[2021] UKFTT 0451 (TC)

(TC) 08335

VAT – fundraising transactions – whether or not there was a direct and immediate link to downstream taxable activities – yes – whether or not VAT grouping means that there was no economic activity for the purposes of the initial transaction – no – whether or not the share purchase agreement was the equivalent of a transfer of a going concern – no – appeal allowed upon the basis of the direct and immediate link to downstream taxable activities

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06939 V

BETWEEN

HOTEL LA TOUR LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE RICHARD CHAPMAN QC
MS GILL HUNTER

The hearing took place on 2 and 3 June 2021 by video. A face to face hearing was not held by virtue of the Covid 19 pandemic. Further written submissions were received dated 18 June 2021, 2 July 2021, and 6 July 2021.

Mr Michael Firth, counsel, for the Appellant.

Miss Isabel McArdle, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

INTRODUCTION

1. This appeal relates to the recoverability of input tax arising from fees for professional services incurred in respect of the sale of shares by Hotel La Tour Ltd ("HLT") in HLT's subsidiary, Hotel La Tour Birmingham Ltd ("HLTB"). By a decision dated 26 June 2018, HMRC disallowed HLT's input tax claim for the period 09/17 and issued a corresponding assessment on the basis that the sale of shares was an exempt supply. HLT appeals upon the basis that the relevant services were directly and immediately linked to HLT's downstream taxable activities, that the effect of HLT and HLTB being in a VAT group is that the supply of the HLTB shares is to be treated as outside the scope of VAT, and, in the alternative, that the sale of the shares in HLTB is to be treated as a sale of a going concern. The amount in issue is £76,822.

FINDINGS OF FACT

2. It is convenient to begin with our findings of fact as there was no dispute between the parties as to the factual circumstances of the appeal. We have been provided with a bundle of documents and witness statements from Mr Mark Stuart (HLT's current Managing Director and, at the relevant times, HLT's Finance Director) on behalf of HLT and from Mr Martyn Ransom (HMRC's decision- making officer) on behalf of HMRC. Although HMRC stated that they put HLT to strict proof as to its factual case, no competing set of facts were provided in answer to HLT's evidence. Further, neither counsel cross-examined the other party's witness. There is, of course, dispute between the parties as to the consequences of these factual circumstances.

3. At the material time, HLT was a holding company and owned the whole of the share capital of HLTB. HLT and HLTB formed a VAT group, with HLT as the representative member. HLTB owned and operated a luxury hotel in Birmingham under the name "Hotel La Tour". HLT provided HLTB with management services. These management services included the provision of key personnel such as the general manager of the hotel.

4. HLT also owned the right to the name "Hotel La Tour" together with other intellectual property and other rights, including the domain name for the Hotel La Tour website, the Hotel La Tour logo, and agreements between HLT and two online booking agencies. HLT permitted HLTB to use this intellectual property and rights although there was no evidence as to the terms or scope of such permission. HLTB was the leaseholder of the property comprising the hotel and its landlord was an unconnected third party. HLT had no interest of its own in the property.

5. In about mid-2015, HLT decided to construct and develop a new hotel in Milton Keynes ("the Milton Keynes Development"). It was anticipated that this would cost approximately £34,500,000. Various finance options were considered. Ultimately, the preferred option was to sell HLTB and to borrow the shortfall from a bank. This choice was reinforced by the fact that the decision to build in Milton Keynes coincided with HLT concluding that HLTB's business had reached the stage where it could not grow any further.

6. HLT sought to obtain the highest price possible for the shares, subject to offers being serious and viable. It is clear from board meeting minutes that from the outset the proceeds of sale of HLTB were to be used to fund the Milton Keynes Development.

7. On 17 May 2017, HLT agreed heads of terms with Dalata UK Ltd ("Dalata") for the purchase of the shares. The sale was completed by a share purchase agreement dated 21 July 2017 ("the Share Purchase Agreement"). The Share Purchase Agreement included (in summary) the following terms:

(1) HLT agreed to transfer the whole of its shares in HLTB to Dalata ("the Shares").

(2) The Share Purchase Agreement defined the consideration for the purchase of the shares as being the sum of £4,812,231.24 subject to any adjustments for completion accounts.

(3) Dalata also undertook to put HLTB in funds to discharge its loan to HLT (being the outstanding sum of £12,179,678.66) and to discharge the sum owing to Coutts Bank (being the outstanding sum of £13,496,714) immediately after completion.

(4) HLT granted Dalata a licence for three months following completion to use the name "Hotel La Tour" and HLT's intellectual property and a licence for twelve months following completion to use the term "previously known as Hotel La Tour" on its website and other literature.

(5) HLT agreed to various restrictive covenants including not to operate or be interested in a competing hotel, restaurant or conference centre within 40 miles of the centre of Birmingham for three years.

(6) Paragraph 10.2 of Schedule 2 to the Share Purchase Agreement provides the following warranty ("the Target" being HLTB):

> "10.2. Assets sufficient for the business
>
> The assets owned by the Target together with the services and facilities to which it has a contractual right comprise all the assets, services and facilities necessary for the carrying on of the business of the Target as now carried on."

8. The completion accounts resulted in the consideration for the purchase of the shares being adjusted to £4,635,132.09. The sale completed on 21 July 2017. HLTB was also removed from HLT's VAT group with effect from 21 July 2017.

9. The net amount received by HLT as a result of the sale of the Shares was approximately £16,000,000 ("the Net Proceeds"). This comprised the consideration for the purchase of the shares and the repayment of HLT's loan to HLTB, less the costs of sale including the fees for professional services.

10. HLT engaged various companies to provide professional services to assist with the sale including market research, buyer shortlisting, financial modelling, and tax compliance. This was with a view to obtaining the highest sales price available, which would provide for the largest sum possible to pay towards the Milton Keynes Development. HLT incurred the following professional fees for such services in the sum of £382,899.51 plus VAT of £76,822.95 ("the Professional Fees" and "the Services" respectively):

(1) Marketing agents (Jones Lang La Salle Limited), who charged £255,000 plus VAT of £51,267.19.

(2) Solicitors (Shoosmiths), who charged £115,399.51 plus VAT of £23,055.76 for strategic advice and conveyancing costs.

(3) Chartered Accountants (Grant Thornton), who charged £12,500 plus VAT of £2,500 for tax support in respect of the sale of the shares.

11. HLT has commenced building the Milton Keynes Development. As at 16 January 2020 (the date of Mr Stuart's witness statement dealing with the matter) £3,000,000 of the Net Proceeds have been utilised in the Milton Keynes Development. The arrangement with the bank funding the development is that the remainder of the Net Proceeds are to be used before the bank loan can be drawn down. It was anticipated that this would take place by March 2021 and there is no suggestion that this did not materialise. It follows, therefore, that the whole of the Net Proceeds has been used towards the Milton Keynes Development.

12. HLT filed its 09/17 VAT return on 2 November 2017 seeking a repayment of £68,883. This included the Professional Fees and a separate invoice from a company named Bellone Brothers Limited for the sum of £167,000 plus VAT of £33,400 which had no connection to the sale of the HLTB shares ("the BBL Invoice").

13. On 23 November 2017, HMRC commenced enquiries in respect of the 09/17 VAT return. This resulted in a decision letter dated 26 June 2018 providing for an assessment in the sum of £110,222. This was effectively the disallowance of the input tax on the Professional Fees and the BBL Invoice. The essence of the decision in respect of the Professional Fees was that HLT was not carrying out any economic activity because the management services were provided by employees who were directors of both HLT and HLTB. As such, HMRC decided, the manager's services were being provided as a director of HLTB rather than being provided by HLT. The BBL Invoice was refused because it was not a valid VAT invoice. Following a request for a review, the decision was upheld by a letter dated 4 September 2018.

