for corporation tax purposes and the amounts reported in the VAT returns. SRL's accountant explained that treatments which SRL regarded as exempt under Group 7 were not included in the VAT return. This explanation of the discrepancy was accepted by HMRC on 7 August 2016, but the question of whether Botox and nail fungus treatments were exempt was referred for consideration within HMRC

3. Following the compliance check, Officer Amies sent the liability decision to SRL and issued assessments. These assessments were notified by Officer Amies to SRL on 23 March 2017 and initially comprised the following:

Period	Amount (£)
02/13	464
05/13	1,625
08/13	1,450
11/13	3,345
02/14	2,286
05/14	1,451
08/14	1,407
11/14	948
02/15	861
05/15	665
08/15	1,372
11/15	1,033
02/16	1,038
05/16	1,327
08/16	1,343
11/16	913

4. SRL requested a review of the liability decision and the assessments. On 21 July 2017 HMRC sent a review conclusion letter to SRL, which concluded that the liability decision should be upheld. However, the review found that the assessment for the period 02/13 was out of time and HMRC removed that period from the assessment.

PRELIMINARY ISSUES

5. The Notice of appeal refers to the review conclusion letter which states that Botox and nail fungus treatment cannot be considered as exempt as HMRC do not consider them to be medical treatments, and the Notice then states that the grounds for appeal are that:

(1) Botox is a medical procedure and SRL employs members of the medical profession to administer and supervise it in all instances; and

(2) nail fungus treatment is also a medical treatment as it is carried out to restore the health of the person concerned as GPs now advise their patients to seek private practices as the NHS is over-stretched.

6. SRL stated that the desired outcome was for Botox and nail fungus treatment to be treated as exempt from VAT.

7. At the hearing Mr Brothers confirmed that (in addition to nail fungus treatment) SRL had claimed exemption for Botox treatments and dermal fillers, which were together classified by SRL as "Injectables" or "Injectable treatments". The assessments raised by HMRC had covered all Injectables, not just Botox treatments, (as HMRC had treated all supplies for which exemption had been claimed as standard-rated) and SRL were seeking to appeal these assessments in respect of all Injectables.

8. We considered that this was a late amendment to the grounds of appeal. We noted that the correspondence between SRL and HMRC in relation to the compliance check had referred to Botox treatment, and this was then reflected in the liability decision, the review and the Notice of appeal. Nevertheless, the bundle of papers provided to us did include material relating to both Botox and fillers, and Mr Hilton stated that HMRC had no objection to this amendment. On the basis that HMRC were satisfied that they had been able to prepare appropriately, we concluded that we should, in the interests of fairness and justice, allow this amendment.

9. In addition, during the course of the hearing, Mr Brothers explained that SRL would not be seeking to rely on items 1 and 2 of Group 7 ("Item 1" and "Item 2") in relation to the nail fungus treatment but was relying only on item 4 of Group 7 ("Item 4") in relation thereto. Exemption under Item 4 would also be relied on as an alternative argument in respect of the Injectables.

10. The liability decision of Officer Amies refers to the requirements of Item 1, but expresses the conclusion more broadly as "you have failed to provide the necessary evidence for your supplies to be classified as "medical" and thus exempt from VAT. I will now raise an assessment for VAT on these supplies which should have been standard rated for VAT purposes." The grounds of appeal had not specified which items of Group 7 were sought to be relied upon by SRL, but the skeleton argument submitted by Mr Brothers had addressed only Items 1 and 2. Mr Hilton informed us that, to the extent that this was a further amendment to the grounds of appeal, HMRC had no objection.

11. We concluded that the original grounds had not expressly limited themselves to any particular items within Group 7, albeit that the phrasing did imply that Items 1 and 2 were in mind. We concluded that, in the interests of fairness and justice, it was appropriate to allow this amendment. Both parties were able to address the evidence they regarded as relevant to Item 4 during the hearing, and we invited both parties to provide us with written submissions after the hearing on the scope of Item 4, in particular the meaning of "state-regulated". We received written submissions from both parties and have considered these in reaching our decision.

RELEVANT FACTS

12. We have made the following findings based on the bundle of papers provided to us and the evidence we heard from Miss Farah Cleaver, Dr Sheena Lalani and Officer Amies (each of whom had provided witness statements) on which they were cross-examined. Additional findings of fact are set out in the Discussion.

13. SRL operates a skin culture and aesthetics clinic in Richmond which offers a range of specialist skin treatments, including acne and rosacea treatment, non-surgical facelifts, nail fungus treatment, tattoo removal, skin peels and Injectable treatments.

14. SRL's accountant, Mrs Katherine James, applied to Richmond Council for permission fo the local planning authority to develop the land at 7 Hill Street, Richmond (the premises on which SRL operates the clinic) for change of use of the second floor from D2 to D1 (health and beauty clinic). That application was granted by Richmond Council, subject to conditions, on 24 May 2012. The conditions were:

(1) development must begin within three years of the date of the permission;

(2) none of the buildings can be occupied until arrangements for the storage and disposal of waste have been made and approved by the local planning authority;

(3) no waste shall be left or stored on the site other than within a building or refuse enclosure;

(4) customers shall not be present on the premises before 9am and after 8pm;

(5) the premises shall not be used for any purposes other than for a health and beauty clinic; and

(6) development must be carried out in accordance with the approved plans.

15. The reason for granting the permission is stated as:

> "The proposal has been considered in the light of the Development Plan, comments from statutory consultees and third parties (where relevant) and compliance with Supplementary Planning Guidance as appropriate. It has been concluded that there is not a demonstrable harm to interests of acknowledged importance caused by the development that justifies withholding planning permission. The proposed use does not result in any loss of retail space or frontage and is considered to be complementary to the character and function of Richmond Town Centre and would bring back into use a vacant commercial space. By reason of the lack of external alterations, consented use, and siting within a town centre and high PTAL rating, the scheme will not prejudice the free flow of traffic and highway or prejudice safety; the character, appearance or setting of this BTM, nearby listed buildings or the conservation area in general, nor residential amenities. The scheme will thereby not prejudice the aims of policy."

16. Miss Cleaver stated that she had been registered with the Care Quality Commission, which regulated health and beauty clinics, through a previous employer. She stated that this industry has since been de-regulated and Richmond Council have taken over responsibility to oversee health and beauty clinics from CQC. This involves annual licensing and inspection. HMRC dispute this, arguing that registration with the CQC belongs to the organisation, not to individuals who used to work there, and as such neither SRL nor Miss Cleaver are registered with the CQC. Whilst HMRC accept that SRL has permission to use the premises for D1 use, they do not accept that Richmond Council have the same role that CQC used to hold in relation to clinics. We note that during the compliance check HMRC had sought evidence of SRL's (and Miss Cleaver's) registration with the CQC but none had been provided. Whilst we accept Miss Cleaver's evidence that a previous employer had been registered with CQC (and she had seen this as covering the services she supplied for them), we find that neither SRL nor Miss Cleaver are registered with the CQC. The relevance of the role of Richmond Council is dealt with in the Discussion.

17. SRL holds a medical liability insurance policy in respect of the clinic. A copy of the insurance invoice for the period 13 August 2016 to 12 August 2017 was provided to us, stating that it was a medical liability policy and showing the insurer as Hiscox Insurance Company Ltd, arranged through Hamilton Fraser Cosmetic Insurance. We did not have a copy of any of the policies which had been in force during the periods in issue, but Miss Cleaver confirmed, and HMRC did not dispute, that the clinic had held a medical liability policy throughout its operation. We therefore accept that this was the case.

Injectable treatments

18. The treatments were provided by:

Practitioner	***Dates at SRL***	***Professional registration***
Dr Suha Kersh	August 2012 to December 2012	General Medical Council ("GMC") 4554572
Dr Katherine Barnes	August 2013 to August 2014	GMC 4640282
Dr Sarah Tonks	June 2014 to July 2014	GMC 7410337
Nurse Cheryl Chancer	April 2014 to March 2015	Nursing & Midwifery Council ("NMC")
Dr Sheena Lalani	September 2014 to present	General Dental Council ("GDC") 79964

19. The extracts from the GMC register showed the following:

(1) Dr Kersh was stated not to be on the Specialist Register but, under the heading "Revalidation Information", it is stated that the doctor's designated body is the British College of Aesthetic Medicine. No further evidence was available to explain this, but this is not significant given that Dr Kersh did not provide any Injectables treatments at SRL during the periods which have been assessed.

(2) Dr Barnes is on the Specialist Register as "General (Internal) medicine from 13 Jan 2004, Geriatrics from 13 Jan 2004" and, it also states as "Information for Employers" that she "may work at any grade in the NHS including consultant".

(3) Dr Tonks was stated to have a "Provisional Registration Date" of 29 July 2013 and a "Full Registration Date" of 5 August 2015. No additional evidence was provided to explain the significance of provisional and full registration. Dr Tonks is not on the Specialist Register.

20. Nurse Chancer is registered with the NMC and her register entry states that her recorded qualifications are "Nurse Independent/Supplementary Prescriber".

21. Dr Lalani has been registered with the GDC as a dentist since 2 August 2001. She has worked at the clinic since September 2014 and is now the only practitioner administering Injectables treatments. Dr Lalani provided a witness statement and gave evidence on which she was cross-examined. We found her to be a credible witness.

22. Dr Lalani's evidence, which we accept, was that:

(1) She was trained to provide Botox and fillers about 10 years ago, and has attended many training courses since then.

