[2015] UKUT 585 (TCC)

Appeal number FTC/13/2013

VALUE ADDED TAX - exemption - whether dental payment plan administrator provided services to patients for consideration - whether services exempt transactions concerning payments or transfers or standard rated debt collection - whether to refer questions to CJEU or stay case pending decision in Bookit II and NEC - if exempt whether change in contractual arrangements from 1 January 2012 abuse of law – appeal allowed in part and stayed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

DPAS LIMITED

Respondent

Tribunal: The Hon Mr Justice Warren
Judge Greg Sinfield

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 6, 7 and 8 May 2015

Kieron Beal QC and Alan Bates, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellant

John Walters QC and Conrad McDonnell, counsel, instructed by Wilsons Solicitors LLP, for the Respondents

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DECISION

Introduction

1. The issue in this appeal is whether the Respondent ('DPAS') makes supplies of services, within the exemption for transactions concerning payments or transfers, to the patients of dentists for whom DPAS provides practice-branded dental plans under arrangements introduced with effect from 1 January 2012. In this case, 'dental plan' refers to the arrangements between a dentist and his or her patient under which the dentist agrees to provide a certain level of dental care and, in return, the patient agrees to pay a specified amount monthly. The plan also includes some other services, namely insurance and payment administration services. The latter are provided by DPAS and the VAT treatment of those services is the subject of this appeal. We discuss below who supplies the services and to whom they are supplied for VAT purposes.

2. In a letter dated 17 April 2012, the Appellants ('HMRC') ruled that supplies of services in relation to the administration of dental plans made by DPAS from 1 January 2012 are either a single, standard rated, supply of services to the dentists or a mix of standard rated supplies of services to the dentists and standard rated supplies of services to their patients. DPAS disagreed with that decision and appealed to the First-tier Tribunal ('the FTT'). Before the FTT, DPAS contended that it made a standard rated supply of services to dentists and a separate exempt supply of payment services to their patients. HMRC maintained the views set out in their letter of 17 April 2012 and also submitted that the arrangements introduced from 1 January 2012 were an abusive practice contrary to the principle prohibiting such abuse first described and applied in the context of VAT by the Court of Justice of the European Communities, later the Court of Justice of the European Union, ('the CJEU') in Case C-255/02 *Halifax plc and Others v HMCE* [2006] STC 919 ('*Halifax*'). DPAS contended that the contractual arrangements were not an abusive practice.

3. In a decision released on 22 November 2013, [2013] UKFTT 676 (TC), ('the Decision'), the FTT (Judge John Brooks) held that:

(1) DPAS makes a supply of services to the patient for consideration;

(2) the supply is exempt as a transaction concerning payments;

(3) the services are not debt collection, which would be standard rated, because they are supplied to the debtors, ie the patients, not to the creditors, ie the dentists;

(4) the £10 registration fee is consideration for a service ancillary to the principal supply which is thus also exempt; and

(5) the contractual arrangements from 1 January 2012 did not amount to an abusive practice.

4. HMRC now appeal, with the permission of the FTT, against the Decision on five grounds that challenge all of the conclusions reached by the FTT. For the reasons set out below, we have decided that HMRC's appeal against the Decision should be allowed in part.

Background

5. The factual background to the appeal has never been disputed. For the purposes of this appeal, the facts, which are more fully set out at [15] – [58] of the Decision, can be summarised as follows.

6. DPAS was established in 1996 by Mr Quentin Skinner. The company's name is an acronym of 'Dental Plan Administration Services'. DPAS designs and implements dental plans under which the private patients of dentists, who are registered with DPAS, can spread the cost of basic dental healthcare evenly throughout the year.

7. There are two types of dental plan, each providing different levels of care, available to dental patients. Each plan includes insurance procured for the patients by DPAS, acting as an agent for the insurer, ACE European Group Limited ('ACE'). The insurance is intended to cover certain risks not covered by the dental plan, eg emergency dental treatment. DPAS also provides a worldwide emergency helpline for patients as part of the dental plan.

8. The dental plans administered by DPAS are 'practice branded' in that they are offered in the name of, and under the 'brand' of the dentists' practices. DPAS provides advice to the dentists and their practice staff in setting up the plan and produces marketing materials such as brochures, leaflets and posters, registration forms, correspondence/headed note-paper and plan membership cards branded in the dentists' names. The agreement to provide dental services under a plan is made between the dentists and their patients. The price, including dental plan charges, is agreed between each dentist and their patients.

9. The patients make monthly payments from their bank accounts to DPAS by way of direct debit. Each direct debit payment includes:

(1) the amount due from the patient to the dentist;

(2) the amount due to from the patient to ACE; and

(3) the fee payable to DPAS (we discuss below whether the dentists or the patients or both are contractually obliged to pay this fee or any part of it).

10. Each month, DPAS accounts to the dentists for the aggregate amount payable to them in respect of all of their patients who have paid the monthly fee less an amount retained by DPAS as charges for its services.

11. DPAS manages the administration, finance and insurance aspects of the dental plans. In the overwhelming majority of cases, DPAS charges a monthly standing charge of £366.66 and a 'per-patient charge' together on a monthly basis. The monthly standing charge is made up of a flat charge of £66.66 to the dentist in respect of dental plan services and a flat charge of £300 described as the 'group patient charge' to be divided equally between the patients registered under the dental plan. The per-patient charge is levied at different rates and nothing turns on the amount of that charge in particular cases.

12. DPAS was registered for VAT from the commencement of its business in 1996. In 2003, Mr Skinner considered that, due to similarities with the CJEU case of *Sparekassernes Datacenter v Skatteministeriet* [1997] STC 932 ('*SDC*'), the services provided by DPAS were predominantly exempt supplies. Following representations, HMRC accepted that DPAS made exempt supplies of "transactions concerning … payments, transfers" within Article 13B(d)(3) of the Sixth VAT Directive, now Article 135(1)(d) of Council Directive 2006/112/EC ('the Principal VAT Directive'). DPAS was deregistered for VAT with effect from 31 January 2004.

13. For commercial reasons relating to the concerns of dentists that dental plan administrators might interfere with the dentist/patient relationship, DPAS only entered into contracts for the provision of its services with the dentists and did not have any contract with the patients. There was no reference to DPAS in the practice branded brochure (the 'Old Brochure') or leaflets explaining the dental plans that were provided to patients. The registration form mentioned in the Old Brochure made no reference to DPAS. DPAS charged the dentists the monthly standing charge of £366.66 and the per-patient charge.

14. From 2008, DPAS charged a £10 registration fee to the patient as a means of recovering directly from the patient the costs of registration onto a dental plan. The registration fee was added to the first monthly payment.

15. On 28 October 2010, the CJEU gave its decision in Case C-175/09 *AXA UK Plc v HMRC* [2010] STC 2825 ('*AXA*'). *AXA* concerned the VAT liability of supplies by Denplan Limited ('Denplan'), a competitor of DPAS, which, like DPAS, operated dental payment plans on behalf of dentists. The dentists entered into contracts with their patients to enable them to pay a fixed monthly fee to cover private dental treatment. The dentists agreed with Denplan that the patients would pay Denplan the monthly fees by direct debit. Denplan deducted and retained a fee from each monthly payment, paid an insurance premium to a group insurance company to cover emergency treatment, and accounted to the dentists for the balance. The dentists were relieved of any work in collecting fees for patients registered under the plan. There was no contract between Denplan and the patients.