THE ISSUES

14. HLT appealed to the Tribunal by a notice of appeal received on 2 November 2018. In essence, the grounds for appeal were as follows:

(1) The input tax on the Professional Fees was incurred as part of the sale process with the intention of using the funds to construct and run the Milton Keynes Development.

(2) The sale represented a sale of the totality of assets and the money raised would be invested back into the business to further its taxable supplies. There was a direct and immediate link between the VAT incurred and the intention to build a new hotel and to make taxable supplies using the newly built assets.

(3) Contrary to HMRC's decision, the management services did constitute economic activity.

(4) If there had not been a supply of management services, the transaction would have been a transaction outside the scope of VAT in order to raise funds for its taxable business and therefore the costs would have been a general overhead of the business.

(5) HMRC should use their discretion to accept alternative evidence in respect of the BBL Invoice.

15. By a letter dated 26 June 2019, HMRC accepted that sufficient management services were provided to justify there being an economic activity but maintained that the services were used in the exempt supplies of the sale of shares rather than in making taxable supplies. HMRC also denied that sale was equivalent to a transfer of a going concern. However, the letter accepted that a valid replacement for the BBL Invoice had been provided and that, as this did not relate to the share sale, the VAT could be reclaimed, and the assessment would be adjusted accordingly. This accounts for the reduction of the amount in dispute from £110,222 to £76,822. This also means that the appeal now solely relates to the Professional Fees.

16. A statement of case was served on 16 September 2019 and an amended statement of case served on 22 January 2021. It is fair to say that the arguments have evolved in the course of the skeleton arguments, oral submissions, and post-hearing submissions (which post-hearing submissions include the introduction of at least one additional argument by HLT).

17. In the light of the various arguments raised, the following issues arise for determination:

(1) Whether the Services and the Professional Fees are directly and immediately linked to HLT's exempt supply of the Shares or to its taxable activities.

(2) (Insofar as HLT is permitted to rely upon the argument) whether or not the effect of HLT and HLTB being in a VAT group is that the supply of the Shares is to be treated as outside the scope of VAT rather than exempt.

(3) Whether or not the sale of the Shares is to be treated as the equivalent of a sale of a going concern.

DIRECT AND IMMEDIATE LINK

Legislation

18. There was no dispute as to the relevant legislation.

19. Article 2(1)(c) of the Principal VAT Directive provides for, amongst other things, the supply of services for consideration within the territory of a Member State by a taxable person acting as such to be subject to VAT. The definition of a "taxable person" appears in Article 9:

> "1. 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity."

20. Article 168 provides for the right of a taxable person to deduct input tax insofar as goods and services are used for the purposes of the taxed transactions of the taxable person.

21. These provisions were implemented in domestic legislation by section 24 of the Value Added Tax Act 1994 ("VATA"), the relevant sub-sections of which are as follows:

> "(1) Subject to the following provisions of this section, 'input tax', in relation to a taxable person, means the following tax, that is to say –
>
> (a) VAT on the supply to him of any goods or services; and
>
> …
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.
>
> (2) Subject to the following provisions of this section, 'output tax', in relation to a taxable person, means VAT on supplies which he makes.
>
> …"

22. Article 135(1)(f) of the Principal VAT Directive provides that transactions in shares are exempt from VAT. This was implemented in domestic law by paragraph 1 of Group 5 to Schedule 9 of VATA as follows:

> "6. The issue, transfer or receipt of, or any dealing with, any security or secondary security being –
>
> (a) Shares …"

Authorities

23. A number of key authorities were referred to by both parties, albeit that they sought to draw different conclusions from how those authorities interact and as to how they relate to the facts and circumstances of the present case. It is appropriate, therefore, to begin by setting out those key authorities.

24. The starting point is that input tax can be recovered where there is a direct and immediate link between a particular input transaction and a particular output transaction or, where there is no such link, where there is a direct and immediate link with the taxable person's economic activity as a whole. This was explained by the CJEU in *Volkswagen Financial Services (UK) Ltd v Revenue and Customs Commissioners* (Case C-153/17), [2018] STC 2217 ("*VWFS*") as follows at [41] to [47]:

"[41] In accordance also with the Court's settled case-law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to the right to deduct is necessary, in principle, before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct (judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments,* C-132/16, EU:C:2017:683, paragraph 28 and the case-law cited).

[42] A taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct where the costs of the services in question are part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such costs do have a direct and immediate link with the taxable person's economic activity as a whole (judgment of 14 September 2017, *Iberdrola Inmobiliaria Real Estate Investments,* C-132/16. EU:C:2017:683, paragraph 29 and the case-law cited).

[43] In this case, it is apparent from the order for reference that the general costs at issues in the main proceedings have a direct and immediate link with the activities of VWFS as a whole, and not merely with some of them. In that regard, the fact that VWFS decided to include those costs not in the price of the taxable transactions, but solely in the price of the exempt transactions, can have no effect whatsoever on such a finding of fact.

[44] Thus, in so far as those general costs were in fact incurred, at least to a certain extent, for the purpose of the supply of vehicles, which are taxed transactions, those costs are, as such, components of the price of those transactions. Accordingly, a right to deduct VAT arises, in principle, in accordance with the considerations set out in paragraphs 38 to 42 of this judgment.

[45] So far as concerns the fact that the general costs at issue in the main proceedings are not clearly reflected in the price of the taxed transactions of supplies of vehicles, it should be recalled that the result of those economic transactions is irrelevant for the right to deduct provided that the activity itself is subject to VAT (judgment of 22 June 2016, *Gemeente Woerden,* C-267/15, EU:C:2016:466. Paragraph 40 and the case-law cited).

[46] As the Court has already held the right to deduct VAT must be guaranteed, without it being subjected to a criterion relating, *inter alia,* to the result of the economic activity of the taxable person, in accordance with Article 9(1) of the VAT Directive under which a taxable person 'shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that 'activity' (judgment of 5 July 2018, *Marle Participations,* C-320/17, EU:C:2018:537, paragraph 44).

[47] Nevertheless, the extent of the right to deduct varies according to the intended use of the goods and services at issue. Whilst, for goods and services intended to be used exclusively for carrying out of taxable transactions, taxable persons are entitled to deduct all the tax that has been charged on their acquisition or supply, for goods and services intended for a mixed use, it is apparent from Article 173(1) of the VAT Directive that the right to deduct is limited to such proportion of the VAT as is attributable to the transactions in respect of which VAT is deductible that are carried out by means of those

> goods or services (see, to that effect, judgment of 9 June 2016, *Wolfgang und Dr Wilfried Rey Grundstücksgemeinschaft*, C-332/14, EU:C:2016:417, paragraph 25)."

25. It is of note that, as set out at [45] of *VWFS*, there is no need for the price of the taxed transactions to be increased in order for the costs to be components of those transactions.

26. The concept of a "cost component" denotes the costs of the input goods or services being incorporated into the cost of either particular output transactions or incorporated into the cost of the economic activities as a whole. This was set out by the CJEU in *Staatssecretaris van Financien v X BV* (Case C-651/11), [2013] STC 1893 at [55] as follows:

> "[55] Lastly, with a view to giving the referring court a helpful answer, given that the answer to the questions referred for a preliminary ruling is needed in order that the referring court may determine whether there is a right to deduct in the circumstances of the main action, it must be recalled that there is a right to deduct where the input transactions effected have a direct and immediate link with output transactions giving rise to the right to deduct. If that is not the case, it is necessary to examine whether the costs incurred to acquire the input goods or services are part of the general costs linked to the taxable person's overall economic activity. In either case, whether there is a direct and immediate link will depend on whether the cost of the input services is incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his economic activities (*Cibo Participations*, paras 31 and 33; *SKF*, para 60; *Eon Aset Management OOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto'* (Case C-118/11) [2012] STC 982, para 48; and *Finanzamt Köln-Nord v Becker* (Case C-104/12) (21 February 2013, unreported), paras 19 and 20)."