(2) She considered that her training in the use of Injectables followed well from her training and practise as a dentist – she had been trained in the use of needles (involving gentle and precise skills) and in the anatomy of the face. This is important when injecting Botox and fillers, as mistakes can cause asymmetry or medical problems.

(3) Injectable treatments, in addition to cosmetic use, can be used to treat a variety of medical conditions including TMJ disorders, helping to relax the muscles of the jaw and decrease clenching for individuals that suffer from Bruxism, treating excessive sweating and helping stroke victims and individuals who have been affected by Bell's palsy to achieve better facial symmetry. In her work as a dentist she had seen the consequences of clenching the jaw/grinding of the teeth.

(4) Dr Lalani was not trained as a psychiatrist, but her training both as a dentist and in the provision of Injectables has included training in the psychology of patients, to help assess the impact of treatments on patients and how the condition a patient presents with may be related to their psychology.

(5) When clients attend the clinic for Injectables treatments they will have a one hour appointment and she spends 30-40 minutes discussing with them their concerns, what they want to achieve and the risks involved. She will hand them a mirror and ask them to explain to her what they do or do not like about their appearance.

(6) Dr Lalani suggested that typical patients are educated professionals, who have already researched what the treatment involves. They often feel that their appearance is affecting their confidence, in part due to pressure from their peers; they want to feel better about themselves. Treatment enhances their self-confidence and influences their quality of life.

(7) Dr Lalani was taken by Mr Brothers to some of the consultation notes that were before us. Dr Lalani explained that she completed the form headed "Hyaluronic Acid Dermal Filler/Botox Treatment Administration Sheet". These sheets include a "Medical assessment", and during this part of the consultation she is trying to assess what the client needs, why they want this/how it will help them, and what options are available (including more invasive surgical options that they could seek elsewhere and the risks/benefits of Injectables treatment). Looking specifically at some of the samples:

> (a) Patient A, treated on 5 August 2015, had Botox for "crows' feet". She did a lot of public speaking and felt anxious about her appearance. Dr Lalani's opinion was that this was a very valid reason to have treatment, and helps with the client's quality of life. She did not see this as a cosmetic reason for having treatment.
>
> (b) Patient B, treated on 2 May 2015, had her lips, fold lines and chin treated with filler. Later she had Botox treatment on her forehead. This client had felt that her appearance made her look older, and this affected her confidence. She wanted to restore her personal wellbeing.
>
> (c) Patient C, treated on 11 July 2015, had presented explaining that she had had a difficult childhood and felt that she had to look and be perfect. Her appearance was impacting every aspect of her life. Her jaw had a square appearance, resulting from pronounced muscles where she clenched her jaw a lot. Dr Lalani advised her to start wearing a night guard to reduce the clenching, and she also had Botox treatment. She recalled that the difference this made to the patient was amazing – she was smiling and so much happier as a person.

(8) Dr Lalani stated that she would not treat a client for whom it could cause medical complications. She recalled a client who had scarring on his forearm and he wanted fillers to make the scarring less visible. Dr Lalani was concerned that there was a danger of the fillers accidentally being injected into the vein (as this is a highly vascular area), which could then be dangerous as it would operate like a blood clot. This risk of potentially causing a serious medical issue led her to refuse to administer the treatment

and she suggested that he approach his GP to obtain a more thorough assessment to help find other solutions.

(9) Dr Lalani regarded the clients she treated as having genuine and valid concerns about their appearance. Mr Hilton suggested in cross-examination that clients (including Patient C) sought treatment principally for cosmetic reasons. Dr Lalani considered it depended on what was meant by "cosmetic" - she saw improved confidence and feeling better about themselves as a medical reason.

(10) The approach she takes with clients who attend seeking treatment is the same irrespective of whether they seeking, eg, to improve the result of clenching or for something that Dr Lalani would regard as cosmetic. All clients have a full consultation, and Dr Lalani explains the risks and benefits of Injectables and completes the consultation notes.

Nail fungus treatment

23. The treatment for nail fungus involves using a medical-grade laser, which is operated by Miss Cleaver and her staff, all of whom are trained by medically qualified representatives of the manufacturer of the laser equipment. It was common ground that neither Miss Cleaver nor any of the trained staff are registered health professionals for the purposes of Items 1 and 2.

24. Miss Cleaver gave evidence in her capacity as shareholder and director of SRL, and as one of the practitioners who provide nail fungus treatments. We found her to be a credible witness. She gave the following evidence:

(1) Miss Cleaver outlined the various treatments offered by SRL, explaining that she obtained permission for D1 use from the council to allow the clinic to undertake non-surgical, medical and medical laser treatments.

(2) The clinic has a website and also advertises its services at GP's offices and some local medical centres.

(3) SRL holds medical liability insurance as this is compulsory given the nature of the treatments they perform.

(4) Nail fungus infections are not always serious, but are unpleasant and can cause discomfort, ingrowing toe nails and skin rashes, as well as bad odour. The nail generally becomes discoloured, thickened and distorted. In the most serious cases, the infection causes pain or discomfort and can cause blood poisoning.

(5) There are a range of treatments available for nail fungus, including tablets or creams available from pharmacists. These do not generally work for more severe cases.

(6) Nail fungus treatments are performed at SRL using a medical grade laser. The laser seeks to destroy the fungus which lies under the nail bed, using a high intense heat. These laser machines are very expensive to buy and run and this treatment is only available privately and not through the NHS.

(7) Miss Cleaver explained that when other remedies do not work, clients contact their GPs who send them to clinics such as SRL. As to the absence of referral letters, Miss Cleaver explained that their clients have been to see their GP (as this is recommended by the NHS) but if the condition is too severe for over-the-counter remedies the GP will tell the client about laser treatment. GPs do not have the staffing or funding to provide referral letters for these kinds of treatment. Instead, they mention the possibility of this treatment to clients, who then look into it themselves on the internet. Some local GPs do have information about SRL, and may mention the clinic specifically. Miss Cleaver

accepted that there was no evidence in the sample notes included in the bundle, or that she could otherwise recall, of a direct referral of a client from a GP.

(8) Miss Cleaver confirmed that irrespective of whether clients present with nail fungus that is causing pain or discomfort, or if it is not painful but causes the nail to look unsightly, the approach taken in the consultation and the provision of treatment is the same.

25. Whilst we found Miss Cleaver to be an honest and credible witness, we are not able to accept her evidence without qualification. We note that (as she readily acknowledged) she is not medically qualified herself and accordingly can only place limited weight on her opinion (at [24(4)]) as to the consequences of not treating nail fungus. Furthermore, her statements (at [24(7)]) as to clients having already been to the GP, and the reasons for lack of GP referrals were challenged by HMRC. We note that the consultation forms to which we were taken (see [26]) do refer to the client having been to a GP, and we do infer from this that in many instances a client will have been to their GP. There were no documented referrals before us. This is addressed in the Discussion.

26. We were shown various consultation forms which had been completed in respect of clients seeking nail fungus treatment. These forms set out personal details, how they heard about SRL, medical history and then detail the date and type of treatment. These forms show:

(1) Patient X heard about the clinic from "google - GP" and received nine laser treatments over a period of two years;

(2) Patient Y heard about the clinic from "internet - GP" and received eight laser treatments over seven months; and

(3) Patient Z heard about the clinic from "GP surgery" and received four laser treatments in a month.

RELEVANT LEGISLATION

27. Article 132 of Council Directive 2006/112/EC (the "Principal VAT Directive") provides:

> "(1) Member States shall exempt the following transactions:
> …
> (b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;
> (c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;
> …
> (e) the supply of services by dental technicians in their professional capacity and the supply of dental prostheses by dentists and dental technicians."

28. Section 31(1) VATA 1994 states that 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 (health and welfare) provides that the following are exempt supplies:

Item No.	
1	The supply of services consisting in the provision of medical care by a person registered or enrolled in any of the following—

(a) the register of medical practitioners;

(b) either of the registers of ophthalmic opticians or the register of dispensing opticians kept under the Opticians Act 1989 or either of the lists kept under section 9 of that Act of bodies corporate carrying on business as ophthalmic opticians or as dispensing opticians;

(c) the register kept under the Health and Social Work Professions Order 2001;

(ca) the register of osteopaths maintained in accordance with the provisions of the Osteopaths Act 1936;

(cb) the register of chiropractors maintained in accordance with the provisions of the Chiropractors Act 1994;

(d) the register of qualified nurses and midwives maintained under article 5 of the Nursing and Midwifery Order 2001.

2 The supply of any services consisting in the provision of medical care, or the supply of dental prostheses, by —

(a) a person registered in the dentists' register;

(b) a person registered in the dental care professionals register established under section 36B of the Dentists Act 1984.

2A The supply of any services or dental prostheses by a dental technician.

3. The supply of any services consisting in the provision of medical care by a person registered in the register maintained under article 19 of the Pharmacy Order 2010 or in the register of pharmaceutical chemists kept under the Pharmacy (Northern Ireland) Order 1976.

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.

29. The Notes to Group 7 then include:

"(2) Paragraphs (a) to (d) of item 1 and paragraphs (a) and (b) of item 2 include supplies of services made by a person who is not registered or enrolled in any of the registers or rolls specified in those paragraphs where the services are wholly performed or directly supervised by a person who is so registered or enrolled.

...

(8) In this Group "state-regulated" means approved, licensed, registered or exempted from registration by any Minister or other authority pursuant to a provision of a public general Act, other than a provision that is capable of being brought into effect at different times in relation to different local authority areas. Here "Act" means—

(a) an Act of Parliament;

(b) an Act of the Scottish Parliament;

(c) an Act of the Northern Ireland Assembly;

(d) an Order in Council under Schedule 1 to the Northern Ireland Act 197425;

(e) a Measure of the Northern Ireland Assembly established under section 1 of the Northern Ireland Assembly Act 197326;

(f) an Order in Council under section 1(3) of the Northern Ireland (Temporary Provisions) Act 197227;

(g) an Act of the Parliament of Northern Ireland."