16. As with DPAS, payment was made by patients via direct debit from their bank accounts to Denplan which accounted to the dentists for payments received. The service of 'collecting payments' was described by the CJEU, at [19], as comprising:

> "… the collection, processing and onward payment of sums of money due from third parties, namely patients, to Denplan's clients, namely, dentists. That service consists, in particular, in transmitting information to the third party's bank calling for the transfer of a certain sum of money from the third party's bank account to the service supplier's bank account in reliance on a standing authorisation given by that third party to his or her bank, and subsequently giving an instruction to the service supplier's own bank to transfer funds from its account to the client's bank account. Meanwhile, the service supplier sends to its client a statement of the sums received and contacts third parties from whom it has not received a transfer of the sum requested."

17. In relation to the question of whether Denplan's services should be regarded as a single supply or two or more supplies, the ECJ concluded at [23]:

> "As regards transactions such as those referred to in the decision making the reference, the actions performed by Denplan, examined for the purposes of VAT, are indissociably connected. The economic purpose of those actions is the transfer of the sum due each month from the patient to the dentist. The transfer of the sum due to the service supplier's bank account is of no use to its client unless that sum, less the service supplier's remuneration, is then paid to the client and the service supplier accounts to that client for the sums received. Consequently, the service in question in the main proceedings, in circumstances such as those

> described by the referring court, must be regarded as forming a single transaction for the purposes of VAT."

18. At [28], the CJEU held that:

> "As regards the service in question in the main proceedings, it is appropriate to point out that its purpose is to benefit Denplan's clients, namely dentists, by the payment of the sums of money due to them from their patients. Denplan is, in return for remuneration, responsible for the recovery of those debts and provides a service of managing those debts for the account of those entitled to them. Therefore, as a matter of principle, that service constitutes a transaction concerning payments which is exempt under Article 13B(d)(3) of the Sixth Directive, unless it is 'debt collection or factoring', a service which that provision, by its final words, expressly excludes from the list of exemptions."

19. In [32] and [33], the CJEU held that Denplan supplied debt collection and factoring services because the object of the services was to obtain payment of debts due to its clients, namely the dentists. The CJEU ruled at [36] that:

> "Article 13B(d)(3) ... is to be interpreted as meaning that the exemption from VAT provided for by that provision does not cover a supply of services which consist, in essence, in requesting a third party's bank to transfer to the service supplier's account, via the direct debit system, a sum due from that party to the service supplier's client, in sending to the client a statement of the sums received, in making contact with the third parties from whom the service supplier has not received payment and, finally, in giving instructions to the service supplier's bank to transfer the payments received, less the service supplier's remuneration, to the client's bank account."

20. On 12 January 2011, HMRC published Revenue & Customs Brief 54/10 which set out HMRC's position in the light of *AXA*. In July 2011, HMRC agreed to allow businesses to delay the implementation of the decision in *AXA* until 1 January 2012. Following *AXA*, DPAS restructured the contractual arrangements of the dental plans with the intention that it would, from 1 January 2012, make supplies of services to the patients as well as to the dentists. It is the VAT liability of the supplies made by DPAS on and after 1 January 2012 that is the subject of this appeal.

21. The steps that DPAS took to implement changes to the existing contractual arrangements and introduce new arrangements for patients joining dental plans from 1 January 2012 are set out by the FTT at [49] - [57]:

> "49. From 1 January 2012 DPAS produced new branded brochures for dentists (the 'New Brochure'). In contrast to the Old Brochure which has no mention of DPAS (see paragraph 36, above) under the section 'How do you Join Our Plan', the New Brochure describing a Maintenance Plan states:
>
> > There is no need for an assessment. Joining is very simple. All you have to do is complete a registration form for us and a Direct Debit mandate and an authorisation form for DPAS.
> >
> > In addition to your first monthly payment, an initial registration fee of £10 per person will be charged by DPAS and will be included in your first Direct Debit payment.

In addition, and unlike the Old Brochure which did not refer to DPAS at all, it clearly states on the New Brochure that:

> Research shows that preventative dentistry delivered on a regular basis greatly reduces the risk of dental disease and provides a platform for a lifetime of improved oral health. We encourage such an approach and with this in mind have joined with DPAS Limited to design a dental plan to reward loyal patients. This plan will be administered by DPAS who will make a separate agreement to manage your payments under the plan. …

50. On 8 September 2011, DPAS wrote to its existing dentist clients in the following terms (with emphasis as stated in the letter):

> Dear Dr …
>
> **DPAS private dental plans and VAT – proposed administrative changes**
>
> You may have heard earlier this year that there have been changes regarding the VAT treatment of private dental plans in the UK. This has resulted from a legal case between HMRC and AXA Denplan, wherein the European Court of Justice pronounced last November that Denplan's operation was that of 'debt collection', and therefore was not exempt from VAT. This pronouncement caused HMRC to issue a new policy document in January, which has a severe effect on DPAS Limited's operation, as it removes the exemption to VAT that we agreed with HM Customs & Excise some years ago.
>
> Rather than simply increase our charges to dental practices to account for the 20% of our revenue that this new policy effectively removes, we have been spending considerable resources this year in seeking a solution that mitigates this adverse position. I am pleased to say that we now have a proposal that will allow us to move forwards without increasing our charges as a result of this VAT ruling, which I now set out below. **May I emphasise that these changes are purely administrative, reflecting the nature of the reality of our services; they have no effect *whatsoever* on the amounts either you or your patients are charged and make no practical difference to the current arrangements.**
>
> **Proposed changes**
>
> Up until now, apart from the contract between you and your patient for the delivery of dental care, the dental plan arrangements have been made up of the following contractual arrangements:
>
> 1. A contract between DPAS and the dentist for the delivery of dental payment plan services.
>
> 2. A contract between DPAS as agent for our underwriters and the patient for the supply of dental accident and emergency insurance cover (Supplementary Insurance).
>
> We now propose to vary this arrangement, by splitting the former into two, consisting of:
>
> (a) A contract between DPAS and the dentist for the delivery of taxable dental payment plan services and
>
> (b) A contract between DPAS and the patient for the provision of dental payment plan facilities.

The monetary value of the DPAS charges will remain unaltered, but will be split into charges to both the dentist and the patient in respect of dental plan services and the amount relating to the Supplementary Insurance. Further details of this are given in the attached 'Your Questions Answered' document.

The financial implication of this is that DPAS will suffer VAT on the revenue flow from contract (a) above, which I am pleased to say that we propose to absorb ourselves at no cost to any of our customers. All of the other contracts remain VAT exempt.

Practical implications

To put this new arrangement into effect, we need to agree with you a new set of Terms & Conditions, and to write to all your current DPAS dental plan patients to explain the changes. Although this communication to patients will necessarily include an acceptance form, it will make clear that this is an administrative change only and that **the patient need do nothing**. We propose to put this into effect from 1st January 2012.

We enclose a new set of Terms & Conditions, and would ask that you sign both copies of these and return them to us as soon as possible. Should a colleague at the practice also receive this letter, please return only one set of Terms & Conditions in duplicate, signed by all relevant parties. We then aim to communicate the changes to your patients in November, and we enclose a copy of the intended letter for your information. **If we do not hear from you by 26th October, we will assume that you have accepted the new Terms & Conditions and are happy for us to write to your patients in this regard.**

Conclusion

This whole episode has been extremely costly and time consuming for us at DPAS to sort out. However, the solution we propose has been carefully considered and put together in full consultation with leading tax Counsel, commercial lawyers and VAT accountants and we have made HMRC aware of our proposals. We believe that this will allow us to continue to service the provision of your dental plan arrangements in the same cost-efficient manner as before, and that this will have no effect whatsoever on the relationship between you and your patients. The alternative would be for our charges to increase to cover the additional VAT suffered, which will simply be an unwanted cost to you and your patients.