27. The VAT treatment of the input will of course depend upon what output it is linked with. If the direct and immediate link is with particular transactions which are exempt, the second stage of analysing whether or not there is a direct and immediate link with the taxable activity as a whole is not reached, the chain is broken, and the VAT cannot be deducted.

28. In *Kretztechnik AG v Finanzamt Linz* (Case C-465/03), [2005] 1 WLR 3755 ("*Kretztechnik*"), it was held that where (as in that case) a share issue is outside the scope of VAT and the objective purpose of the share issue is to raise capital for the benefit of taxable activity as a whole (and where it is so used), the costs of the supplies relating to the share issue are part of its overheads. The CJEU stated as follows at [36]:

> "[36] In this case, in view of the fact that, first, a share issue is an operation not falling within the scope of the Sixth Directive and, second, that operation was carried out by Kretztechnik in order to increase its capital for the benefit of its economic activity in general, it must be considered that the costs of the supplies acquired by that company in connection with the operation concerned form part of its overheads and are therefore, as such, component parts of the price of its products. Those supplies have a direct and immediate link with the whole economic activity of the taxable person (see *BLP Group*, cited above, para 25; *Midland Bank*, para 31; Abbey National, para 35 and 36, and *Cibo Participations*, para 33)."

29. In *Skatteverket v AB SKF* (Case C-29/08) [2010] STC 419 ("*SKF*"), the CJEU held that fiscal neutrality requires that if costs relating to disposals of shares would form part of the taxable person's general costs in cases where the disposal itself would be outside the scope of VAT, the same must apply if the disposal is exempt from VAT. The CJEU stated as follows at [64] to [68]:

> "[64] In order to give a useful answer to the referring court, it must be recalled that the court has held, on numerous occasions, that there is a right to deduct VAT paid on consultancy services used for the purposes of various financial transactions, on the ground that those services were directly attributable to the economic activities of the taxable persons (see, *inter alia*, *Midland Bank* (para 31); *Abbey National* (paras 35 and 36); *Cibo Participations* (paras 33 and 35); *Kretztechnik* (para 36); and *Securenta* (paras 29 and 31)).
>
> [65] Admittedly, the output transactions in shares in the cases which led to the above-mentioned judgments, unlike those in the main proceedings in the present case, were outside the scope of VAT. However, as is clear from the case law cited in paras 28 and 30 of this judgment, the main factor distinguishing the legal classification of those transactions from that of transactions which come within the scope of VAT but are exempt from it is whether the company which is liable to the tax is or is not involved in the management of the companies in which a shareholding has been taken.
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> [66] However, if the right to deduct input VAT paid on consultancy costs relating to a disposal of shares which is exempted because of involvement in the management of the company whose shares are sold was not allowed, and if the right to deduct input VAT in respect of such costs relating to a disposal which is outside the scope of VAT was allowed on the ground that those costs constitute general costs of the taxable person, that would amount to treating objectively similar transactions differently for tax purposes, and would be an infringement of the principle of fiscal neutrality.
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> [67] In that regard, the court has ruled that the principle of fiscal neutrality, which is a fundamental principle of the common system of VAT, precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, *Kingscrest Associates Ltd v Customs and Excise Comrs* (Case C-498/03)[2005] STC 1547, [2005] ECR I-4427, para 41; *Turn- und Sportunion Waldburg v Finanzlandesdirektion für Oberösterreich* (Case C-246/04) [2006] STC 1506, [2006] ECR I-589, para 33; and *R (on the application of Teleos plc) v Revenue and Customs Comrs* (Case C-409/04) [2008] STC 706, [2008] QB 600, para 59) and, further, precludes economic operators who carry out the same activities from being treated differently as far as the levying of VAT is concerned (see, *inter alia*, *Gregg v Customs and Excise Comrs* (Case C-216/97) [1999] STC 934, [1999] ECR I-4947, para 20, and *Revenue and Customs Comrs v Isle of Wight Council* (Case C-288/07) [2008] STC 2964, [2008] ECR I-7203, para 42).
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> [68] It follows that, if the consultancy costs relating to disposals of shareholdings are considered to form part of the taxable person's general costs in cases where the disposal itself is outside the scope of VAT, the same tax treatment must be allowed if the disposal is classified as an exempted transaction."

30. In *C & D Foods Acquisition ApS v Skatteministeriet* (Case C-502/17), [2019] STC 593, the CJEU held that in order to be deductible, the direct and exclusive reason for a share disposal transaction must be the taxable economic activity. This is to be determined objectively. The CJEU stated as follows at [34] to [39]:

> "[34] So far as concerns the question of whether the expenditure associated with a share transfer transaction comes within the scope of VAT, it should be recalled that, in its judgment of 29 October 2009, *SKF* (Case C-29/08) EU:C:2009:665, the Court was called upon to examine that question concerning expenditure incurred by a parent company in the context of a transaction for the sale of shares in a subsidiary and a controlled company to

which the former company, as the parent company, supplied services subject to VAT.

[35] The Court noted, in para 33 of the judgment of 29 October 2009, *SKF* (Case C-29/08) EU:C:2009:665, that, in such a context, a disposal, carried out in order to enable the parent company to restructure a group of companies, could be regarded as a transaction that consisted in obtaining income on a continuing basis from activities which went beyond the compass of the simple sale of shares. Accordingly, the Court found that that transaction had a direct link with the organisation of the activity carried out by the group and accordingly constituted the direct, permanent and necessary extension of the taxable activity of the taxable person and consequently came within the scope of VAT.

[36] The Court has, furthermore, held that it is in the light of their objective content that it is necessary to determine whether there is a direct and immediate link between the supply of goods or services utilised and a taxable output transaction or, exceptionally, a taxable input transaction (judgment of 21 February 2013, *Finanzamt Köln-Nord v Becker* (Case C-104/12) EU:C:2013:99, para 24 and the case-law cited).

[37] In that context, the Court stated that the exclusive reason for the transaction at issue should also be taken into account, since that reason must be regarded as a criterion for determining the objective content. Where it is clear that a transaction has not been performed for the purposes of the taxable activities of a taxable person, that transaction cannot be regarded as having a direct and immediate link with those activities within the meaning of the Court's case-law, even if that transaction would, in the light of its objective content, be subject to VAT (judgment of 21 February 2013, *Finanzamt Köln-Nord v Becker* (Case C-104/12) EU:C:2013:99, para 29).

[38] It follows that, in order for a share disposal transaction to be able to come within the scope of VAT, the direct and exclusive reason for that transaction must, in principle, be the taxable economic activity of the parent company in question, or that transaction must constitute the direct, permanent and necessary extension of that activity. That is the case where that transaction is carried out with a view to allocating the proceeds of that sale directly to the taxable economic activity of the parent company in question or to the economic activity carried out by the group of which it is the parent company.

[39] In the present case, it is apparent from the file before the Court that the objective of the disposal of shares at issue in the main proceedings was to use the proceeds of that sale to settle the debts owed to Kaupthing Bank, the new proprietor of the Arovit group. As stated in the preceding paragraph of this judgment, such a sale cannot be deemed to be either a transaction for which the direct and exclusive reason is the taxable economic activity of C&D Foods, or a transaction constituting the direct, permanent and necessary extension of the taxable economic activity of that company. In those circumstances, that sale does not constitute a transaction consisting in obtaining income on a continuing basis from activities which go beyond the compass of the simple sale of shares and, accordingly, it does not come within the scope of VAT. It follows that the VAT relating to the disputed services is not deductible."