30. Section 73 VATA 1994 deals with the making of assessments as follows:

"**73. Failure to make returns etc.**

(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

…

(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment."

31. The liability decision and the assessments are then appealable under s83(1) VATA 1994:

"**83. Appeals**

(1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—

(a) the registration or cancellation of registration of any person under this Act;

(b) the VAT chargeable on the supply of any goods or services, on the acquisition of goods from another member State or, subject to section 84(9), on the importation of goods from a place outside the member States;

…

(p) an assessment—

(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or

(ii) under subsections (7), (7A) or (7B) of that section; or

(iii) under section 75;

or the amount of such an assessment;…"

32. Section 55 of Town and Country Planning Act 1990 then deals with permissions required for development, and contains the definition of development:

"55. Meaning of "development" and "new development"

(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

...

(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land—

(a) the carrying out for the maintenance, improvement or other alteration of any building of works which—

(i) affect only the interior of the building, or

(ii) do not materially affect the external appearance of the building,

and are not works for making good war damage or works begun after 5th December 1968 for the alteration of a building by providing additional space in it underground;

(b) the carrying out on land within the boundaries of a road by a highway authority of any works required for the maintenance or improvement of the road but, in the case of any such works which are not exclusively for the maintenance of the road, not including any works which may have significant adverse effects on the environment;

(c) the carrying out by a local authority or statutory undertakers of any works for the purpose of inspecting, repairing or renewing any sewers, mains, pipes, cables or other apparatus, including the breaking open of any street or other land for that purpose;

(d) the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such;

(e) the use of any land for the purposes of agriculture or forestry (including afforestation) and the use for any of those purposes of any building occupied together with land so used;

(f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class.

(g) the demolition of any description of building specified in a direction given by the Secretary of State to local planning authorities generally or to a particular local planning authority.

…"

SKIN RICH LIMITED'S SUBMISSIONS

33. Mr Brothers accepted that he needed to establish that both Injectables and nail fungus treatment qualified for exemption. Mr Brothers accepted that Items 1 and 2 could not apply to the provision of nail fungus treatment as this treatment was not provided by a registered health professional. He relied solely on Item 4 for that treatment (and relied on that Item in the alternative for the Injectables treatment).

34. Mr Brothers submitted that the tests to be applied to the Injectables treatments under Items 1 and 2 are:

(1) whether treatments are undertaken by registered health professionals;

(2) if so, is that person registered to provide that treatment(s);

(3) if so, is the treatment the provision of "medical care" for which the primary purpose of the treatment is to protect, restore or maintain the health of the individual (patient) concerned.

Registered health professionals and whether registered to provide the treatment (Items 1 and 2)

35. The practitioners who have provided the Injectables treatments were notified to HMRC in the course of the compliance check. Mr Brothers referred to the details of each practitioner (see [18] above) and submitted that there is little doubt that the practitioners are appropriately registered.

36. During the course of the compliance check, HMRC continually put SRL to proof that the registered health professionals were appropriately qualified to perform the Injectables treatments. Mr Brothers submitted that this was an unreasonable position to adopt. Miss Cleaver is not able to talk of the medical requirements of the Injectables treatments, which is why that work is necessarily subcontracted out to the registered health professionals.

37. The very fact that the practitioners conduct Injectables treatments and are subject to registration and regulation by either the GMC, the GDC or the NMC is evidence itself that the practitioners are suitably qualified. It is inconceivable that members of these Councils would undertake work for which they are not qualified - that is the very essence of registration with the appropriate Council.

38. The services for which exemption is claimed is entirely consistent with the strict interpretation of (what is now) Group 7, as adopted in *Dr Anthony Raymond Evans* [1976] VTD 285.

39. Mr Brothers referred to the evidence from Dr Lalani as to her qualifications and submitted that we are entitled to infer the same for the remaining practitioners.

Medical care (Items 1 and 2)

40. The question is whether the treatment is the provision of "medical care", for which the primary purpose of the treatment is to protect, restore or maintain the health of the individual (patient) concerned

41. SRL has never disputed that some of its (other) services are cosmetic. SRL deals with the VAT treatment of those services correctly. However, SRL has also always undertaken medical treatments using medical practitioners for those treatments.

42. Mr Brothers submitted that the Injectables treatments are for medical purposes. He referred us to *Skatteverket v PFC Clinic AB* (Case C-91/12) [2013] STC 1253, arguing that this also tells us that cosmetic services which provide "protection, maintenance or restoration of human health" as their principal purpose would qualify to be exempt from VAT.

43. In the alternative, if we were to find that the Injectables treatments were partly or mainly cosmetic in nature, it was submitted that the evidence supported the conclusion that the principal purpose, in any event, is the "protection, maintenance or restoration of human health".

44. Although during the hearing Mr Brothers confirmed that the nail fungus treatment could not qualify for exemption under Items 1 or 2, we had received submissions in SRL's skeleton argument on its characterisation as medical care, and these were as follows. (They remain relevant in any event to Item 4.)

45. Mr Brothers referred to the evidence of Miss Cleaver and submitted that the treatment is necessary for the health and well-being of the client, either on a preventative or a restorative basis, and that the NHS has undertaken a programme of outsourcing of this treatment. That NHS England still advises clients to consult their GP prior to treatment shows the underlying health aspect to this ailment and corresponding treatment.

Care or medical treatment (Item 4)

46. The "provision of care or medical or surgical treatment" is not defined and so must be taken to have its ordinary meaning, noting that it is framed as "care" or "medical…treatment".

47. Mr Brothers referred to the evidence of Dr Lalani, who is registered with the GDC and has been trained in the provision of Injectables. Whilst she had not been trained in psychology or to administer psychological treatments, she confirmed that her training had equipped her with the skills to assess the psychological effect on clients as part of her medical assessment. She assessed all patients for treatment and recorded this on the treatment sheets. This treatment meets the criteria of the provision of care or medical treatment.

48. The laser treatment for nail fungus is provided by Miss Cleaver and her other staff. Miss Cleaver was registered with the CQC, and SRL's business is insured under a medical insurance policy. Miss Cleaver's testimony had been that nail fungus is a virus which can lead to pain, discomfort and, in more serious cases, complications up to and including blood poisoning. The treatment record for patients showed that patients may receive a number of treatments, dependant upon their condition, over a period of time. Miss Cleaver had explained how the patients came to the clinic, and stated that, at this time, the condition was beyond self-medication (ie products which could be bought from a pharmacist). The treatment provided at the clinic involved the use of a medical laser. This treatment meets the criteria of the provision of care or medical treatment.

State-regulated institution (Item 4)

49. On 24 May 2012, Richmond Council granted the licence for the use of SRL's premises as class D1 for use as a "health and beauty clinic". SRL's business commenced in August 2012.

50. The grant of this licence was made in accordance with the Town and Country Planning Act 1990 ("TCPA 1990"). The classes of premises were set down by The Town and Country Planning (Use Classes) Order of 1987 (the "TCPO 1987"). Part D TCPO 1987 sets out the D1 classes as:

> "a For the provision of medical or health services except the use of premises to the residence of the consultant or practitioner
>
> b As a creche, day nursery or day centre
>
> c For the provision of education
>
> d For the display of works of art (otherwise than for sale or hire)
>
> e As a museum
>
> f As a public library or public reading room
>
> g As a public hall or exhibition hall
>
> h For, or in connection with, public worship or religious instruction"

51. SRL's business is self-evidently registered within use for D1(a).

52. Turning to the definition of a "state-regulated institution", the first consideration is whether TCPA 1990 is a "general public Act" as required by Note (8) given that SRL's

premises are licensed for use under that Act. The Government website at www.legislation.gov.uk lists all UK public general acts from 1801 onwards, and that list includes TCPA 1990.

HMRC'S SUBMISSIONS

53. Historically, HMRC took the view (and the UK's legislation so provided) that supplies of all services by a person registered or enrolled as a medical practitioner (as further provided in VATA 1994) were exempt from VAT. In the Joined Cases of *d'Ambrumenil and another v Customs and Excise Commissioners* (C-307/01) *and Unterpertinger v Pensionsversicherungsanstalt der Arbeiter* (C-212/01) [2003] ECR I-13989, however, the Court of Justice of the European Union ("ECJ") ruled that the predecessor to Article 132(1)(c), namely Article 13A(1)(c) of Council Directive 77/388/EEC (the "Sixth VAT Directive") did not exempt all services that could be effected in the exercise of the medical and paramedical professions, but only those carried out for diagnosing, treating and if possible curing diseases and health disorders. The test was what the principal purpose of the service was.

54. With effect from 1 May 2007, Items 1 and 2 of Group 7 were amended such that the exemption was limited to the supply of services consisting in the provision of medical care by registered health professionals.

Registered health professionals and whether registered to provide the treatment (Items 1 and 2)

55. In the present case the services are not carried out within the profession in which the relevant professionals are registered. It is not sufficient for the relevant professional to appear on one of the specified registers – that register must also set out the field in which that person is qualified to practise.