51. The new terms and conditions enclosed with the letter, insofar as they are material, provided:

1. Interpretation

In these terms and conditions –

'we', 'us', and 'our' means DPAS Limited, …; and

'you' and 'your' means our customer carrying on the business of dentistry (whether as a body corporate, an individual dental practitioner or a partnership of dental practitioners).

2. Payment of patient fees

2.1 Subject to condition 2.2, we will arrange for you to receive out of the payments by [patients] participating in the dental plan ("Participating Patients") which we have managed and administered

> for the patients concerned the net sums referred to in condition 2.3 below. The net sums referred to in that condition will belong to you from and after our allocation of the charges and premiums referred to below and, pending remittance to you, will be held in a designated trust account.
>
> 2.2 We are not responsible for the failure or cancellation of any Direct Debit mandate; and where a mandate is dishonoured on three consecutive occasions reserve the right to cease attempting to administer payment of fees for the Participating Patient in question with the result that no further sums would be receivable by you in respect of the Participating Patient.
>
> 2.3 The net sums referred to in this condition are the total of the plan payments received by us from the Participating Patient net of the amounts we allocate to (a) the charges we make to the Participating Patients for managing and administering their plan payments under the agreements made by us with them; (b) payments of the Supplementary Insurance premiums; and (c) the charges we make to you in accordance with condition 3.
>
> 2.4 We will remit, to such bank account as you notify to us in writing from time to time, amounts due to you on a monthly basis; and provide a monthly statement in this respect.
>
> ...
>
> **3. Our charges**
>
> 3.1 Charges for the services we provide are as communicated to you from time to time, and subject to periodical review.

52. DPAS also entered into a similar agreement on identical terms and conditions with any new dental practice ie one that first used DPAS's services after 1 January 2012.

53. The letter to be sent to existing patients with a dental plan, envisaged under the 'practical implications' sub-heading in the letter sent to the dentists (see paragraph 50, above), was to be written on the dental practice's own letterhead in the following terms (with emphasis as stated in the letter):

> As you are aware, your monthly Direct Debit is paid through DPAS Limited, which devised, provides and administers your dental plan using its Direct Debit administrator status. Although in the past, of course, DPAS has had a relationship with you, we, the dental practice, have paid an administration charge to DPAS out of the Direct Debit payment that you made.
>
> Following a review, we have agreed with DPAS to make some changes in the dental plan administrative arrangements. From now on, it is proposed (as explained in the DPAS Acceptance Form enclosed) that part of the total monthly Direct Debit amount to be paid by you to DPAS will be retained by DPAS in respect of its obligation to you to manage and administer your dental plan payments and to manage and administer your Supplementary Insurance cover and dental emergency helpline.
>
> **WE WANT TO REASSURE YOU THAT THESE ARE PURELY ADMINISTRATIVE CHANGES. THEY WILL NOT ALTER THE COVER PROVIDED UNDER THE DENTAL PLAN OR**

AFFECT THE LEVEL OF YOUR TOTAL MONTHLY PAYMENTS.

Please read and sign the enclosed DPAS Acceptance Form and return it in the envelope provided.

If you would like any further details of this proposed new arrangement please do not hesitate to call DPAS on [telephone number].

54. The 'DPAS Acceptance Form' for existing patients referred to in the letter was addressed to the patient. It stated (with emphasis as in the original document):

DPAS ACCEPTANCE FORM

Please read and sign this DPAS Acceptance Form. It forms the basis of your agreement with DPAS that they will manage and administer your dental plan payments for you.

IF YOU DO NOT SIGN THIS DPAS ACCEPTANCE FORM AND DO NOT CONTACT US, WE SHALL ASSUME YOU ARE HAPPY TO PROCEED ON THE BASIS OUTLINED BELOW AND DPAS WILL PROVIDE YOU WITH THE DENTAL PLAN MANAGEMENT AND ADMINISTRATION SERVICES SET OUT BELOW.

I agree with DPAS Limited (DPAS) that DPAS will manage and administer the payments to be made by me in respect of my/our dental plan(s). In return for its management and administration services, I authorise DPAS to deduct and retain from the total monthly payments that I/we have agreed with my/our dentist(s) from time to time a monthly charge which will not exceed £3.00 per patient*. This charge includes the premium payable in respect of the Supplementary Insurance cover and the dental emergency helpline.

…

*The monthly charge per patient will be made up of £0.94 plus an equal share of a monthly group patient charge of £300.00 to be divided equally according to the number of patients registered under the dental plan(s). The total monthly charge will not exceed £3.00 per patient. This charge is subject to periodical review.

55. The letter and Acceptance Forms were sent to approximately 340,000 patients and over 80,000, approximately 30%, of these were returned to DPAS. DPAS also received over 3,000 telephone calls to a helpline established to deal with issues raised by the letters with 90% of these calls sought confirmation that the amount they were paying for the dental plan would not be increasing.

56. From 1 January 2012 any patient who wished to join a dental plan, irrespective of whether he or she had become aware of the plans from reading the Old Brochure which did not mention DPAS or the New Brochure which did, was required to complete an authorisation form. After space for inserting personal and bank account details the form continues as follows (with emphasis as in the form):

DPAS AUTHORISATION: Please read and sign this DPAS Authorisation. It forms the basis of your agreement with DPAS that they will manage and administer your dental plan payments for you.

> The answers on this form contain your personal data. DPAS Limited (DPAS) records, processes and holds your personal data in accordance with the Data Protection Act(s). Your personal data will only be used by DPAS and/or its subcontractors in the management and administration of your dental plan and for no other purpose.
>
> The Supplementary Insurance policy is designed to meet the demands and needs of patients who require insurance cover for treatment costs arising from dental injury or emergency. The policy forms part of your dental plan and is mandatory. No recommendation has been made in connection with the Supplementary Insurance policy.
>
> I confirm that I have read and fully understand the explanatory brochure and the Supplementary Insurance Policy Summary. I am also aware of any registration fee payable.
>
> I agree with DPAS that DPAS will manage and administer the payments to be made by me in respect of my dental plan. In return for its management and administration services, I authorise DPAS to deduct and retain from the total monthly payments that I have agreed with my dentist from time to time a monthly charge which will not exceed £3.00*. This charge includes the premium payable in respect of the Supplementary Insurance cover and the dental emergency helpline.
>
> …
>
> *The monthly charge per patient will be made up of £0.94 plus an equal share of a monthly group patient charge of £300.00 to be divided equally according to the number of patients registered under the dental plan(s). The total monthly charge will not exceed £3.00 per patient. This charge is subject to periodical review.

Under the DPAS authorisation, on the same document, is a direct debit mandate to be completed in favour of DPAS.

57. In the event that a patient's Direct Debit was not paid, the letter sent to that patient after October 2012 would have been in the following terms:

> As administrators of your dental plan payments we are writing to inform you that we have been unable to collect your dental plan payment this month (shown on your bank statement as 'DPAS Dental Plan'). ...
>
> ...
>
> If you wish to cancel your plan membership or have any other queries please contact your practice as soon as possible."