31. The relevant principles in fundraising cases were set out by Lord Hodge (with whom the rest of the Supreme Court agreed) in *Frank A Smart & Son Ltd v Revenue and Customs Commissioners* [2019] UKSC 39, [2019] 1 WLR 4849 ("*Frank A Smart*"). In doing so, he distinguished between the "initial fundraising transaction" (being the fundraising activity) and

the "downstream transactions" (being the activities the funds raised were to be used for). Lord Hodge stated as follows at [65]:

> "*(iii) Summary of the case law*
>
> [65] I derive the following propositions which are relevant to this appeal from the case law:
>
> (i) As VAT is a tax on the value added by the taxable person, the VAT system relieves the taxable person of the burden of VAT payable or paid in the course of that person's economic activity and thus avoids double taxation. This is the principle of deduction set out in article 1(2) and operated in article 168 of the PVD and vouched, for example, in *Rompelman v Minister van Financiën* (Case C-268/83)[1985] ECR 655, para 19; *Abbey National* [2001] 1 WLR 769, para24; *Kretztechnik* [2005] 1 WLR 3755, para 34 and *SKF* [2010] STC 419, paras 55—56.
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> (ii) There must be a direct and immediate link between the goods and services which the taxable person has acquired (in other words the particular input transaction) and the taxable supplies which that person makes (in other words its particular output transaction or transactions). This link gives rise to the right to deduct. The needed link exists if the acquired goods and services are part of the cost components of that person's taxable transactions which utilise those goods and services: see for example *Midland Bank* [2000] 1 WLR 2080, paras 24 and 30; *Abbey National*, para 28; *Kretztechnik*, para 35; *Securenta* [2008]STC 3473, para 27; SKF, para 57 and *Revenue and Customs Comrs v University of Cambridge* EU:C:2019:559, para 31.
>
> (iii) Alternatively, there must be a direct and immediate link between those acquired goods and services and the whole of the taxable person's economic activity because their cost forms part of that business's overheads and thus a component part of the price of its products: see for example *BLP* [1996] 1 WLR 174, para 25; *Midland Bank*, para 31; *Abbey National*, paras 35 and 36; *Kretztechnik*, para 36; *SKF*, para 58 and *University of Cambridge*, para 31.
>
> (iv) Where the taxable person acquires professional services for an initial fund-raising transaction which is outside the scope of VAT, that use of the services does not prevent it from deducting the VAT payable on those services as input tax and retaining that deduction if its purpose in fund-raising, objectively ascertained, was to fund its economic activity and it later uses the funds raised to develop its business of providing taxable supplies. See, for example, *Abbey National*, paras 34—36; *Kretztechnik*, paras 36—38; *Securenta*, paras 27—29 and SKF, para 64. The same may apply if an analogous transaction involving the sale of shares is classified as an exempt transaction: *SKF*, para 68.
>
> (v) Where the cost of the acquired services, including services relating to fund-raising, are a cost component of downstream activities of the taxable person which are either exempt transactions or transactions outside the scope of VAT, the VAT paid on such services is not deductible as input tax. See for example *Securenta*, paras 29 and 31; *SKF*, paras 58—60 and *Sveda* [2016] STC 447, para 32. Where the taxable person carries on taxable transactions, exempt transactions and transactions outside the scope of VAT, the VAT paid on the services it has acquired has to be apportioned under article 173 of the PVD.
>
> (vi) The right to deduct VAT as input tax arises immediately when the deductible tax becomes chargeable: article 167 of the PVD, *Securenta*, paras 24 and 30 and *SKF*, para55. As a result, there may be a time lapse between the

deduction of the input tax and the use of the acquired goods or services in an output transaction, as occurred in *Sveda*. Further, if the taxable person acquired the goods and services for its economic activity but, as a result of circumstances beyond its control, it is unable to use them in the context of taxable transactions, the taxable person retains its entitlement to deduct: *Midland Bank*, paras 22 and 23.

(vii) The purpose of the taxable person in carrying out the fund-raising is a question of fact which the court determines by having regard to objective evidence. The CJEU states that the existence of a link between the fund-raising transaction and the person's taxable activity is to be assessed in the light of the objective content of the transaction: *Sveda*, para 29*; Iberdrola* [2017] BVC 39, para 31. The ultimate question is whether the taxable person is acting as such for the purposes of an economic activity. This is a question of fact which must be assessed in the light of all the circumstances of the case, including the nature of the asset concerned and the period between its acquisition and its use for the purposes of the taxable person's economic activity: *Eon Aset Menidjmunt OOD v Direktor na Direktsia "Obzhalvane i upravlenie na izpalnenieto" - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (Case C-118/11) [2012] STC 982, para 58; *Klub OOD v Direktor na Direktsia "Obzhalvane i upravlenie na izpalnenieto" - Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (Case C-153/11) [2012]STC 1129, paras 40—41 and *Sveda*, para 21."

32. We were also referred to *Midland Bank v Customs and Excise Commissioners* (Case C-98/98), [2000] 1 WLR 2080, and *BLP group plc v Customs and Excise Commissioners* (Case C-4/94), [1996] 1 WLR 174. We have considered these additional cases but do not set them out here given the analysis of the authorities by Lord Hodge in *Frank A Smart*.

Submissions

33. In summary, Mr Firth's submissions on behalf of HLT were as follows:

(1) In general, there are two stages of analysis. Stage one is to determine whether an input has a direct and immediate link with a particular output. If it does and it is taxable, there is full recovery of the input. If it does and it is exempt, there is no recovery of input and the chain of attribution is broken (and so there is no consideration of stage two). If either it does and it is outside the scope of VAT, or if there is no directly and immediately linked output, stage two is considered. Stage two is to determine whether the input has a direct and immediate link with the taxpayer's economic activity as a whole with the effect that it is an overhead. If it does and it is taxable, then recovery of the input is allowed.

(2) The effect of *Frank A Smart* and the CJEU case law (particularly *SKF*) is that the chain-breaking effect is modified in fundraising cases. Given that a direct and immediate link to a share sale that is outside the scope of VAT does not break the chain, a direct and immediate link to a share sale that is exempt is to be treated the same way.

(3) Further, by virtue of *SKF* and *Frank A Smart*, the use of a supply for an initial fundraising transaction does not prevent input recovery if the purpose of the fundraising transaction was to raise funds for actual or potential taxable activities.

(4) The direct and immediate link was therefore between the inputs and the taxable hotel activity. This is because the fundraising costs form part of the cost components of the taxable transactions. As the purpose of the share sale was to raise finance to fund taxable transactions, the costs of sale reduce the amount of the Proceeds available to fund those taxable transactions, which would then be sought to be recovered through the

taxable transactions. Further, the shares were sold for the best price that could be obtained in the market and so did not incorporate any of the cost of the fundraising services.

34. In summary, Miss McArdle's submissions on behalf of HMRC were as follows:

(1) The general approach to the chain-breaking effect of a direct and immediate link to an exempt transaction is not modified in respect of fundraising share sales.

(2) The relevant expenditure must be part of the costs of the output transactions which utilise the goods and services acquired (see the CJEU's judgment at [30] in *Midland Bank plc v HMRC* [2000] 1 WLR 2080).