56. The Commissioners of Customs and Excise argued in *Evans* that only the services made by a nurse in his or her registered capacity could and should fall within the exemption, and that Dr Evans's request for a strict interpretation of the law would lead to an absurdity as all supplies made by a nurse would fall within the exemption. The Tribunal agreed with the Commissioners and stated that:

> "…item 1 must be construed to be limited to services supplied both by the persons therein set out and in the course of their professions, vocations or businesses as such. Otherwise, it is our view that the exempting provisions of Group 7 would amount to an absurdity…"

57. Although this decision preceded the Principal VAT Directive, HMRC's position is that it remains authority. HMRC submit that SRL has failed to demonstrate that the supplies are made by health professionals acting in their registered capacity. SRL has submitted no satisfactory evidence showing that any of the individuals who work in the clinic are appropriately qualified, for the purposes of the exemption, to carry out the treatments in question. Dr Lalani, who carries out Injectables treatments, is registered as a dentist. Some individuals are registered with the GMC, but there is no confirmation of their specific areas of expertise.

58. SRL carries the burden of proof to demonstrate that the treatments are performed by appropriately registered health professionals and HMRC submit that SRL has failed to do this based on the evidence provided.

Medical care (Items 1 and 2)

59. HMRC submit that *Skatteverket* confirms that cosmetic treatments must have the protection, maintenance or restoration of human health as the principal aim in order to be exempt from VAT. The ECJ concluded at [39] that:

> "…Article 132(1)(b) and (c) of the VAT Directive must be interpreted as meaning that: - supplies of services … consisting in plastic surgery and other cosmetic treatments, fall within the concepts of "medical care" and "the provision of medical care" within the meaning of Article 132(1)(b) and (c) where those services are intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health…" .

60. *Ultralase Medical Aesthetics Ltd v HMRC* [2009] UKFTT 187 (TC) confirms that services of cosmetic treatment done purely for aesthetic reasons are standard rated.

61. Whilst SRL's treatments may result in improved self-esteem of the recipient, HMRC submit that the principal purpose remains for cosmetic reasons. Mr Hilton referred to Dr Lalani's evidence that she asked clients to look in a mirror and explain what they did and did not like about their face as illustrating this. Although supplies of cosmetic services may be exempt if they have as their purpose the diagnosis, treatment and, in so far as possible, cure of a disease or health disorder, SRL has not provided evidence to demonstrate that this is the case. Indeed, whilst SRL has claimed that Botox can be used to treat issues such as excessive sweating, and fungal nail treatment can prevent warts and blood poisoning, none of the evidence confirms that these factors formed the principal aim of the treatments.

62. HMRC accepted that supplies of nail fungus treatment by SRL may be exempt where they are undertaken as an element of a health care treatment programme. However, SRL has provided no evidence of any patients being referred by a GP and has in fact claimed that GPs do not refer patients in writing due to resourcing issues. HMRC consider that a GP recommending these treatments would make a documented referral – if this had occurred then this may demonstrate that the treatment had the required purpose.

63. The burden of proof rests with SRL to demonstrate that the principal purpose of the treatments is for medical reasons. HMRC submit that the evidence does not indicate that this is the case.

Care or medical treatment (Item 4)

64. HMRC submitted that SRL cannot rely on Item 4 as its services do not consist of "care or medical or surgical treatment". They referred to the decision in *Ultralase* in which it was decided that services carried out in a hospital and/or other licensed institution for cosmetic purposes are standard rated.

65. (HMRC did not make any submissions on the extent to which "care or medical or surgical treatment" differs from the "provision of medical care" under Items 1 and 2.)

State-regulated institution (Item 4)

66. HMRC accepted that SRL is an "institution", submitting that the question therefore is whether it is "state-regulated".

67. HMRC understand SRL's argument to be that it meets the definition in Note (8) having been granted permission for D1 use of its premises by Richmond Council in accordance with TCPO 1987.

68. Entities which provide healthcare services are required to register with the Care Quality Commission ("CQC") pursuant to the Health and Social Care Act 2008 ("HSCA 2008"). Specifically, it is a criminal offence for a service provider to carry on a "regulated activity" without being registered pursuant to section 11 of the HSCA 2008.

69. Regulated activity includes the provision of "health or social care in, or in relation, to England" and also includes the supply of staff who are to provide such care under s8(2) and (3). Miss Cleaver stated in emails dated 26 September 2016 and 17 December 2016 that she

was registered with the CQC via her previous employer, and gave evidence that her industry was then de-regulated and Richmond Council took over responsibility to oversee treatments.

70. According to the CQC website, a company should register as an organisation and "it will be the organisation itself that registers, not the people who control it (although, from April 1 2015, organisations will be subject to a fit and proper person requirement in relation to their directors and those in equivalent positions)." This means that any previous registration by Miss Cleaver does not cover SRL as a limited company.

71. HMRC submit that the intended reading of Item 4 is that a "state-regulated institution" is akin to a hospital and the services it provides. The fact that SRL is not registered with the CQC, as all hospitals are, strongly supports HMRC's position that SRL is not a "state-regulated institution", as well as that SRL's treatments are cosmetic in nature.

72. Furthermore, whilst SRL has claimed that Richmond Council oversees the nail fungus treatments instead of the CQC, it has provided no evidence to substantiate this.

73. In *HMRC v LIFE Services Limited* [2017] UKUT 0484 (TCC), the Upper Tribunal considered an argument around Item 9, which exempts supplies of welfare services by a state-regulated private welfare institution or agency. The definition in Note (8) applies to both Items 4 and 9. Life Services Limited argued that the provisions of the Care Act 2014 "…provide statutory authority for LIFE being regarded as "state-regulated" as that term is used in Item 9 by virtue of it being registered with the Gloucestershire County Council and being subject to oversight by the Council."

74. The Upper Tribunal rejected the argument and ruled that:

> "72. In our view, Note (8) contemplates that there would need to be more than a simple delegation of functions before an entity could be said to be "approved" and therefore state-regulated.' (paragraph 71) 'In our view, the provisions of the Care Act 2014 to which we are referred do no more than impose duties on the relevant local authorities to provide the relevant services and give it the power to delegate its functions to another person. The provisions say nothing about how those services are to be regulated.
>
> …
>
> 74…the correct approach is to examine whether the person who has the obligation to provide the services in question is subject to state regulation in the provision of those services…"

75. HMRC submit that these principles apply to the instant case. Whilst the TCPO 1987 contains a "use class" for "any use not including a residential use for the provision of any medical or health services", it contains no provisions for how such services are to be regulated.

76. HMRC referred to the provisions relating to planning as s22 and s23 of the Town and Country Planning Act 1971. (We note that that Act is no longer in force, and planning matters are now dealt with by TCPA 1990. The replacement provisions are s55 and s56 respectively.)

77. Planning permission is required where land is "developed". Section 55 TCPA 1990 deems land to be developed where there is a material change of use, however, s55(2)(f) provides that land is not considered to be developed where the change of use occurs within a class.

78. The classes in question are set out by TCPO 1987, and Class D1 is set out at [50] above. It follows from s55(2)(f) that, were SRL to change its activities from the provision of medical or health services (notwithstanding HMRC's position that the services are cosmetic in nature)

to the provision of, say, education, then no planning permission would be required because this would be a movement within the class.

79. HMRC accordingly submit that it is clear that the planning permission in question cannot amount to state regulation of the services supplied by SRL because, clearly, so far as the Council is concerned, a profound change in those services (such as a move from health care to education), provided it fell within class D1, would not trigger the requirement for planning permission.

80. The D1 use class is simply permission by Richmond Council for the building to be used in a particular way. The planning report shows that the Council, when considering the application, was clearly concerned with maintaining the character of the town centre. The report lists the proposed treatments which SRL had stated that it would offer but there is no specific mention of nail fungus treatments. Crucially, the report also makes no mention of any responsibility by Richmond Council for the quality of the treatments.

81. Therefore, HMRC submit that the D1 planning use does not corroborate SRL's claim that the Council oversees the nail fungus treatments. It is plain from the wording of TCPO 1987 that it is intended to make provisions relating to town planning and not to the regulation of care.

DISCUSSION

82. Article 132(1) of the Principal VAT Directive requires Member States to exempt certain activities in the public interest, and these include:

> (1) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature (sub-paragraph (b));
>
> (2) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned (sub-paragraph (c)); and
>
> (3) the supply of services by dental technicians in their professional capacity and the supply of dental prostheses by dentists and dental technicians (sub-paragraph (e)).

83. The UK legislation implementing this Article is in Group 7. We have addressed below the ways in which the implementing legislation might be said to take a different approach from the Directive. At this stage we merely note that the categories have not simply been transposed into the UK legislation.

> (1) Item 1 of Group 7 exempts the "provision of medical care" by a person registered on the register of medical practitioners, the register of qualified nurses and certain other specified registers.
>
> (2) Item 2 exempts the "provision of medical care, or the supply of dental prostheses" by a person registered in the dentists' register.
>
> (3) Item 4 exempts the "provision of care or medical or surgical treatment" in any "hospital or state-regulated institution".

84. The Notes to Group 7 (which form part of Schedule 9 itself) are particularly important in the present instance.

85. Note (2) to Group 7 provides that paragraphs (a) to (d) of Item 1 and (a) and (b) of Item 2 (ie the specified registers) include supplies of services made by a person who is not registered or enrolled in any of the registers specified where the services are "wholly performed or directly supervised" by a person who is so registered or enrolled. The Injectables treatments were

supplied by SRL (which, as a company, is (evidently) not on the professional registers) to its clients, and it is this Note which enables SRL to benefit from the exemption if the services supplied are wholly performed by a person registered or enrolled in the specified registers for the purposes of Items 1 and 2 and the remaining requirements of those Items are satisfied. The Injectables treatments were provided (during the periods of assessment) by Dr Barnes, Dr Tonks, Nurse Chancer and Dr Lalani. It was common ground that the Injectables treatments were "wholly performed" by these practitioners for this purpose.