As with the earlier letter (set out at paragraph 30, above) the direct debit payment would have included the fee due to the dentist from the patient."

Legislation

22. DPAS argued that the supply to the patients was an exempt supply of services relating to transactions concerning payments or transfers within Article 135(1)(d) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the Principal VAT Directive').

23. The UK has implemented the provisions of the Principal VAT Directive in the Value Added Tax Act 1994 ('VATA94') and regulations made under it. Article

135(1)(d) of the Principal VAT Directive is implemented by Item 1 of Group 5 of Schedule 9 to the VATA94. It was common ground between the parties to this appeal that we did not need to consider the terms of the exemption under the VATA94. It was not suggested that Article 135(1)(d) had not been properly implemented and, as the VATA94 must be interpreted conformably with Article 135(1)(d), nothing turns on any difference between Article 135(1)(d) and domestic provisions.

24. Article 2(1)(c) of the Principal VAT Directive provides that a supply of services for consideration within the territory of a Member State by a taxable person acting as such is subject to VAT. Article 24(1) provides that any transaction that does not constitute a supply of goods is a supply of services.

25. Article 131 of the Principal VAT Directive provides:

> "The exemptions provided for in Chapters 2 to 9 [which include Article 135(1)] shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse."

26. Article 135(1) of the Principal VAT Directive provides that Member States shall exempt the transactions described therein which include the following:

> "(d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;"

The Decision

27. In the proceedings before the FTT, it was not disputed that the plan itself is administered by DPAS on behalf of the dentists and that the plan administration services that are supplied by DPAS to the dentists are standard rated. The FTT considered the following issues:

(1) whether DPAS supplies services to the patients for consideration;

(2) if so, whether the services are within the exemption for transactions concerning payments or transfers; and

(3) if the services supplied to patients are exempt, whether the change in the contractual arrangements from 1 January 2012 is an abusive practice which must be redefined so as to re-establish the situation that would have existed if there had been no abuse.

28. In relation to the first issue, the FTT considered whether it was necessary to analyse the arrangements that were in place before 1 January 2012 when determining whether DPAS made a supply of any services to patients for VAT purposes from that date. The FTT accepted the submissions made by Mr Walters on behalf of DPAS that if another company were to set up business in competition with DPAS using contractual arrangements identical to those of DPAS from 1 January 2012, those arrangements would have to be analysed on their own merits and without reference to any pre-existing arrangements. The principle of fiscal neutrality is concerned with ensuring that supplies of similar goods and services, which are thus in competition with each other, are treated the same way for VAT purposes. At [65], the FTT concluded that it was not necessary to consider the contractual arrangements in force prior to 1 January 2012 when deciding

whether DPAS makes supplies of services to the patients under the arrangements in place from 1 January 2012. The FTT found, in [65], that the purpose of the new arrangements was to circumvent the effect of the CJEU's decision in *AXA*.

29. The FTT considered the position under the arrangements in place from 1 January 2012 in relation to existing patients (ie those who had taken out a dental plan before 1 January 2012) and new patients (ie those who took out a dental plan on or after 1 January 2012). The FTT concluded that the letter sent to existing patients had the effect of varying the terms of the agreement between the patients and the dentists and putting in place a new agreement between the patients and DPAS under which the patient pays monetary consideration to DPAS in return for management and administration services. The existing patients included those (some 30%) who signed the Acceptance Form and those (some 70%) who did not. The FTT held that its analysis clearly applied to those who had signed and returned the Acceptance Form. In relation to the remaining 70% of patients who did not return their Acceptance Forms but nevertheless continued to make payments in respect of their dental plans to DPAS via direct debit, the FTT accepted the submission made on behalf of DPAS that the patients had accepted the new arrangements by conduct. In relation to the new patients, the FTT found that, whether they had read the Old Brochure or the New Brochure, each one was required to complete a DPAS Authorisation Form. The FTT held, in [80], that the form clearly shows that there is an agreement between the patient and DPAS under which DPAS agrees to manage and administer the payments to be made by the patient in respect of his or her dental plan in return for a monthly charge that DPAS deducts from those payments.

30. The FTT then considered, as both parties agreed it must, the economic and commercial reality of the arrangements put in place from 1 January 2012. At [86], the FTT accepted the submissions on behalf of DPAS that the patient is paying for and receiving something more than a supply of dental services from a dentist, namely an administrative and management service provided by DPAS.

31. At [87], the FTT concluded that, as a matter of economic and commercial reality, DPAS makes a supply of services to the patients for consideration under the contractual arrangements introduced with effect from 1 January 2012.

32. In relation to the second issue, namely whether the supplies by DPAS to the patients were exempt, the FTT reviewed various authorities, which we discuss below, and concluded, at [100], that DPAS's supplies to the patients have the characteristics of those described in *AXA* at [28]. The FTT observed that there was a crucial distinction between the two cases, namely that in *AXA* the supplies were to the dentist, who was a creditor, whereas DPAS supplied services to the patients who were not creditors. That distinction led the FTT to conclude that the services supplied by DPAS were not debt collection because debt collection is a service that can only be provided to a creditor. The FTT then held that, because the service supplied by DPAS to patients has the characteristics described by the CJEU at [28] of *AXA* but is not debt collection, "as a matter of principle, that service constitutes a transaction concerning payments which is exempt". The FTT also held, in [108], that the £10 registration fee is consideration which DPAS receives for the services provided to patients similar to an arrangement fee charged by a bank for a loan or overdraft facility and, as such, should be treated as an ancillary part of the exempt supply by DPAS.

33. Having found that DPAS made exempt supplies of services to the patients, the FTT considered the third issue, namely whether the arrangements were an abusive practice as described and applied in the context of VAT by the CJEU in *Halifax*. Having noted that it was accepted in *Halifax* at [73] that a taxable person can structure his business so as to limit his tax liability without it being an abusive practice, the FTT found that the arrangements introduced from 1 January 2012 were not artificial and concluded that they did not amount to an abusive practice.

34. The FTT allowed DPAS's appeal. HMRC now appeal, with the permission of the FTT, against the Decision on five grounds that challenge all the conclusions reached by the FTT. In their grounds of appeal, HMRC contend that the FTT had made the following errors of law in the Decision:

(1) holding that DPAS made a supply of services to the patients for a consideration;

(2) deciding that DPAS's supply of services to the patients fell within the exemption in Article 135(1)(d) of the Principal VAT Directive;

(3) deciding that DPAS's supply was not 'debt collection' and thus excluded from exemption;

(4) its treatment of the £10 registration fee as an ancillary part of the exempt supply; and

(5) holding that DPAS's changes to its contractual arrangements from 1 January 2012 did not amount to an abusive practice.

Contractual arrangements from 1 January 2012

35. The FTT concluded that DPAS makes a supply of services to the patients for consideration under the contractual arrangements introduced with effect from 1 January 2012 contractually and as a matter of economic and commercial reality. Mr Kieron Beal QC, who appeared with Mr Alan Bates for HMRC, submitted that the FTT was wrong on both points, ie the contractual analysis and from the point of the economic and commercial reality.