(3) Miss McArdle focussed upon *SKF* at [58] to [60] and [71] for the proposition that the first stage is not to be ignored and so fundraising cases do not create a special regime. She also noted that *Frank A Smart* was a case in which the first stage was not in consideration because there was no activity potentially constituting an output transaction.

(4) The existence of a direct and immediate link requires an objective assessment rather than depending upon the subjective intentions of HLT.

(5) The direct and immediate link was to the exempt share sale. This is because: the relevant supplies were all part of the process of selling the shares; the services were purchased in order to maximise the selling price of the shares; the services were funded by the proceeds of the sale rather than by the profits of any taxable output transaction; and the profits of the sale were used for purposes including paying off HLTB's loan.

(6) Miss McArdle accepted during oral submissions that if the analysis reached stage two (and so if the chain of attribution had not been broken) the inputs did have a direct and immediate link to HLT's general economic activities.

Discussion

35. We find that there is a direct and immediate link between the Services and HLT's downstream taxable general economic activities and that the chain is not broken by the share sale. This is for the following reasons.

36. We accept that the first stage of the analysis is to be modified in fundraising cases in the sense that (with one rider) the initial share transaction is to be disregarded. The effect of *SKF* and *Frank A Smart* is that the relevant objective purpose is of the fund-raising and the relevant use is the use of the funds. It is clear from *Frank A Smart* at [65](iv) (as set out in paragraph 31 above) that the *use* of professional services for the initial fund-raising transaction does not break the chain. However, the rider to this is that the chain will be broken where the cost of the inputs was a cost component of the price of the shares in the initial transaction. Crucially, Lord Hodge stated as follows in *Frank A Smart* at [46] and [47]:

> "[46] Applying this reasoning to the circumstances of SKF's proposed transaction, the CJEU advised that the referring court would have to ascertain whether the costs incurred were likely to be incorporated in the price of the shares which SKF intended to sell or whether they were only among the cost components of SKF's products (para 62). It referred to the cases which I have discussed (*Midland,Bank*, *Abbey National*, *Kretztechnik* and *Securenta*), acknowledging that they concerned financial output transactions which were outside the scope of VAT. But it went on to observe that the main difference between an exempt share sale and a share sale which was outside the scope of VAT was whether the taxable company was or was not involved in the management of the companies whose shares were being sold. There was therefore a risk of infringement of the principle of fiscal neutrality through treating objectively similar transactions differently for tax purposes. It held

> (para 68) that if the costs relating to the disposals of shareholdings are considered to form part of a taxable person's general costs in cases where the disposal itself is outside the scope of VAT, the same tax treatment must be allowed where the disposal is classified as an exempt transaction. In my view it is implicit in the CJEU's reasoning that it accepted the distinction which Advocate General Jacobs made in his opinions in *Abbey National* and *Kretztechnik* but recognised the need to modify the result for the purpose of VAT of an exempt initial transaction in order to avoid discriminatory fiscal treatment.
>
> [47] It is important to consider further the statement in para 59 of the judgment, summarised in para 44(iv) above. It was that, in contrast to the circumstance where the costs of services are part of a taxable person's general costs and components of the price of the goods and services which he supplies (para 58), **"where goods and services acquired by a taxable person are used for purposes of transactions that are exempt or do not fall within the scope of VAT, no output tax can be collected or input tax deducted". In order to be consistent with the CJEU's reasoning outlined above, that statement, when applied in the context of a fund-raising transaction such as a sale of shares, must be a reference to the downstream transactions of which the input costs form a cost component, and not the initial fundraising transaction, unless the cost of the inputs was a component of the price of the shares in the initial transaction.**" (our emphasis added)

37. It is of note that Lord Hodge treated the CJEU as disregarding the use of the service in the initial share transaction in fund-raising cases (see Lord Hodge at [38]).

38. It is also of note that Lord Hodge treated the CJEU as extending the treatment of share disposals outside the scope of VAT to those where the share disposals are exempt. As such, the relevant consideration in fund-raising cases is whether the services are incorporated into the prices of the initial share transaction in the downstream transactions. Lord Hodge stated as follows at [49]:

> "[49] In my view, it is clear that in *SKF* [2010] STC 419 the CJEU has not extended the reasoning of *BLP* [1996] 1 WLR 174 to apply it to fund-raising transactions which are outside the scope of VAT. On the contrary, in order to avoid discriminatory treatment of taxable persons, it has extended the reasoning in the cases about share disposals that are outside the scope of VAT to share disposals which are exempt, by requiring an examination as to whether the costs associated with the input services are incorporated in the price of the shares sold in the initial transaction or in the prices of the taxable person's products in downstream transactions. If the latter, the costs would be "among only the cost components of transactions within the scope of the taxable person's activities".

39. When analysing the cost components, the manner in which the assets or services are paid for is not determinative. Lord Hodge stated at [67] that the relevant proceeds were the "net proceeds."

40. We agree with Miss McArdle that in general the necessary direct link exists if the services are part of the cost components of the person's taxable transactions which use those goods and services and that this has a chain-breaking effect. However, we disagree with Miss McArdle's submission that this general position is not modified in fundraising transactions. It is clear from the following paragraphs and sub-paragraphs of *Frank A Smart* that the general position is modified such that the use of services for a fundraising transaction which is either outside the scope of VAT or exempt does not prevent deduction if:

(1) The purpose in fundraising was to fund its economic activity [65(iv)]. This is to be ascertained from the objective evidence [65(iv)] and [65(vii)]. As Lord Hodge notes, "The ultimate question is whether the taxable person is acting as such for the purposes of an economic activity," [65(vii)]. The circumstances to be taken into account include the nature of the asset and the period between acquisition and use for the economic activity [65(vii)].

(2) The funds are later used for taxable supplies [65(iv)]. However, the right to deduct arises immediately, potentially resulting in a time lapse between deduction and use or retention of the right to deduct even if unable to use them in certain circumstances [65(vi)] and [69].

(3) The cost of the services are cost components of downstream activities which are taxable. The right to deduct will therefore be lost if the cost of the services are incorporated into the price of the shares sold in the initial transaction that is exempt or outside the scope of VAT [47] or of downstream activities which are exempt or outside the scope of VAT [65(v)]. If the downstream activities are a combination of taxable transactions, exempt transactions and transactions outside the scope of VAT, the inputs will have to be apportioned [65(v)].

41. It follows that we agree with Miss McArdle's submission that an objective assessment of the purpose of the fundraising is required as distinct from the subjective intentions of HLT. We also agree that the chain will be broken if the costs of the Services are a cost component of the fundraising. However, for the reasons set out above, we do not accept that the *use* of the Services for the fundraising transaction prevents deduction.

42. We apply the above legal principles to the facts of the present case as follows.

43. We find that, objectively ascertained, the purpose of the share sale was to fund HLT's taxable general activities. HMRC appear to accept that HLT was carrying out a downstream taxable business, as this was the basis of the concession that the second stage of consideration was met if the chain had not been broken at the first stage. In any event, we agree that HLT was carrying out a downstream taxable business of the building, development and ultimately management of the Milton Keynes Development. Crucially, HLT's financial position was that it could not afford to develop the Milton Keynes Development without entering into the Share Purchase Agreement. It is right that the Share Purchase Agreement stretched further than just the transfer of the Shares, as it included a means of ensuring that HLTB paid its inter-company loan to HLT and that HLTB paid its own indebtedness to Coutts. However, this is still part of the fundraising purpose as it is clear from the terms of the Share Purchase Agreement and the completion accounts that the terms of the transaction were intended to result in a total sum being paid to HLT on completion, either directly or by placing HLTB in funds to pay the inter-company debts to HLT. It is of note that there is no suggestion that the Net Proceeds were for any purpose other than the Milton Keynes Development. The use of the Net Proceeds to pay for the costs of sale is not a purpose in its own right; the overall purpose of the fundraising was to result in monies being payable to HLT which could then be used for the Milton Keynes Development and so any monies used for the costs of sale represented by the Professional Fees were to facilitate that purpose. This is because, objectively analysed, the Services were only necessary to facilitate the sale itself. Indeed, Miss McArdle rightly makes the point that the Services were purchased (and so the Professional Fees incurred) in order to maximise the selling price of the Shares.