86. Note (8) defines "state regulated" for the purposes of Item 4 and that is considered below.

Provision of medical care (Items 1 and 2)

87. The meaning of the provision of medical care is central to the scope of the exemption in Items 1 and 2. The same phrase is used in Article 132(1)(c) of the Principal VAT Directive and has been considered by the ECJ in its body of case law.

88. The decision of the ECJ in *d'Ambrumenil* concerned whether a doctor, acting as an expert medical witness in medical negligence, personal injury and disciplinary proceedings and as a professional arbitrator and mediator benefitted from the exemption. The relevant provisions were Article 13A(1)(c) of the Sixth VAT Directive and Item 1(a). Article 13A(1)(c) exempted "the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned", and was thus the same as Article 132(1)(c). Item 1(a) was different at that time, as referred to in HMRC's submissions, and stated that "the supply of services by a person registered or enrolled in any of the following...the register of medical practitioners" was exempt.

89. At [52] to [61] the ECJ decided as follows:

> "52. According to the Court of Justice's case law, the exemptions envisaged in article 13 of the Sixth Directive are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person: see, in particular, *Sparekassernes Datacenter (SDC) v Skatteministeriet* (Case C-2/95) [1997] ECR I-3017 , 3051, para 20, and *Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I in Berlin* (Case C-141/00) [2002] ECR I-6833, 6880, para 28. Those exemptions constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one member state to another ...
>
> 53. As the Commission has correctly observed, article 13(A)(1)(c) does not exempt all the services which may be effected in the exercise of the medical and paramedical professions, but only "provision of medical care", which constitutes an independent concept of Community law. It follows that services effected in the exercise of those professions remain subject to the general rule making them subject to VAT set out in article 2(1) of the Sixth Directive, if they do not correspond to the concept of "the provision of medical care", or to the terms of any other exemption provided for by that Directive.
>
> 54. Even if other services provided by doctors may share the characteristics of activities in the public interest, it follows from the court's case law that article 13(A) of the Sixth Directive does not exempt from VAT every activity performed in the public interest, but only those which are listed and described in great detail: *Institute of the Motor Industry v Customs and Excise Comrs* (Case C-149/97) [1998] ECR I-7053 , 7080, para 18, and *D v W* (Case C-384/98) [2000] ECR I-6795 , 6818, para 20.

> 55. The United Kingdom Government's argument seeking to extend the scope of the exemption under article 13(A)(1)(c) to all the activities normally included in the functions of doctors and to which Directive 93/16 refers should therefore be rejected. The objectives pursued by that Directive, which is intended to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications, require that the activities of doctors be therein described in such a way as to cover all of their activities in the various member states, whereas the definition of the activities covered by that exemption, which creates an exception to the principle of subjection to VAT, fulfils different objectives.
>
> 56. It should be noted, furthermore, that the fact that the same persons may provide both services exempted from VAT and services subject to that tax does not constitute an anomaly in the context of the system of deduction put in place by the Sixth Directive, since articles 17(5) and 19 thereof specifically govern that situation.
>
> 57. In relation to the concept of "provision of medical care", the court has already held in para 18 of its judgment in *D v W* , at p 6818, and restated in para 38 of its judgment in *Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I in Berlin* (Case C-141/00) [2002] ECR I-6833 , 6882, that that concept does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders.
>
> 58. While it follows from that case law that the "provision of medical care" must have a therapeutic aim, it does not necessarily follow therefrom that the therapeutic purpose of a service must be confined within an especially narrow compass: see, to that effect, *Commission v France* [2001] ECR I-249 , 272, para 23. Para 40 of the judgment in *Kügler* shows that medical services effected for prophylactic purposes may benefit from the exemption under article 13(A)(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 are 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 health care, which is common to both the exemption under article 13(A)(1)(b) and that under (c) of that paragraph: see *Commission v France* , para 23, and *Kügler* , para 29.
>
> 59. 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 13(A)(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 health care and of making it more accessible to individuals.
>
> 60. As the Advocate General correctly pointed out in paras 66-68 of her opinion, 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, but rather the provision of advice required prior to the taking of a decision with legal consequences, the exemption under article 13(A)(1)(c) does not apply to the service."

90. It is clear from this decision that the provision of medical care cannot include treatments carried out for a principal purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders. Whilst this case specifically concerned the

provision of medical care within Item 1, we see no principled reason for a distinction to be drawn between Items 1 and 2 in this respect.

91. In *Skatteverket* the ECJ considered the treatments provided by a clinic which provided cosmetic and reconstructive plastic surgery as well as skincare services. The Skatteverket sought to deny input tax recovery on the basis that the services were exempt under Article 132(1)(b) or (c):

> "23 With respect to those points, it must be recalled from the outset that the terms used to specify the exemptions in Article 132 of the VAT Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all goods and services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 should be construed in such a way as to deprive the exemptions of their intended effect (see by analogy, in particular, Case C-86/09 *Future Health Technologies* [2010] ECR I-5215, paragraph 30 and the case-law cited).
>
> 24 As regards medical services, it is apparent, by analogy, from the case-law on Directive 77/388 that Article 132(1)(b) and (c) of the VAT Directive, which have distinct fields of application, are intended to regulate all exemptions of medical services in the strict sense (see *Future Health Technologies*, paragraphs 26, 27 and 36 and the case-law cited). Article 132(1)(b) of that directive covers all services supplied in a hospital environment while Article 132(1)(c) thereof covers medical services provided outside such a framework, at the private address of the person providing the care, at the patient's home or at any other place (see, to that effect, Case C-141/00 *Kügler* [2002] ECR I-6833, paragraph 36, and *Future Health Technologies*, paragraph 36).
>
> 25 Accordingly, the concept of 'medical care' in Article 132(1)(b) of the VAT Directive and that of 'the provision of medical care' in Article 132(1)(c) are both intended to cover services that have as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (see *Future Health Technologies*, paragraphs 37 and 38).
>
> 26 In that regard, it should be borne in mind that, whilst 'medical care' and 'the provision of medical care' must have a therapeutic aim, it does not necessarily follow that the therapeutic purpose of a service must be confined within a particularly narrow compass (see *Future Health Technologies*, paragraph 40 and the case-law cited).
>
> 27 Accordingly, it is clear from the case-law that medical services effected for the purpose of protecting, including maintaining or restoring, human health can benefit from the exemption under Article 132(1)(b) and (c) of the VAT Directive (see *Future Health Technologies*, paragraphs 41 and 42 and the case-law cited).
>
> 28 It follows, in the context of the exemption laid down in Article 132(1)(b) and (c) of the VAT Directive, that the purpose of the services such as those at issue in the main proceedings is relevant in order to determine whether those services are exempt from VAT. That exemption is intended to apply to services whose purpose is for diagnosing, treating or curing diseases or health disorders or to protect, maintain or restore human health (*Future Health Technologies,* paragraph 43).

> 29 Thus, services such as those at issue in the main proceedings, in so far as their purpose is to treat or provide care for persons who, as a result of an illness, injury or a congenital physical impairment, are in need of plastic surgery or other cosmetic treatment may fall within the concept of 'medical care' in Article 132(1)(b) of the VAT Directive and 'the provision of medical care' in Article 132(1)(c) thereof respectively. However, where the surgery is for purely cosmetic reasons it cannot be covered by that concept.
>
> …
>
> 33 As far as concerns whether the subjective understanding that the recipients of services, such as those at issue in the main proceedings, have must be taken into consideration in the assessment of the purpose of a specific intervention, which is the subject of the third question, it follows from the case-law that the health problems covered by exempt transactions under Article 132(1)(b) and (c) of the VAT Directive may be psychological (see to that effect, in particular, Case C-45/01 *Dornier* [2003] ECR I-12911, paragraph 50, and Joined Cases C-443/04 and C-444/04 *Solleveld and van den Hout-van Eijnsbergen* [2006] ECR I-3617, paragraphs 16 and 24).
>
> 34 However, the subjective understanding that the person who undergoes plastic surgery or a cosmetic treatment has of it is not in itself decisive for the purpose of determining whether that intervention has a therapeutic purpose.
>
> 35 Since that is a medical assessment, it must be based on findings of a medical nature which are made by a person qualified for that purpose.
>
> 36 It follows that the fact, referred to in the fourth question, that services such as those at issue in the main proceedings are supplied or undertaken by a licensed member of the medical profession or that the purpose of such interventions is determined by such a professional, may influence the assessment of whether interventions such as those at issue in the main proceedings fall within the concepts of 'medical care' or 'medical treatment' within the meaning of Article 132(1)(b) and (c) of the VAT Directive respectively."

92. The ECJ thus clearly stated that:

(1) exemption is intended to apply to services whose purpose is for diagnosing, treating or curing diseases or health disorders or to protect, maintain or restore human health (at [28]) – and, following *d'Ambrumenil*, this must be their principal purpose;

(2) services whose purpose is to treat or provide care for persons who, as a result of an illness, injury or a congenital physical impairment, are in need of plastic surgery or other cosmetic treatment may fall within the concept of medical care. However, where the surgery is for purely cosmetic reasons it cannot be covered by that concept (at [29]);

(3) the subjective understanding that the person who undergoes plastic surgery or a cosmetic treatment has of it is not in itself decisive for the purpose of determining whether that intervention has a therapeutic purpose (at [34]); and

(4) the fact that services are supplied or undertaken by a licensed member of the medical profession or that the purpose of such interventions is determined by such a professional may influence the assessment of whether interventions fall within the concepts of medical care or medical treatment (at [36]).