Relevance of contractual arrangements before 1 January 2012

36. In considering the contractual position and the economic reality of the arrangements, Mr Beal submitted that it was necessary to take account of the contractual arrangements in force before 1 January 2012. Mr Beal relied on the comments of Mance LJ in *Debenhams Retail plc v Customs and Excise Commissioners* [2005] EWCA Civ 892, [2005] STC 1155 at [12]:

> "The tribunal found it helpful to start with the arrangements prior to 2000. DR takes issue with their relevance. However, it is clear that the only motive for the change of arrangements in 2000 was to reduce the VAT payable. It is of potential relevance in understanding and analysing the new arrangements from 2000 to understand what the arrangements were, and presumably would still be, apart from that motive; and it is on any view relevant to understand the previous arrangements in so far as they took effect expressly by way of variation of the prior arrangements."

37. Relying on that passage, Mr Beal criticised the FTT for concluding, in [65], that it was not necessary to consider the contractual arrangements in force prior to 1 January 2012. We consider that Mr Beal's criticism is misplaced. The FTT cited the passage

from *Debenhams Retail* quoted above at [62] and recorded, at [63], the submission made by HMRC that "it is necessary to consider the arrangements in place before 1 January 2012 in order to determine the correct VAT treatment of supplies after that date.". The FTT recorded and agreed with the submissions of Mr Walters on behalf of DPAS that, if HMRC were correct, dental plan services provided by a person under the same contractual arrangements as DPAS after 1 January 2012 would, if that person had never provided services under any other arrangements, be treated differently for VAT purposes which would be contrary to the principle of fiscal neutrality. It was to that submission that the FTT was responding when it stated that it was not necessary to consider the earlier arrangements. We consider that the FTT was saying that the earlier arrangements do not necessarily determine the correct VAT treatment of supplies under the new arrangements.

38. We agree, however, that consideration of the arrangements in force before 1 January 2012 is relevant to understanding the new arrangements that were introduced from that date and varied (or purported to vary) the old arrangements. That is not to say that the contractual arrangements that existed before 1 January 2012 necessarily determine whether DPAS supplies services to the patients from that date. The earlier arrangements are part of the context and purpose of the changes to the arrangements. We consider that the FTT correctly and appropriately took the earlier arrangements into account to that extent. The FTT set out the pre-2012 contractual arrangements at [31] - [38] and discussed them in the context of the changes at [67] and [68]. The earlier arrangements may also be relevant to a consideration of whether changes in the arrangements from 1 January 2012 were an abusive practice. The FTT clearly had this in mind when it found, in [65], that the purpose of the new arrangements was to circumvent the effect of the CJEU decision in *AXA*.

Contractual issues – DPAS Authorisation Form

39. Any transaction, which is not a supply of goods, is a supply of services and, if for consideration, is subject to VAT unless exempt (Articles 24(1) and 2(1)(c) and Chapters 2 to 9 of Title IX of the Principal VAT Directive). The CJEU has held that a supply of services for consideration requires a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509 at [14]). Although the CJEU in *Tolsma* used the term 'legal relationship', that should be understood, in the light of Case C-498/99 *Town and County Factors Ltd v Customs and Excise Commissioners* [2002] STC 1263 at [21] - [24], as including a reciprocal arrangement under which the service provider's obligations are not legally enforceable but are binding in honour only.

40. Mr Beal submitted that the FTT was wrong to conclude, in [80], that the DPAS Authorisation Form created a contract between DPAS and the patients who took out a dental plan from 1 January 2012 under which DPAS supplied services to the patients in return for consideration. Mr Beal said that the FTT had misconstrued the effect of the Authorisation Form. The terms of the form are set out in [56] of the Decision quoted above. Mr Beal submitted that the Authorisation Form contains no obligation on the patients to pay any amount to DPAS and the patients have no authority from the dentists to authorise DPAS to deduct or retain any amount from the total monthly payments. The underlying contract is between the dentist and the patient under which the patient

agrees to pay a monthly amount to DPAS in return for dental services supplied by the dentist. DPAS is obliged under its contract with the dentist to manage the payments by the patient in return for an amount, agreed with the dentist, that DPAS deducts from the monthly payment. The patient would not know exactly how much of the monthly payment would be deducted and retained by DPAS. Mr Beal contended that it followed that the monthly payment is not consideration for any service provided by DPAS to the patient.

41. Mr John Walters QC, who appeared with Mr Conrad McDonnell, for DPAS, accepted that if there is no contract between DPAS and the patients then there is no supply and HMRC's appeal must be allowed. He submitted that there is a contractual relationship. Although the dentist specified the amount payable by the patient under the dental plan, that amount was made up of three elements, namely (as found by the FTT at [16]) the amount due from the patient to the dentist, the amount due from the patient to the insurer and the fee payable to DPAS. Mr Walters contended that the patient enters into two agreements when, as explained in the New Brochure, he or she signs the dental practice registration form and a direct debit mandate and the Authorisation Form for DPAS. The fact that not all of a patient's monthly payment is due and payable to the dentist is shown by the fact that, as HMRC accept, an element of each payment is an insurance premium payable to DPAS as agent of the insurer. Mr Walters submitted that, when entering into the new arrangements, DPAS, the dentists and the patients do so on the basis that there are separate supplies by DPAS to the dentists and to the patients as well as supplies by the dentists to their patients.

42. The contractual arrangements introduced by DPAS from 1 January 2012 are, on DPAS's case, tripartite arrangements. Lord Millett observed in *Customs and Excise v Plantiflor Ltd* [2002] STC 1132 at [49] that tripartite arrangements which result from two or three separate but related bilateral contracts call for close analysis in order to determine their tax consequences. As Lewison J explained in *A1 Lofts Ltd v HMRC* [2009] EWHC 2694 (Ch), [2010] STC 214 at [40], quoted with approval by Lord Neuberger in *Secret Hotels2 Ltd v HMRC* [2014] UKSC 16, [2014] STC 937 at [32], the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them. This starting point is a matter of domestic law.

43. The DPAS Authorisation Form states, in bold, that it forms the basis of the agreement between the patient and DPAS under which DPAS will manage and administer the dental plan payments for the patient. The DPAS Authorisation Form also states that, in return for the management and administration services, the patient authorises DPAS to deduct a charge from the monthly payments that the patient agrees with the dentist. That charge includes the insurance premium. The actual amount of the monthly charge deducted by DPAS is not specified in the form but it stipulates that the charge will not exceed a specified amount.

44. We consider that the DPAS Authorisation Form creates a legal relationship between DPAS and the patient under which the patient agrees that part of the amount payable under the dental plan will be consideration for DPAS's services to the patient. There is, to use the terms used by the CJEU, reciprocal performance pursuant to the agreement in the DPAS Authorisation Form in that the charge deducted and retained by DPAS is the amount actually paid by the patient, as part of the monthly payment under the plan, for the services supplied to the patient by DPAS.

45. We do not accept that, in the absence of express authority, the patients had no power to authorise DPAS to deduct anything from the monthly payments that the patients had agreed with the dentists. It is clear that the DPAS Authorisation Form was part of the wider contractual arrangements to which the dentist was also a party. In our view, the effect of the language in the DPAS Authorisation Form is that the monthly payments include, in addition to the payments to the dentist for dental care, charges by DPAS and the insurer for their services. The dentist was aware that DPAS would deduct amounts from the monthly payments. We consider that the dentists must be taken to have agreed that the patients would pay for DPAS's services by way of the deductions. This was clearly what was agreed in relation to the existing patients (see [53] of the Decision above) and it would be irrational to conclude that the dentists had not agreed the same treatment in respect of new patients. Accordingly, the amounts deducted and retained by DPAS are consideration provided by the patients in return for the services. That analysis does not depend on whether a particular patient had seen the revised language in the New Brochure, which referred to a separate agreement with DPAS to manage the patient's payments under the plan, or had only seen the Old Brochure, which made no mention of DPAS, before signing the form.