44. Miss McArdle also makes the valid point that the Services were all part of the process of selling the Shares. However, this goes to the question of whether or not the Services were used

in the fundraising transaction. Whilst we agree that they were so used, this does not prevent deduction.

45. As set out in paragraph 11 above, we find that the Net Proceeds were used in respect of the Milton Keynes Development. HMRC accepted that activities relating to the Milton Keynes Development constituted taxable activities.

46. We find that the cost of the Services was not incorporated in the price of the shares sold in (and were not cost components of the price of the shares in) the initial transaction. The agreed evidence is that the Shares were sold for the best price achievable in the market. The price was not increased in order to provide for the costs of the Services and there was no allocation for such costs within the sale price. We note in this regard that although there is no requirement for such increased price or allocation in order for the costs to be components of the price of the Shares, the presence of such increase or allocation would support the cost of the Services being cost components of the initial transaction. Instead, the Services were paid for out of the proceeds of sale, thus reducing the amount available for the taxable transactions and so being a cost of those taxable transactions. Further, for the reasons set out above, the objective purpose of incurring the costs of the Services was in order to raise the funds to pay for the downstream transactions.

47. These findings are sufficient to allow the appeal. In deference to the well-argued submissions in respect of the VAT group and to the transfer of a going concern we briefly set out our findings as to those issues below.

THE VAT GROUP

Submissions

48. In summary, Mr Firth's submissions were as follows:

(1) Mr Firth accepted that the argument was a new one and had been raised late, and had only occurred to HLT in the course of addressing the relevance of the VAT group to the "equivalent to a transfer of a going concern" issue. However, he submitted that it was a short point of law and should therefore be considered.

(2) Section 43 of VATA provides as follows:

> "(1) Where under sections 43A to 43D any persons are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and
>
> (a) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and
>
> (b) any supply which is a supply to which paragraph (a) above does not apply and is a supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member;
>
> (c) [not relevant in the present case]
>
> and all members of the group shall be liable jointly and severally for any VAT due from the representative member.
>
> …"

(3) The VAT grouping means that HLT's management services to HLTB should be disregarded with the effect that there was no economic activity.

(4) As such, the sale of shares was outside the scope of VAT rather than exempt.

(5) Mr Firth relied upon *HMRC v Taylor Clark Leisure plc* [2018] UKSC 35 at [22] and [31] ("*Taylor Clark Leisure plc*") to the following effect:

"[22] This point was clearly made by the House of Lords in *Customs and Excise Comrs v Thorn Materials Supply Ltd [1998] 1 WLR 1106* in their discussion of the predecessor provisions, namely article 4(4) of the Sixth Directive and section 29 of the 1983 Act. Lord Nolan, with whom Lord Browne-Wilkinson and Lord Lloyd of Berwick agreed, stated, at p 1113, that those provisions were

"designed to simplify and facilitate the collection of tax by treating the representative member as if it were carrying on all of the businesses of the other members as well as its own, and dealing on behalf of them all with non-members."

I do not construe Lord Nolan's reference to "dealing on behalf of" the other members of the VAT group as a reference to an agency relationship. Section 43 is not concerned with the intra-group legal arrangements of group members. It is concerned with dealings in relation to VAT with entities outside of the VAT group and with HMRC, including the disregard of intra-group supplies in relation to liability for VAT. In its dealings with HMRC in relation to VAT the representative member is treated as carrying on the businesses of the other members of the group. Lord Clyde made the same point (p 1121H) stating that in the UK the single taxable person for which provision was made in article 4.4 of the Directive was the representative member. Lord Hoffmann, while dissenting, agreed on the effect of the provisions. He stated, at p 1118:

" Section 29 does produce a single taxable person, namely, the representative member. But it does so, not by the crude method of deeming all members to be a single person … but by the much more limited and specific assumptions which the subsection [now section 43(1)(a)(b) of VATA] makes."

Thus, the single taxable person is the representative member. The joint and several liability of the other members of the group for VAT due by the representative member is the means by which the UK has sought to counter tax evasion and avoidance in accordance with the authority conferred by the second paragraph of article 11 of the Principal Directive.

…

[39] In this regard I agree with the impressive analysis of the single taxable person in the context of a subsisting VAT group by the FTT (Judge Roger Berner, Mr Nigel Collard) in paras 73–75 of the decision in *Standard Chartered plc v Revenue and Customs Comrs [2014] SFTD 1270* . In particular, as Judge Berner stated, at para 73:

"Under UK law, as set out in section 43 VATA , the concept of the single taxable person is properly implemented through the representative member … The representative member is not the agent or trustee of the constituent members of the group. It is … the domestic law embodiment of the single taxable person"."

(6) Mr Firth also relied upon *HMRC v Northumbria Healthcare NHS Foundation Trust* [2020] EWCA Civ 874 at [39] ("*Northumbria Healthcare*"):

"[39] In the present case, the language of the De-Supply Order uses an expression ("supply") which has a well-recognised meaning in VAT law. The concept of making a supply for a consideration is an essential element of the carrying on of an economic activity. As Mr Scorey QC put it, by making the De-Supply Order in the form that it did, Parliament chose to effect the change at a structural level. It did so by recharacterising the activity that might otherwise have amounted to the carrying on of an economic activity. It is the inevitable consequence of the absence of supplies that there cannot be the

carrying on of an economic activity. That is simply to apply Lord Briggs' proposition (5). I agree."

49. In summary, Miss McArdle's submissions were as follows:

(1) Miss McArdle objected to the introduction of a new argument as it was extremely late and there was no good explanation for it not having been introduced earlier.

(2) The effect of grouping is to treat supplies made by a group member as being made by the representative member. This does not render the supplies a nullity. Instead, the supplies are to be disregarded.

(3) Miss McArdle relied upon *Intelligent Managed Services Ltd v HMRC* [2015] UKUT 0341 (TCC) at [49] and [50] ("*Intelligent Managed Services Ltd*"):

> "[49] By virtue of the single taxable person fiction, as applied by s 43(1) VATA, the group is to be treated as carrying on all the businesses carried on by group companies. That fiction does not, however, change the nature of those businesses. They remain separate businesses as a matter of fact. The fiction does not extend to treating the group as carrying on a different, amalgamated, business in which the separate businesses of the group lose their individual identity. That is clear, in our view, from the opinions of the House of Lords in *Customs and Excise Commissioners v Thorn Materials Supply Ltd and another* [1998] STC 725, in particular that of Lord Nolan, at p 733, where his Lordship referred to the representative member of the group being treated "as if it were carrying on all the businesses of the other [group] members as well as its own". We accept, in this respect, Mr Pleming's submission that this is the case whether or not those individual businesses themselves make supplies outside the group. The treatment of such supplies is dealt with separately by s 43(1)(b).
>
> [50] Nor can the fact that, by virtue of s 43(1), VMMSL's supplies within the group are to be disregarded affect the position. Although the VAT effects of those supplies are to be disregarded, the activities of VMMSL and the intra-group transactions it makes are not. That, we consider, is also clear from what Lord Nolan said in *Thorn Materials* at p 732:
>
> "That leaves open the question of what is meant by the requirement in s 29(1) that a supply by one member of a group to another must be disregarded. I accept Mr Prosser's [counsel for Thorn] submission that it does not mean that the separate existence of the appellants and [another group company] is to be denied or that the sale agreement and the prepayment are to be treated as not having taken place …"
>
> Consequently, the intentions and activities of VMMSL, objectively ascertained, form part of the overall factual matrix which must be considered in determining whether the group as a whole, as the transferee for this purpose, intended to use the assets transferred in carrying on the business, or whether there was no more than a transfer of assets."