93. Before seeking to apply these principles to the facts in the present case, we note that we do not consider that the decision of this Tribunal in *Ultralase* is particularly helpful for this purpose. In that case the taxpayer provided surgical treatments for patients in hospitals and its

own private clinics. The taxpayer claimed that as all of its treatments were cosmetic, not medical, they should be standard-rated. HMRC contended that the location of the treatments was sufficient to bring the supplies within the exemption provided by Item 4. The Tribunal concluded that the cosmetic services were standard rated – but neither party had argued that the services were anything other than cosmetic services.

94. In order to constitute the provision of medical care, SRL must establish that the principal purpose of the Injectables treatments for which exemption is claimed is to diagnose, treat or cure diseases or health disorders, or to protect, maintain or restore human health.

95. We do not consider that the facts that the clinic has permission from Richmond Council for D1 use or that it holds medical liability insurance are relevant to this question.

96. Dr Lalani explained (see [22(3)]) the various medical reasons why a person may seek Injectables treatment. We recognise that where the primary purpose of a client seeking treatment is for these reasons then, in line with the decision in *Skatteverket*, this may be medical care. However, the evidence did not support this being the primary purpose for which treatment was sought from SRL. There was no evidence of clients seeking treatment to assist with excessive sweating or Bell's palsy, and Dr Lalani could not recall clients having attended for such reasons. Dr Lalani did refer to Patient C, who had suffered from the consequences of clenching, but Dr Lalani had told us that this client had come to the clinic as she wanted to improve her appearance.

97. This leads us to consider the ECJ's conclusion that the subjective understanding that the person who seeks treatment has of it is not in itself decisive for the purpose of determining whether that intervention has a therapeutic purpose, and the fact that services are undertaken by a medical professional or that the purpose of such intervention is determined by such a professional may influence the assessment of whether interventions fall within the concept of medical care.

98. The administration sheets indicate that some patients wanted to improve their appearance – this is the subjective understanding of the person seeking treatment to which the ECJ refers. We do accept Dr Lalani's clear and thoughtful evidence that there are occasions where the client's concern about their appearance affects their confidence and makes them anxious. She saw improved confidence and feeling better about yourself as a medical reason for seeking treatment. The decision in *Skatteverket* confirms that the determination of the purpose of intervention by a medical professional may influence our assessment of whether the treatments constitute medical care. Dr Lalani acknowledged that she has not been trained as a psychiatrist, although she has had some training in the psychology of patients, and this does affect the weight which we attach to her conclusions as to the reasons for clients seeking treatments. Furthermore, her evidence that clients are often happier and feel better about themselves after treatment could apply irrespective of the purpose for which treatment is sought.

99. There are, however, further hurdles to SRL's claim that the Injectable treatments were provided for the principal purpose of protecting, maintaining or restoring human health:

> (1) Dr Lalani confirmed that where a client seeks treatment to improve their appearance then, unless there is a reason why she is concerned it would not be safe to do so, she performs that treatment.
>
> (2) The papers included administration sheets in respect of other clients (of both Dr Lalani and Nurse Chancer) where there was no evidence of any medical assessment having been undertaken, in contrast to those to which we were taken by Mr Brothers during Dr Lalani's evidence. This is not to say that we find that these medical assessments did not take place – but no evidence has been provided by SRL that they did.

(3) HMRC had specifically requested evidence of referrals from other "appropriately qualified persons", such as a client's GP, and none was provided.

(4) We have not heard evidence from Dr Tonks, Dr Barnes or Nurse Chancer as to the way in which they dealt with clients and performed treatments during the periods which HMRC have assessed. Mr Brothers invited us to infer that the approach taken by Dr Lalani (the consultation with the client and keeping a record of concerns discussed and reason for treatment) was also taken by the other practitioners. HMRC objected to this. We do not consider that it is appropriate for us to make any such inference. No evidence was provided which supports the submission that this same approach was taken by Dr Barnes, Dr Tonks or Nurse Chancer. Furthermore, the sample administration sheets which were provided (although mainly completed by Dr Lalani) did include some by Nurse Chancer which are much shorter and do not contain the distinct section on the medical assessment.

100. In conclusion, SRL has not satisfied us that the principal purpose of the Injectable treatments is to protect, restore or maintain the health of the individual rather than for cosmetic reasons.

101. Mr Brothers made an alternative submission, namely that if we were to find that the Injectables treatments were partly or mainly cosmetic in nature, the evidence nevertheless supports the conclusion that the principal purpose, in any event, is the protection, maintenance or restoration of human health. As we understand this submission, Mr Brothers is drawing a distinction between the purpose of a treatment and its effects (or nature). To the extent that Mr Brothers is submitting that a treatment may have a cosmetic benefit but this does not preclude its also having the principal purpose of protecting, maintaining or restoring health, we agree (although on the facts we do not find that this principal purpose has been established).

102. Our conclusions on the Injectables treatment not constituting the provision of medical care mean that those supplies cannot be exempt under Item 1 or 2. We have nevertheless considered the remaining requirements of those Items as they were argued before us.

Registered health professionals and fields of expertise (Items 1 and 2)

103. Items 1 and 2 exempt relevant supplies "by a person registered or enrolled in any of the following...", and then set out the specified registers. No additional requirements are set out therein as to the level of qualification of the professional or any other matter. Similarly, Article 132(1)(c) refers to the provision of medical care in the exercise of the medical profession without further clarification.

104. The Injectable treatments were provided by Dr Barnes, Dr Tonks, Nurse Chancer and Dr Lalani during the periods 05/13 to 11/16. Their registrations are set out at [18] to [21]. Before dealing with the parties' submissions on these practitioners' expertise, we start with the status of Dr Tonks.

105. Dr Tonks only worked at the clinic for a short period of time, from June to July 2014, and overlapped throughout with Nurse Chancer. We have no information as to the number of treatments she performed during this period. However, the GMC register states that her Provisional Registration Date was 29 July 2013, and her Full Registration Date was not until 5 August 2015. No evidence was provided as to what "provisional registration" involves or means, save that we can infer that it was, somehow, less than a full registration. Item 1(a) refers only to a person being "registered or enrolled in... the register of medical practitioners or the register of medical practitioners with limited registration". No additional guidance or commentary is given as to what this means, but we consider that we should take this to mean that an individual's registration is permanent (at least unless and until it is revoked), rather than

having a temporary, or provisional, character to it. We therefore conclude that Dr Tonks was not a registered healthcare professional within Item 1(a) when she was providing the Injectables treatments.

106. HMRC submitted that the registered healthcare professionals providing the treatment should have their specialism as stated on the relevant medical registration as the provision of treatments such as Injectables. Mr Hilton also noted, in the context of Dr Kersh whose designated body was said to be the British College of Aesthetic Medicine, that it was not stated that the aesthetics related to treatments to the face rather than other parts of the body and submitted that this was not sufficient evidence of the required expertise. (Whilst the status of Dr Kersh is not relevant to this appeal, we nevertheless set out this submission as it clearly illustrates the position which HMRC are taking.)

107. We cannot see any support in the legislation for such a narrow interpretation.

108. We also consider that the approach put forward by Mr Brothers, namely that the fact that practitioners conduct Injectables treatments and are registered by one of the medical councils is itself evidence that the practitioners are suitably qualified, is incorrect. This is particularly so given that one of the practitioners, Dr Lalani, is registered as a dentist (and practised as a dentist for a number of years) yet was conducting Injectables treatments. We deal with this further below, but note that this illustrates the reason we consider Mr Brothers' submission to be flawed – we do not suppose it to be correct that, say, a practitioner registered as an osteopath (on the register in Item (ca)) should be assumed to be qualified to act as a midwife simply because they were practising as such.

109. We conclude that it will be a question of fact in each case as to whether the person performing the treatment is suitably qualified to perform the treatments for the purposes of Items 1 and 2. The fact that a person's training or expertise in a particular area is not cited on the relevant medical registration should not be determinative of the application of exemption.

110. We are, however, mindful of the fact that we have not been provided with any evidence of the training or expertise of Dr Barnes or Nurse Chancer. The only evidence we have is that of their medical registrations. We do not regard this as sufficient.

111. On the other hand, we accept Dr Lalani's evidence as to her training in the provision of Injectables treatments. We did consider whether Dr Lalani's registration with the GDC (which is a register within Item 2 rather than a register within Item 1) of itself precludes the availability of exemption. The Principal VAT Directive appears to contain different exemptions dealing with doctors and dentists – Article 132(1)(c) deals with the provision of medical care in the exercise of the medical professions (as defined by the Member State concerned) and Article 132(1)(e) deals with the supply of services by dental technicians in their professional capacity and the supply of dental prostheses by dentists and dental technicians. It might be said that Article 132(1)(c) has been enacted in Item 1 and Article 132(1)(e) in Item 2. If this were the case, this would seem to us to suggest that the exemption cannot apply to the provision of a person specified in one Item of services specified in the other Item. But Article 132(1)(e) does not refer to the supply of services by dentists themselves rather than dental technicians, and the draftsman was clearly aware of different uses of terminology. This leaves it open for us to conclude that the provision of medical care by a dentist could be within Article 132(1)(c). Viewed in this light, we conclude that, if (contrary to our conclusion on this point above) the Injectables treatments comprised the provision of medical care, then the supply of such services by Dr Lalani would be exempt within Item 2.