46. We also reject the submission that, because the patient does not know the exact amount of the charge deducted by DPAS, the charge is not consideration for any service provided by DPAS. We consider that the language in the DPAS Authorisation Form is clear: DPAS deducts and retains an amount as a monthly charge in consideration for its supplies of management and administration services. The amount of the charge can vary with the number of patients in a practice who have entered into dental plans but will not exceed a specified cap. The fact that the charge may vary does not mean that it is not consideration or that the patient has not agreed to pay whatever the actual charge is in any given month.

47. We consider that the DPAS Authorisation Form shows that there is an agreement between the patients who entered into a dental plan from 1 January 2012 and DPAS under which DPAS provides services to the patients in return for consideration, namely the charges deducted from the patients' monthly payments.

Contractual issues – existing patients who signed DPAS Acceptance Forms

48. In relation to patients who had an existing dental plan before 1 January 2012, the FTT held that the letter, which enclosed the DPAS Acceptance Form, sent to those patients by the dentists had the effect of varying the terms of the agreement between the patients and the dentists and putting in place a new agreement between the patients and DPAS under which DPAS provides management and administration services to the patients in return for the charges deducted from the monthly payments. The FTT held, in [72], that its analysis clearly applied to those patients, some 30% of the total, who had signed and returned the Acceptance Form.

49. Mr Beal submitted that there was nothing in the letter to suggest that there was any variation to the existing arrangements between the dentists and the patients or any novation of the existing arrangements as between the dentists, patients and DPAS. The purported contractual variation was ineffective and did not create a new agreement. He also submitted that the DPAS Acceptance Form did not create an agreement between the patients and DPAS for the supply of services based on the same points as he had made in relation to the language and effect of the DPAS Authorisation Form.

50. We consider, as did the FTT, that where existing patients signed and returned the Acceptance Form the contractual position was changed. The letter from the dentists to the existing patients clearly stated that the dentists and DPAS proposed to change the existing arrangements and described what the new arrangements would be when it said:

> "…we have agreed with DPAS to make some changes in the dental plan administrative arrangements. From now on, it is proposed (as explained in the DPAS Acceptance Form enclosed) that part of the total monthly Direct Debit amount to be paid by you to DPAS will be retained by DPAS in respect of its obligation to you to manage and administer your dental plan payments and to manage and administer your Supplementary Insurance cover and dental emergency helpline."

51. For the same reasons as we have given in relation to the DPAS Authorisation Form, we consider that the DPAS Acceptance Form provides that there is an agreement between DPAS and the existing patients who signed and returned the Acceptance Form under which DPAS provides services to the patients in return for consideration, namely the charges deducted from the monthly payments.

Contractual issues – existing patients who did not sign DPAS Acceptance Forms

52. In relation to the remaining 70% of patients who did not return a DPAS Acceptance Form, the position is less clear. The DPAS Acceptance Form stated:

> "If you do not sign this DPAS acceptance form and do not contact us, we shall assume you are happy to proceed on the basis outlined …"

53. The FTT concluded, at [78], that the patients had accepted the new arrangements by conduct, namely by continuing to make payments in respect of their dental plans to DPAS via direct debit. The FTT, having referred to the relevant passages from *Chitty on Contracts*, considered that the situation in this case was similar to the example in *Chitty* of a tenant accepting an offer of a new tenancy by simply staying on in the premises.

54. Mr Beal submitted that acceptance of the offer could not be inferred from the patients' silence. The FTT referred to *Felthouse v Bindley* (1862) 11 CB (N.S.) 869 and *Linnett v Halliwells LLP* [2009] EWHC 319 (TCC) at [74] and [75]. In *Linnett*, Ramsay J said that the general principle is that acceptance of an offer cannot be inferred from silence, except in exceptional circumstances. Mr Beal submitted that there were no such exceptional circumstances in this case and that the FTT did not find any.

55. Mr Beal submitted that the FTT was wrong to infer that the patient had accepted DPAS's offer by conduct, namely continuing to make monthly payments by way of direct debit. Mr Beal contended that the patient was obliged to make monthly payments to DPAS by direct debit under the pre-2012 agreement between the dentist and the patient. The existing contract continues until the conduct of the patient unequivocally shows acceptance of the new arrangements. Accordingly, the fact that a patient continued to make payments to DPAS by direct debit from 1 January 2012, as the patient was obliged to do under the old arrangements, could not be taken to be acceptance of an offer by DPAS to enter into a new contract.

56. Mr Walters submitted that, in the letter from the dentists to existing patients and the DPAS Acceptance Form which was enclosed with it, the dentists and DPAS made an offer to the existing patients to vary the contract between the dentists and the patients and create a new contract between DPAS and the patients. He contended that, in those

cases where existing patients did not return the DPAS Acceptance Form and did not communicate non-acceptance, the continued payment of monthly fees to DPAS by direct debit constituted acceptance by conduct of the offer in the circumstances of this case.

57. Mr Walters relied on passages from *RTS Flexible Systems Ltd v Molkerei Alois Müller Gmbh & Company KG (UK Production)* [2010] UKSC 14 ('*RTS v Müller*'). The case concerned a dispute between the parties in relation to work carried out and equipment supplied before a detailed written contract had been agreed under a Letter of Intent Contract and continued after that agreement had expired. The relationship subsequently broke down. RTS sought payment for its work and Müller counterclaimed for its losses. The issues in the appeal before the Supreme Court were whether the parties had made a contract after the expiry of the Letter of Intent Contract and, if so, on what terms. Lord Clarke, who gave the judgment of the Court, set out certain general principles applicable to all contracts at [45] and [56]. Mr Walters referred us to the passage in [49] which indicated that it is necessary for the court to look first to the correspondence as a whole in order to determine whether a contract has been concluded in the course of correspondence. He drew our attention to Lord Clarke's observation at the end of [49] that:

> "The same principles apply where, as here, one is considering whether a contract was concluded in correspondence as well as by oral communications and conduct."

58. Mr Walters also relied on the following passage from [50] of *RTS v Müller*:

> "The fact that the transaction is executed rather than executory can be very relevant. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations and difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential."

59. Mr Walters submitted that *RTS v Müller* shows, see [54], that whether a court will hold that a binding contract was made depends upon all the circumstances of the case. Mr Walters submitted that, in this case, the relevant facts include the following:

(1) the letter sent by DPAS to existing patients was in a form that had been agreed with the dentists;

(2) the agreements with the existing patients had a one month notice clause;

(3) many of the Old Brochures contained a clause stating that the terms were subject to change without notice and provision for an annual fee review;

(4) the existing patients allowed direct debits to be collected after 1 January 2012; and

(5) contracts for the supply of significant numbers of services are commonly subject to standard terms.

60. Mr Walters submitted that, taking account of all the circumstances of the case, the FTT was entitled to conclude that the existing patients who had not returned the DPAS Acceptance Form had not returned it on the assumption that the new arrangements would apply.