(4) *Northumbria Healthcare* is to be distinguished as it related to legislation which treated certain transactions as de-supplied (namely, the Value Added Tax (Treatment of Transactions) Order 1992.

Discussion

50. We find that HLT is not entitled to rely upon the VAT group argument in the manner in which it seeks to do so. It does not appear within HLT's grounds of appeal, or, indeed any statement of case of either party. The first time it was raised was in further written submissions after the hearing. Notwithstanding the absence of any formal application, we treat HLT's

application to rely upon this new argument as if it were an application to amend the grounds of appeal. By analogy with the Civil Procedure Rules, the approach to late amendments was summarised as follows by Carr J in *Quah International v Goldman Sachs* [2015] EWHC 759 (Comm) at [36] to [38] (approved by the Court of Appeal in *Nesbit Law Group LLP v Acasta European Insurance Co Ltd* [2018] EWCA Civ 268):

> "[36] An application to amend will be refused if it is clear that the proposed amendment has no real prospects of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.
>
> [37] Beyond that, the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities: *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 (at paras. 69 to 72, 85 and 106); *Worldwide Corporation Ltd v GPT Ltd* [CA Transcript No 1835] 1 December 1988; *Hague Plant Limited v Hague* [2014] EWCA Civ 928 (QB) (at paras. 4 to 7 and 29); *Durley House Ltd v Firmdale Hotels plc* [2014] EWHC 2608 (Ch) (at paras. 31 and 32); *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.
>
> [38] Drawing these authorities together, the relevant principles can be stated simply as follows:
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice

> means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

51. We also keep in mind the principles in *Martland v HMRC* [2018] UKUT 178 ("*Martland*"). Although in *Martland* the Upper Tribunal was dealing with an application to admit a late appeal, this is still relevant to applications relating to or similar to relief from sanctions. The Upper Tribunal stated as follows at [44]:

> "[44] When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:
>
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission."

52. There can be no doubt that the application to rely upon the additional argument is extremely late. Further, there is no good reason for the failure to apply to amend earlier. As regards a consideration of all the circumstances of the case, we note that HMRC is prejudiced because it faces a new argument which has not been raised before, was introduced after the oral hearing, and which is entirely contrary to HLT's previous position. Indeed, HLT has not abandoned its previous argument that the share sale was an exempt transaction. By contrast, HLT is not prejudiced as, for the reasons set out above, it succeeds in its appeal without the VAT group argument.

53. Even if we had allowed HLT to argue the VAT group argument, we would have dismissed it. The effect of the VAT grouping is to disregard the supplies between members for the purposes of the VAT consequences that would otherwise arise out of those supplies themselves. However, in *Customs and Excise Commissioners v Thorn Materials Supply Ltd and another* [1998] STC 725 ("*Thorn Materials Supply Ltd*"), Lord Nolan stated as follows at 732:

> "… I accept Mr Prosser's submission that it does not mean that the separate existence of the appellants and Home is to be denied or that the sale agreement and the prepayment are to be treated as not having taken place. What it does mean is that the 90 per cent supply to which these facts gave rise must be disregarded or, as Mummery LJ put it, ignored, for tax purposes."

54. Similarly, in *Taylor Clark Leisure plc* at [27] (a case relied upon by HLT) Lord Hodge noted that:

> "[27] … Section 43 of VATA does not make the group a taxable person but treats the group's supplies and liabilities as those of the representative member for the time being."

55. In *Kretztechnik*, the CJEU provided the following definition of "economic activity" at [18]:

> "[18] In that connection, it must be borne in mind that it is clear from art 2(1) of the Sixth Directive, which defines the scope of VAT, that, within a member state, only activities of an economic nature are subject to VAT. Economic activities are defined in art 4(2) of the Sixth Directive as encompassing all activities of producers, traders and persons supplying services, in particular the exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis (*KapHag*, para 36)."

56. As such, the separate businesses within the VAT group retain their individual entity. An economic activity is therefore still taking place as a matter of fact, albeit that that the economic activity is treated for VAT purposes as if it is the economic activity of the representative member. The principle that the transactions between group members are still to be treated as having taken place (as distinct from the VAT supplies) was considered by the FTT (Judge Roger Berner and Mr Nigel Collard) in *Standard Chartered Bank plc v HMRC* [2014] UKFTT at [55] (albeit not binding upon us):

> "[55] The opinion of Lord Nolan in *Thorn Materials* was considered by the First-tier Tribunal in *University of Essex v Revenue and Customs Commissioners* [2010] SFTD 893, a case concerning the effect of the group provisions on the application of the capital goods scheme. The Tribunal said (at [22]):
>
> "It is clear from this that the purpose of s 43 is to enable a group to be treated as if it were a single taxable entity, and that the representative member is to be treated as carrying on the businesses of the other members as well as its own and dealing on behalf of those members with non-members. Consistently with this, group members (other than the representative member) are not treated as carrying on business on their own account. However, group members are nevertheless treated as continuing to have a separate existence, and transactions between group members (as opposed to the VAT supplies those transactions give rise to) are not to be ignored."

57. HLT's argument is that the supplies are to be disregarded and so the economic activity is to be disregarded. However, this would overlook the fact that the group members are still to be treated as having a separate existence with transactions taking place. Given that it is the transactions which constitute economic activity, the economic activity (as opposed to the VAT supplies the economic activity gives rise to) is not to be ignored.

58. We agree with Miss McArdle that *Northumbria Healthcare* is of no assistance as it relates to the deemed de-supplying of supplies rather than disregarding the supplies for the purposes of the VAT consequences of those supplies.

59. For completeness, we note that Mr Firth submits that caution should be exercised when considering *Intelligent Managed Services Ltd* to the extent that it is inconsistent with *Taylor Clark Leisure plc.* However, the relevant principles relied upon by Miss McArdle arise from *Thorn Materials Supply Ltd* which is consistent with (and considered in) *Taylor Clark Leisure plc*

TRANSFER OF A GOING CONCERN

Submissions

60. In summary, Mr Firth's submissions were as follows:

(1) The sale of the Shares is to be treated as the equivalent to a transfer of a going concern and so is outside the scope of VAT rather than exempt. This would mean that the Professional Fees would be general overheads.

(2) Mr Firth relied upon *SKF* at [35] and [41] to the following effect:

> "[35] As regards the nature of the transaction at issue, the Commission of the European Communities argues that it should be regarded as equivalent to a transfer of a totality of assets or part thereof within the meaning of art 5(8) of the Sixth Directive which, as it is a supply of goods, must be deemed to be an economic activity. According to the Commission, the sale of all the assets of a company and the sale of all of its shares are, in functional terms, equivalent.
>
> …
>
> [41] It follows from the foregoing that the answer to the first question is that art 2(1) and art 4(1) and (2) of the Sixth Directive and arts 2(1) and 9(1) of Directive 2006/112 must be interpreted as meaning that, where a parent company disposes of all the shares in a wholly owned subsidiary and of its remaining shareholding in a controlled company which was previously wholly owned by it, and where it has supplied to those companies services that are subject to VAT, that disposal is an economic activity coming within the scope of those directives. However, in so far as the disposal of shares is equivalent to the transfer of a totality of assets or part thereof of an undertaking, within the meaning of art 5(8) of the Sixth Directive or the first paragraph of art 19 of Directive 2006/112, and where the member state concerned has chosen to exercise the option provided for by those provisions, that transaction does not constitute an economic activity subject to VAT."