Provision of care or medical or surgical treatment (Item 4)

112. Items 1 and 2 apply to the "provision of medical care", whereas Item 4 applies to "care or medical or surgical treatment". On a straightforward reading of these phrases, we consider that Item 4 is capable of applying to a wider range of services, in particular by reference to the use of the word "care" rather than the phrase "medical care". This means that our conclusion that the Injectables treatments did not qualify as the provision of medical care does not of itself preclude them falling within Item 4. In any event, we need also to consider the provision of nail fungus treatment.

113. This difference in terminology can be found in the Principal VAT Directive as well. Article 132(1)(c), to which Items 1 and 2 give effect, refers to the "provision of medical care" whereas Article 132(1)(b), to which Item 4 gives effect, refers to "hospital and medical care and closely related activities".

114. We have noted that in *Skatteverket*, the ECJ decided (at [25]) that the concept of medical care in Article 132(1)(b) only covered services that, like those within Article 132(1)(c), had as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders. We conclude that this applies equally to "medical...treatment" within Item 4. However, that case was not concerned with the meaning of closely related activities in Article 132(1)(b). We therefore proceed on the basis that this does not restrict those activities in such a way, nor, accordingly, the use of the word "care" in Item 4.

115. In *Customs and Excise Commissioners v Kingscrest Associates Ltd and another (trading as Kingscrest Residential Care Homes)* [2002] EWHC 410 (Ch), which related to supplies made by two residential care homes, Pumfrey J held:

> "8. The tribunal found that items 1 to 8 and 11 of Group 7 set out details of supplies of goods and services which, viewed broadly, belong in the 'Health' class, while items 9 and 10 belong in the 'Welfare' class. They construed the word 'care' where it appears in item 5 (health-related) and item 9 (welfare-related) as taking its colour from its surroundings. They concluded that the services provided both at Conan Doyle House and 11 Gloucester Drive are 'care designed to promote the physical or mental welfare of elderly, sick, distressed or disabled persons' and that exemption would have been available under item 9 had the respondents not supplied the services for profit.
>
> 9. In its context in item 4, on the other hand, the only context provided for the word 'care' is the reference to medical or surgical treatment and the specific requirement that the care be supplied in a hospital or other approved institution. There is no limitation to the persons to whom the care may be provided. Thus the potential objects of the 'care' include persons who are otherwise healthy, and cannot be limited to the class who are the objects of the 'care' referred to in item 9. The tribunal concludes that the care must be medically or surgically related if it is to qualify for an exemption under item 4. The supply of care which is not medically or surgically related qualifies for exemption only if the additional requirements of item 9 are satisfied by the service and the supplier. The reference in item 4 to 'other institution approved ….' is, the tribunal concluded, apt to cover nursing homes, convalescent homes and the like not properly to be described as hospitals which nonetheless supply care of a medical or surgical nature. I would add clinics to this list.
>
> 10.. The Tribunal found that the words bore this meaning both as they stand and when construed in the light of Article 13A.1(b) of the Sixth Directive . The Tribunal held that properly construed item 4 was consistent with Article 13A.1(b) , and that the services fell outside the scope of that Article.
>
> ...

> 15.. In my judgment, the conclusions of the tribunal are correct for the reasons which it gives. I consider that the tribunal was correct in saying that the difference between item 4 and item 9 lay in the failure of item 4 to specify the sort of person who is to be cared for. I consider that this is a key to identifying the relationship between item 9 and item 4. There is no doubt that some services falling within item 4 may be seen as a sub-class of the services referred to in item 9, in that they can be described as the 'provision of care [or] treatment … designed to promote the physical … welfare of … sick persons' but it does not follow that other services falling naturally within item 9 also fall within item 4, or vice-versa. The use of the words 'wide' and 'narrow' can produce confusion, but I would say that the services of item 4 are narrowly defined, being limited to care of a medical and surgical nature. Services falling outside the narrower definition of item 4 must not be profit-making if they are to be exempt."

116. Pomfrey J thus limited the meaning of "care" in Item 4 to care of a medical and surgical nature. Whilst questions were subsequently referred from this appeal to the ECJ, they did not relate to this conclusion. Nevertheless, we are mindful of the fact that this decision was before two significant ECJ decisions on the meaning of "closely related activities" and consider those below.

117. In *Christoph-Dornier-Stiftung fur Klinische Psychologie v Finanzamt Giessen* (C-45/01) [2003] ECR I-12911, the ECJ considered whether a psychotherapy service offered by Dornier's charitable foundation by qualified psychologists in Dornier's out-patient clinic constituted hospital or medical care pursuant to Article 13(A)(1)(b) of the Sixth VAT Directive, thereby qualifying for VAT exemption.

118. The ECJ held services such as those provided by Dornier were "closely related activities" under Article 13(A)(1)(b) only if given as a service ancillary to hospital or medical care:

> "22. By its first question, the national court essentially asks whether the exemption from VAT provided for in art 13A(1)(b) of the Sixth Directive applies to psychotherapeutic treatment given in the out-patient facility of a foundation governed by private law by qualified psychologists employed by the foundation who are licensed to carry out such treatment but are not doctors.
>
> 23. It follows from the answer to the third question that psychotherapeutic treatment given in conditions such as those indicated in the main proceedings may benefit from the exemption provided for in art 13A(1)(c) of the Sixth Directive. Since, according to the information given in the order for reference, the treatment at issue in the main proceedings appears to have been given to the patients in the out-patient facility of a foundation governed by private law, it is not necessary to examine whether the same treatment also fulfils the conditions for benefiting from a tax exemption pursuant to art 13A(1)(b).
>
> 24. The possibility cannot be totally excluded, however, that an interpretation of the terms used in art 13A(1)(b) may be relevant for resolving the dispute pending before the national court. Accordingly, it is appropriate to rule on the interpretation of art 13A(1)(b) of the Sixth Directive.
>
> 25. In accordance with the wording of its first question, the national court wishes to know whether such treatment is an activity closely related to hospital and medical care.
>
> 26. In asking the Court of Justice whether psychotherapeutic treatment given in conditions such as those referred to above is an activity closely related to hospital and medical care within the meaning of art 13A(1)(b) of the Sixth Directive, the national court appears not to envisage the possibility that such

treatment may be medical care within the meaning of that provision. Dornier and the Commission submit, however, that medical care should be given a broad interpretation, which could thus apply to psychotherapeutic treatment given by persons who are not doctors. In those circumstances, in order to give an appropriate answer to the first question, the course followed by the Advocate General in her opinion must be adopted and consideration given not only to the term activities closely related to hospital and medical care, but also to the term medical care, both of which are found in art 13A(1)(b) of the Sixth Directive.

27. It must be acknowledged that, even if psychotherapeutic treatment is not an activity closely related to hospital care or care by doctors, it may nevertheless be covered by the term medical care within the meaning of the above mentioned provision, as Dornier and the Commission suggest.

...

33. As stated by the Court of Justice in para 22 of *EC Commission v France* [2001] ECR I-249, cited above, art 13A(1)(b) of the Sixth Directive does not include any definition of the concept of activities closely related to hospital and medical care. None the less, it is apparent from the very terms of that provision that it does not envisage services which are unrelated to hospital care for the patients receiving those services or to any medical care which they might receive.

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 art 13A(1)(b) of the Sixth Directive.

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 art 13A(1)(b) of the Sixth Directive 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."

119. *Diagnostiko & Therapeftiko Kentro Athinon-Ygeia AE v Ipourgos Ikonomikon* (Joined Cases C-394/04 and C-395/04) [2005] ECR I-10373 concerned whether the provision of telephones and televisions to in-patients constituted services closely related to hospital and medical care.

"14. By its question, the referring court essentially asks whether the supply of telephone services and the hiring out of televisions to in-patients by a medical establishment referred to in Article 13A(1)(b) of the Sixth Directive and the supply by that establishment of beds and meals to persons accompanying inpatients amount to activities closely related to hospital and medical care within the meaning of that provision.

15. It should be noted at the outset that, according to the Court's case-law, the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (Case C-287/00 *Commission v Germany* [2002] ECR I-5811, paragraph 43, and Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I4427, paragraph 29). Those exemptions

constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another (Case C-349/96 CPP [1999] ECR I-973, paragraph 15, and Case C-240/99 *Skandia* [2001] ECR I-1951, paragraph 23).

16. Moreover, the aim of Article 13A of the Sixth Directive is to exempt from VAT certain activities which are in the public interest. That provision does not, however, 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 (see, inter alia, Case C-149/97 *Institute of the Motor Industry* [1998] ECR I7053, paragraph 18, and Case C-8/01 *Taksatorringen* [2003] ECR I13711, paragraph 60).

17. As the Court has already stated, Article 13A(1)(b) of the Sixth Directive does not include any definition of the concept of activities closely related' to hospital and medical care (Case C-76/99 *Commission v France* [2001] ECR I249, paragraph 22). None the less, it is apparent from the very terms of that provision that it does not envisage services which are unrelated to hospital care for the patients receiving those services or to any medical care which they might receive (*Dornier*, cited above, paragraph 33).

18. Accordingly, services fall within the concept of an activity closely related' to hospital or medical care appearing in Article 13A(1)(b) of that directive only when they are actually supplied as a service ancillary to the hospital or medical care received by the patients in question and constituting the principal service (*Dornier*, paragraph 35).

19. It is apparent from the case-law that a service can be considered to be ancillary to a principal service where it constitutes not an end in itself but a means of enhancing the enjoyment or benefit of the principal service supplied by the provider (see, to this effect, in particular, Joined Cases C-308/96 and C-94/97 *Madgett and Baldwin* [1998] ECR I6229, paragraph 24, and Dornier, paragraph 34).