61. While, of course, we gratefully acknowledge the principles expounded in *RTS v Müller*, we do not find that they assist DPAS in this case. It seems to us that, looking at all the circumstances of the case, it is not possible to conclude that the existing patients accepted the new arrangements by silence or conduct. We agree with Mr Beal that the FTT did not find that there were any exceptional circumstances in this case such as to justify inferring that the existing patients had accepted the variation to the contract with the dentists and a new contract with DPAS. In our view, there is nothing in the correspondence and other documents that would have entitled the FTT to make such an inference.

62. We consider that, in order to constitute acceptance, the relevant conduct must clearly show an intention on the part of the party to accept the new terms or contract. We accept that some of the existing patients, having read the DPAS Acceptance Form, might have decided that they were content with the new arrangements and that they would not sign and return the form. It is also possible that existing patients continued to make payments to DPAS by direct debit after 1 January 2012 for several reasons other than acceptance of the new arrangements. For example, an existing patient might not have received the letter or received it but not have read it or read it and failed to understand it. In such cases, the continuation of payments by direct debit would not indicate acceptance by the existing patient. If the FTT considered the possibility of direct debit payments continuing in such circumstances, it does not refer to them. In our view, the FTT was not entitled to conclude that the 70% of the existing patients who did not return the DPAS Acceptance Form had accepted the new arrangements by continuing to make payments in respect of their dental plans to DPAS via direct debit. We conclude that DPAS has not established that there is an agreement between it and the existing patients who did not sign and return the DPAS Acceptance Form and, accordingly, DPAS does not supply services to those patients.

Economic and commercial reality

63. Both parties agreed that, in determining the identity of the supplier and the recipient of a supply and the nature of a transaction for VAT purposes, regard must be had to the economic and commercial reality. The CJEU stated the principle in Case C-653/11 *HMRC v Paul Newey* [2013] STC 2432 at [41] – [45]:

> "41 It is also apparent from the case-law of the Court that the term supply of services is therefore objective in nature and applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person (see, to that effect, *Halifax and Others*, paragraphs 56 and 57 and the case-law cited).
>
> 42 As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, Joined Cases C-53/09 and C-55/09 *Loyalty Management UK and Baxi Group* [2010] ECR I-9187, paragraphs 39 and 40 and the case-law cited).
>
> 43 Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient

> in a 'supply of services' transaction within the meaning of Articles 2(1) and 6(1) of the Sixth Directive have to be identified.
>
> 44 It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.
>
> 45 That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions."

64. Mr Beal submitted that the FTT erred when it found, at [86], that:

> "…the patient is paying for and receiving something more than a supply of dental services from a dentist, namely the administrative and management service of DPAS."

65. He contended that the words "something more" in [86] referred to the services described in [85], namely:

> "…the ability to spread payments, the guarantee of a fixed agreed price for the dental services covered, whatever those services turn out to be, and the other benefits in terms of oral health which the discipline of this financial structure produces"

66. Mr Beal contended that the FTT's conclusion in [86] was wrong in law in two respects, namely:

(1) it mischaracterised the nature of the services actually supplied to the patient and the identity of the supplier; and

(2) the conclusion that DPAS supplies administrative and management services to the patients was not one that the FTT was entitled to reach on the evidence before it and was an error of law of the type described in by Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14 at 36.

67. In support of his submission, Mr Beal submitted that DPAS did not and could not offer the benefits to patients as part of some separate, independent arrangement. DPAS marketed its services to dentists and they marketed the dental plans to patients. A witness for DPAS, Mr Gary Anders, had accepted in cross-examination that DPAS has no separate right to pursue the patients for non–payment and that DPAS's service is an integral part of the dental plan. Mr Beal pointed out that the letter to existing patients stated that the changes were "purely administrative" and the letter to dentists repeated that assertion and added that they "make no practical difference to the current arrangements". Mr Beal submitted that, having found that DPAS did not supply services to patients before January 2012, it was not reasonably open to the FTT to conclude that DPAS made supplies to patients with effect from 1 January 2012 given the evidence, eg the letter to patients. In substance and reality, the services supplied by DPAS were supplied to the dentists and not to the patients.

68. Mr Walters submitted that the only element of the dental plan supplied by the dentists from 1 January 2012 was dental services. DPAS supplied the patients with the other elements of the dental plan, apart from the insurance which was supplied by ACE. Mr Walters said that the statements in the letters to existing patients were mere comfort that the cover and total monthly charges would not change. The statements did not mean that the changes were artificial or lacked commercial substance and reality.

69. We agree with Mr Walters on this point. We have concluded that, except in relation to the existing patients who did not sign and return the DPAS Acceptance Form, DPAS supplied services to the patients. DPAS provided a service of ensuring that money was taken by direct debit from the patients' accounts and passed, after deduction of DPAS's fees, to the dentists and ACE. DPAS provided the same service both before and after 1 January 2012. What changed on that date was the contractual arrangements under which DPAS supplied that service. We do not accept that because DPAS did not make any supply of services, for VAT purposes, to patients before 1 January 2012, the FTT was not entitled to find that, as a matter of economic and commercial reality, DPAS made supplies to patients under the new arrangements from date. We see no reason to interfere with the FTT's finding that those services were management and administration separate from and more than the dental services supplied by the dentists.

Conclusion on contractual arrangements from 1 January 2012

70. For the reasons discussed above, we conclude that there is an agreement between DPAS and the existing patients as at 1 January 2012 who signed the DPAS Acceptance Form and the new patients after that date who signed the DPAS Authorisation Form. Under that agreement, DPAS supplies services in return for monthly charges paid by the patients as part of their monthly payments under their dental plans. Accordingly, under the contractual arrangements introduced with effect from 1 January 2012 and as a matter of economic and commercial reality, DPAS makes a supply of services to those patients. To the extent that it relates to such supplies, we dismiss HMRC's appeal on the first ground.

71. In our view, there is no agreement between DPAS and the existing patients who did not sign and return the DPAS Acceptance Form and, accordingly, DPAS does not supply services to those patients. To the extent that the FTT found that DPAS supplied services to such patients, we consider that it made an error of law and allow HMRC's appeal.

VAT treatment of services supplied by DPAS

72. HMRC's second and third grounds of appeal can conveniently be considered together because they both concern whether the services supplied by DPAS are exempt under Article 135(1)(d) of the Principal VAT Directive. The second ground is that the FTT was wrong to decide that DPAS's supplies of services should be seen as transactions concerning payments or transfers within the exemption in Article 135(1)(d). The third ground of appeal is that, if the supplies are transactions concerning payments or transfers, the FTT was wrong to decide that they should not be excluded from the exemption on the ground that the services are debt collection, which is standard rated. Since the FTT issued the Decision, there have been two references from the United Kingdom to the CJEU for a preliminary ruling in relation to the issues that arise in this case. In *Bookit Limited v HMRC* [2014] UKFTT 856 (TC) ('*Bookit II*'), the FTT referred questions concerning the essential characteristics required in order for a supply to come within the exemption as interpreted by the CJEU in *SDC*. In *HMRC v National Exhibition Centre Limited* [2015] UKUT 23 (TCC) ('*NEC*'), the Upper Tribunal referred questions similar to those referred in *Bookit II* and, in addition, a question asking whether a supply to a payer falls within the debt collection exclusion.

73. Mr Beal referred to the case of *R v International Stock Exchange of the United Kingdom and Republic of Ireland Ltd ex parte Else (1982) Ltd and another* [1993] QB 534, in which Bingham MR said at page 545:

> "In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer."