(3) Mr Firth also drew our attention to *Staatsecretaris van Financien v X BV* (Case C-651/11) [2013] STC 189 ("*XBV*"). The CJEU stated as follows at [50] to [54]:

> "[50] In any event, the facts in *SKF* differ from those at issue in the main proceedings in so far as there was no question of a number of vendors having effected successive transactions in favour of the same purchaser.
>
> [51] Accordingly, the disposal to a single person of all the shares in a company by all the shareholders of that company cannot be regarded as equivalent to the transfer of a totality of assets within the meaning of art 5(8) of the Sixth Directive.
>
> [52] With regard, in the third place, to the relevance to the answer given of the fact that the transfer of 30% of the shares is closely linked to the management activities carried out by the vendor for the company in which it held its shares, it should be noted, as the Netherlands and United Kingdom governments point out, that the cessation of the management activities appears to be the direct and logical result of the sale of X's shareholding.
>
> [53] It would be otherwise only if the vendor's management activities had been an autonomous part of its own undertaking that could be operated independently by the transferee and for the transferee had paid a consideration separate from that of the price of the shares. However, in such a case, the transfer of the totality of assets would cover only the management activities, and not the disposal of shares, because the two transactions relate to different undertakings.

> [54] It must be held, therefore, that the fact that the shares are transferred at the same time as the management activities cease has no bearing on the answer given to the questions referred for a preliminary ruling."

(4) There was no functional equivalence to a transfer of a going concern in *XBV*. Mr Firth distinguished the outcome in *XBV* upon the basis that in *XBV* only 30% of the shares were transferred whereas in the present case the whole shareholding was transferred.

(5) Mr Firth submitted that HLTB was an independent unit and so the transfer enabled an independent economic activity to be carried out. He also noted that the Share Purchase Agreement included the grant of various rights by HLT to Dalata such as the right to use the trademarks, restrictive covenants and warranties as to HLT being a going concern and its continuity as a business. This is consistent with a transfer of a going concern and creates functional equivalence.

(6) Mr Firth also submitted that the effect of section 43 of VATA and the VAT grouping of HLT and HLTB is that HLT is treated as carrying out HLTB's business. As such, upon HLTB leaving the VAT group, the effect was that the business was transferred from HLT to HLTB.

61. In summary, Miss McArdle's submissions were as follows:

(1) *XBV* cannot be distinguished. Miss McArdle submits that a disposal of assets is not sufficient to be equivalent to a transfer of a going concern. She relies upon paragraphs [38] to [40]:

> "[38] Therefore, as the German government submits, the transfer of shares in a company cannot, irrespective of the size of the shareholding, be regarded as equivalent to the transfer of a totality of assets or part thereof within the meaning of art 5(8) of the Sixth Directive, unless the holding is part of an independent economic activity to be carried out, and that activity is carried on by the transferee. The mere disposal of shares, unaccompanied by the transfer of assets, does not allow the transferee to carry on an independent economic activity as the transferor's successor.
>
> [39] Shareholders are not owners of the assets of the undertaking in which they hold their shares; they are owners of the shares and, as such are entitled to a dividend and to the communication of information, and are involved in the adoption of important decisions for the management of the undertaking. As regards a 30% shareholding in a company it must be observed that that represents only a limited entitlement in respect of that company.
>
> [40] It follows from the foregoing that the transfer of 30% of the shares in a company cannot be regarded as equivalent to the transfer of a totality of assets or part thereof within the meaning of art 5(8) of the Sixth Directive."

(2) Miss McArdle also relies upon *DTZ Zadelhoff vof v Staatssecretaris van Financien* [2012] STC 2271 in which the CJEU stated as follows at [42]:

> "[42] The answer to Questions 1 and 2 is, therefore, that art 13B(d)(5) of the Sixth Directive must be interpreted as meaning that the exemption from VAT in that provision covers transactions, such as those at issue in the main proceedings, which are designed to transfer shares in the companies concerned and have that effect but which, in the final analysis, concern immovable property held by those companies and the (indirect) transfer of that property. The exception to the exemption provided for in the second indent of that provision is not applicable if the member state has not availed itself of the possibility provided by art 5(3)(c) of the Sixth Directive of considering shares or interest equivalent to shares giving the holder of de jure or de facto rights

of ownership or possession over immovable property to be intangible property."

(3) Miss McArdle further submitted that VAT grouping has no effect upon the transfer of a going concern issue as the effect of the grouping is that the economic activity of the member is treated as the economic activity of the representative.

Discussion

62. We do not agree that the sale of the Shares (or the Share Purchase Agreement as a whole) can be treated as the equivalent of a transfer of a going concern.

63. There was no transfer of HLT's management of HLTB. On the basis of *SKF* this would not itself be fatal. However, there is nothing else that was transferred which meant that Dalata as transferee would be carrying on an independent economic activity as HLT's successor. The relevant assets were held by, and the relevant economic activity carried on by, HLTB rather than HLT prior to the transfer of the Shares and by Dalata immediately after the transfer of the Shares.

64. The additional rights in the Share Purchase Agreement granted by HLT to Dalata provide protection for Dalata but do not mean that, when taken with the transfer of the Shares, there is any functional equivalence to the transfer of a going concern because, again, the key economic activity is being carried on by HLTB not HLT or Dalata. Clause 8 of the Share Purchase Agreement grants Dalata various rights to use the trade mark and licensed intellectual property which had been used by HLTB. However, no evidence was given as to the terms upon which HLTB had previously been entitled to use the trade mark and licensed intellectual property. Indeed, by paragraph 7.17 of the warranties at Schedule 2 of the Share Purchase Agreement, HLT warranted that HLTB had all necessary licences and permissions in place. As set out in paragraph 7(6) above, paragraph 10.2 of Schedule 2 was a warranty that HLTB's assets and its contractual rights comprised everything necessary for carrying on HTLB's business. As such, the grant of the licence to Dalata does not achieve functional equivalence to a transfer of assets because, in accordance with the warranty (which HLT does not submit was incorrect) HLTB already had the rights and assets necessary for carrying on its business. Similarly, the warranties would provide Dalata with a contractual remedy against HLT in the event of a breach, but are not part of a transfer of assets allowing Dalata to carry on an independent economic activity as the transferor's successor. The same is true of the restrictive covenants granted by HLT to Dalata in the Share Purchase Agreement.

65. We agree with Miss McArdle that the principles in *XBV* are applicable, notwithstanding that the whole of the Shares in HLT were transferred as distinct from the 30% of the shares in *XBV*. The amount of the shareholding was one of the reasons for the decision in *XBV*. However, *XBV* makes it clear that the mere disposal of shares of any amount does not allow the transferee to carry on an independent economic activity as the transferor's successor if it is unaccompanied by the transfer of assets.

66. The fact that HLT and HLTB were in a VAT group does not affect this analysis. Mr Firth focused upon a transfer of a going concern from HLT to HLTB when they ceased to be members of the same VAT group. However, when HLTB left the VAT group the effect was the end of the deeming provisions in section 43 of VATA rather than any transfer. In any event, the relevant transfer in the present case is from HLT to Dalata, not from HLT to HLTB.

DISPOSITION

67. It follows that, for the reasons set out in paragraphs 1 to 47 above, we allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

68. 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.

RICHARD CHAPMAN QC
TRIBUNAL JUDGE

Release date: 03 DECEMBER 2021