...

23. The exemption of activities closely related to hospital and medical care provided for in Article 13A(1)(b) of the Sixth Directive is designed to ensure that access to such care is not prevented by the increased costs of providing it that would follow if it, or closely related activities, were subject to VAT (*Commission v France*, paragraph 23).

24. The hospital and medical care envisaged by this provision is, according to the case-law, that which has as its purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (*Dornier*, paragraph 48).

25. Accordingly, taking account of the objective pursued by the exemption provided for in Article 13A(1)(b) of the Sixth Directive, it follows 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 that provision. Only such services are of a nature to influence the cost of health care which is made accessible to individuals by the exemption in question.

26. That finding is confirmed, as is correctly maintained by those governments that submitted observations, by the first indent of Article 13A(2)(b) of that directive, according to which the Member States are not to exempt the supply of services envisaged, inter alia, in Article 13A(1)(b) if they are not essential to the transactions exempted. As the Advocate General noted at points 30 to

32 of his Opinion, that provision, which is binding on the Member States, lays down conditions which must be taken into account for the interpretation of the various exemptions referred to therein, which, like that provided for in Article 13A(1)(b), relate to the supply of services or goods which are closely related' or closely linked' to an activity in the public interest.

27. In addition, at paragraphs 48 and 49 of the judgment in *Commission v Germany*, cited above, the Court held, in relation to the exemption provided for in Article 13A(1)(i) of the Sixth Directive concerning the supply of services closely related' to university education, that the carrying out of research projects for consideration, even though it may be regarded as of great assistance to university education, is not essential to attain its objective, that is, in particular, the teaching of students to enable them to pursue a professional activity, and that, accordingly, it could not benefit from that exemption.

28. Taking into account the objective of the exemption provided for in Article 13A(1)(b) of that directive and having regard to the wording of Article 13A(2)(b), those findings are equally valid, as the Advocate General has essentially noted in point 35 of his Opinion, for the interpretation of the concept of an activity closely related' to hospital and medical care featuring in the first of those provisions.

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 exemption provided for in Article 13A(1)(b) of the Sixth Directive. 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.

...

35. Consequently, the answer to the question asked must be that the supply of telephone services and the hiring out of televisions to in-patients by persons covered by Article 13A(1)(b) of the Sixth Directive and the supply by those persons of beds and meals to people accompanying in-patients do not amount, as a general rule, to activities closely related to hospital and medical care within the meaning of that provision. It can be otherwise only if those supplies are essential to achieve the therapeutic objectives sought by the hospital and medical care and their basic purpose is not to obtain additional income for the supplier by carrying out transactions which are in direct competition with those of commercial enterprises liable for VAT.

It is for the referring court, taking account of all of the specific facts in the litigation before it and, if appropriate, of the content of the medical prescriptions drawn up for the patients concerned, to determine whether the services supplied satisfy those conditions."

120. We derive the following from *Dornier* and *Ygeia*:

(1) services fall within the concept of an activity closely related to hospital or medical care only when they are actually supplied as a service ancillary to the hospital or medical care received by the patients in question and constituting the principal service;

(2) a service can be considered to be ancillary to a principal service where it constitutes not an end in itself but a means of enhancing the enjoyment or benefit of the principal service supplied by the provider;

(3) 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 that provision; and

(4) the provision of services which 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 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.

121. Having already concluded that the Injectable treatments did not constitute the provision of medical care, we address first whether such treatment could benefit from the wider language used in Article 132(1)(b) or Item 4.

122. As the Injectables treatments were given to clients of SRL as an end in themselves, and not ancillary to another (medical or surgical) treatment, it is clear that they cannot be closely related activities for the purpose of Article 132(1)(b).

123. Item 4 uses different language, referring to "care or medical or surgical treatment". No evidence was adduced to suggest that the Injectables comprise surgical treatment and we therefore consider the word "care". We make two points on this:

(1) In the absence of any definitions or Notes on the subject, the use of the word "care" should be taken to have its ordinary meaning (albeit that we consider that we should be mindful when seeking to apply this word that it is seeking to implement the language used in the Principal VAT Directive). The Oxford English Dictionary defines the noun "care" as:

> "the provision of what is necessary for the health, welfare, maintenance, and protection of someone or something"

(2) We cannot see anything in the language of Item 4 which requires us to "read across" the decisions of the ECJ that closely related activities cannot be an end in themselves, but must be ancillary to hospital or medical care. Care in Item 4 can stand alone.

124. Given that ECJ case law has established that the "provision of medical care" must have the principal purpose of protecting, maintaining or restoring human health, we note that on an ordinary reading the word "care" is also fairly constrained and, whilst it widens the scope of treatments within Item 4 beyond those in Items 1 and 2, the extension is not wide-ranging. We would suggest that "care" might construed as bringing a general welfare component into the services which could be within Item 4. However, Pomfrey J held in *Kingscrest* that "care" must be of a medical or surgical nature (although gave no further guidance as to what this might involve). This decision binds us, and we do not consider that the subsequent decisions of the ECJ in *Dornier* or *Ygeia* have cast doubt upon it. Indeed, they indirectly offer support to that decision in the constrained approach they have taken to the meaning of closely related activities.

125. In considering what might be of a medical nature, we suggest a distinction can be drawn between psychotherapy services of the type in issue in *Dornier* and the telephones and televisions from *Ygeia* (using these for illustration only). Telephones and facilities to make a hospital stay more comfortable could not be said to be of a medical nature – whereas psychotherapy services could be.

126. We were not satisfied that the principal purpose of the Injectable treatments was not cosmetic. However, where they were administered by trained practitioners to improve a

client's appearance and make them feel better about themselves, we conclude that such treatment is of a medical nature and can comprise "care" within Item 4. We are aware that this conclusion appears at odds with the decision of this Tribunal on Item 4 in *Ultralase*, but note that the decision in that case does not address the meaning of "care".

127. Turning to the nail fungus treatments, we did not consider whether these treatments involve the provision of medical care for the purposes of Items 1 and 2, as it was agreed that the services were not performed by a registered healthcare professional.

128. HMRC submitted (in the context of Items 1 and 2) that the nail fungus treatment did not constitute medical care as there was no evidence of the purpose of the treatment from the client's GP (or another registered healthcare professional). They went so far as to say that if there had been documented referral letters from the client's GP then this may demonstrate that the treatment had the required principal purpose. We essentially see this as agreement by HMRC in principle that treatment of nail fungus could be medical care (within Items 1 and 2) but that on the evidence SRL has not established that this was the case.

129. We agree with HMRC on this point. We cannot conclude that a laser treatment applied to the feet is for the principal purpose of diagnosing, treating or curing diseases or for protecting, maintaining or restoring human health in circumstances where we have no evidence from a medical professional in support thereof.

130. Given the ECJ's decision in *Skatteverket* that the principal purpose requirement applies to the concept of medical care in Article 132(1)(b) as well as in Article 132(1)(c), we conclude that this must also prevent the nail fungus treatment from being "medical...treatment" within Item 4.

131. As with the Injectables treatment, the nail fungus treatment was provided as an end in itself, and therefore, in line with the decisions of the ECJ in *Dornier* and *Ygeia*, it cannot be a closely related activity within Article 132(1)(b).

132. Again, this leaves the question of "care". Our reason for concluding that the nail fungus treatment is not "medical...treatment" for the purpose of Item 4 was based on the absence of appropriate evidence of a medical condition and the purpose for which treatment was sought. This also prevents us from being able to conclude that the treatment is of a medical nature. Essentially, if evidence of the medical condition had been provided, then we would regard the treatment as within Item 4 on the basis that it is a "medical...treatment" and the lack of such evidence cannot be overcome by relying on "care" instead.

State-regulated institution (Item 4)

133. "State-regulated" is defined by Note (8) for the purposes of Group 7 as "approved, license, registered or exempted from registration by any Minister or other authority pursuant to a provision of a public general Act, other than a provision that is capable of being brought into effect at different times in relation to different local authority areas".

134. Mr Brothers relies on the permission granted by Richmond Council in respect of change of use, described at [14] and [15]. In addition, his submission is that Richmond Council overseas the nail fungus treatments provided by SRL.

135. The permission is granted by Richmond Council in accordance with the TCPA 1990, and we accept that this is a public general Act. However, this permission clearly relates to planning matters:

(1) the application was for permission of the local planning authority to develop the land;

(2) the grant of the application is made by the "Planning" section of Richmond Council; and

(3) the conditions attached relate to planning matters.

136. Furthermore, we conclude that this relates only to planning matters and does not evidence any oversight of the treatments provided by the clinic. There is no evidence of Richmond Council imposing any obligations on SRL in relation to hygiene, training/supervision of practitioners, quality of service, complaints procedures or any matters relating governing the provision of the treatments. We note that Miss Cleaver stated (see [16]) that Richmond Council overseas the nail fungus treatments and that the clinic is subject to annual licensing and inspection, but in the absence of any further information as to what this involves we infer from the grant of permission that the Council is checking that the use of the premises remains in the class for which permission was given.

137. HMRC referred us to *LIFE Services*, in which the Upper Tribunal stated (at [74]) that the correct approach is to examine whether the person who has the obligation to provide the services in question is subject to state regulation in the provision of those services". We agree, and conclude that SRL is not "approved, licensed, registered or exempted from registration..." for the purposes of Item 4.

138. Neither the provision of the Injectables nor the nail fungus treatments are exempt under Item 4.

CONCLUSION

139. For the reasons given above, the appeals are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

140. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 06 AUGUST 2019