74. Mr Beal submitted that we should decide Grounds 1, 4 and 5 and, if our decision in relation to those grounds is not such as to render it unnecessary, make a reference to the CJEU for a preliminary ruling in relation to Grounds 2 and 3 in these proceedings similar to the references which have been made in *Bookit II* and *NEC*. Mr Beal submitted that the questions referred in *Bookit II* and *NEC* are relevant to Ground 2 and Ground 3 of the present appeal. Indeed, Mr Beal contended that that CJEU's answer in *NEC*, which raises the question of whether debt collection includes services supplied to the payer, will be determinative of Ground 3 in the present appeal.

75. Mr Beal submitted that the facts of this case are materially different from those in *Bookit II* and *NEC* and it would be helpful to provide the CJEU with examples of other situations in which issues concerning the application of the exemption under Article 135(1)(d) of the Principal VAT Directive have arisen. Mr Beal submitted that the CJEU would want to know about the attempts of some taxpayers to change the direction of supply in order to circumvent *AXA*. He also submitted that, although there was a question concerning the scope of the debt collection exclusion in *NEC*, the CJEU may deal with the reference without answering that question and it was more relevant in this case.

76. Mr Beal told us that the written observations in *Bookit II* had been settled and the written procedure is now closed. The written procedure in *NEC* was expected to close in July. The CJEU can list cases together and the UK would ask for it to do so in relation to *Bookit II*, *NEC* and this case.

77. Mr Beal submitted that if we decided not to make a reference in this case, we should stay the consideration of Grounds 2 and 3 pending the decision of the CJEU in *Bookit II* and *NEC*.

78. Mr Walters submitted that there was no need for a reference to the CJEU in this case. On the exemption point, he submitted that the facts of *Bookit II* are very different from those in this case. In relation to Ground 2, Mr Walters submitted that the VAT liability of the services supplied by DPAS has already been determined and is acte clair from [28] of the CJEU's judgment in *AXA*. Mr Walters accepted that the debt collection issue in *NEC* is the same point as arises in this appeal but did not accept that meant that there should be a further reference on the same point. He suggested that, as there is a reference before the CJEU, a further reference is not necessary and should not be made pending the outcome of that case for the following reasons, namely:

(1) it might delay the final determination of the *Bookit II* and *NEC* references as well as this appeal;

(2) it would increase the costs of this appeal;

(3) it was not right to burden the CJEU with references on the same point; and

(4) it could not be assumed that this case would catch up with the *Bookit II* and *NEC* references as that might not happen and it was unsafe to refer on that basis.

79. Mr Beal submitted that the need for a reference only arises if we are against HMRC on the contractual issues and hold that DPAS made a supply of services to the patients. In the event, we have concluded that, from 1 January 2012, DPAS made supplies to existing patients who signed and returned the DPAS Acceptance Form and the new patients who entered into dental plans and signed the DPAS Authorisation Form. In relation to those supplies, we do not consider that a reference to the CJEU is either necessary or appropriate. In summary, we accept the submission of Mr Walters that a reference should not be made in this case because there are already existing references before the CJEU on the same points that are more advanced. We consider that, although it cannot be guaranteed, it is highly likely that the rulings of the CJEU in relation to the *Bookit II* and *NEC* references will determine one or both of Ground 2 and Ground 3 in this appeal. In the circumstances, we consider that the likelihood of further delay to and increased costs of this appeal and the risk that it would not catch up with the existing references outweigh the possibility that the CJEU's judgment will not resolve the issues in this case. We are also mindful of the exhortations for national courts to exercise a measure of self-restraint in referring cases to the CJEU if it is not to be overwhelmed (see, for example, paragraph 20 of the opinion of Advocate General Jacobs in Case C-338/95 *Wiener SI GmbH v Hauptzollamt Emmerich* and Chadwick LJ in *Littlewoods Organisation Plc & Anor v Customs & Excise* [2001] EWCA Civ 1542, [2001] STC 1568 at [117]). For those reasons, we have decided not to make any reference in this case.

80. Jumping ahead, we reject Ground 5 of HMRC's appeal (abuse) for the reasons set out below. In the circumstances, we do not consider that we should attempt to anticipate what the CJEU will say in *Bookit II* and *NEC*. Accordingly, we have not reached any conclusion on the issue of whether the services supplied by DPAS to the patients, ie those patients who signed and returned the DPAS Acceptance Form and patients who entered into dental plans from 1 January 2012, are exempt under Article 135(1)(d) of the Principal VAT Directive. Instead, we direct that final determination of the VAT liability of the supplies made by DPAS to the patients is reserved until after the CJEU has given its judgment in *Bookit II* and *NEC*. We direct that the parties shall make submissions in writing as to the determination and disposal of the issue of the VAT liability of the supplies by DPAS within 28 days of the issue of the judgment of the CJEU in *Bookit II* and *NEC*.

VAT treatment of £10 registration fee

81. The FTT recorded in [29] that the £10 registration fee was introduced in 2008 in order to enable DPAS to recover the cost of registering a patient on a dental plan directly from the patient. The New Brochure and the DPAS Authorisation Form, which were in use from 1 January 2012, state that the registration fee is charged and retained by DPAS. The FTT concluded in [108] that the £10 registration fee is additional consideration for the supplies of services by DPAS to the patients. The FTT regarded the registration fee as similar to an arrangement fee charged by a bank for a loan or overdraft facility and, as such, an ancillary part of the exempt supply by DPAS.

82. Mr Beal contended that the FTT gave insufficient reasons for its conclusion and was not entitled, on the evidence, to come to the conclusion that registration is ancillary to an exempt supply (which HMRC deny) made by DPAS. Mr Beal submitted that the patients paid the £10 registration fee in order to join the dental plans offered by the dentists. Mr Beal contended that, for patients entering into a dental plan on or after 1 January 2012, there is no way of knowing whether the patients join plans after viewing the Old Brochure or the New Brochure and the DPAS Authorisation Form contains no indication of what the registration fee is for, beyond its being a registration fee. Mr Beal submitted that the only evidence before the FTT was that the £10 registration fee covers the "original set up costs" incurred when a new patient joins a dental plan, such as the provision of dental plan membership cards. Mr Beal submitted that the only conclusion reasonably open to the FTT was that the £10 registration fee is payable in respect of one or more distinct and separate services, namely registering a patient on a dental plan so that the patient can receive services from the dentist and (which HMRC deny) from DPAS in respect of the dental plan. He contended that the registration services cannot be considered as enabling the patient better to enjoy the services provided by DPAS. Mr Beal submitted that the £10 registration fee is consideration for a separate, standard rated supply of services of being put on the plan distinct from any exempt (which HMRC deny) supply of services made by DPAS to the patients.

83. Mr Walters submitted that the FTT's conclusion that the £10 registration fee is additional consideration for the supplies of services by DPAS to the patients was a finding of fact that the FTT was entitled to make on the basis of the evidence. Mr Walters pointed out that the registration fee is referred to in the Practice Registration Form and the DPAS Authorisation Form which states that an initial registration fee is payable to DPAS. Mr Walters contended that it was open to the FTT to conclude on the evidence that the service of registration is not an end in itself for the patients and so must be considered to be ancillary to the principal supply.

84. It is common ground that the £10 registration fee is consideration for a supply of services by DPAS. The issue for the FTT was whether the registration fee is consideration for a separate standard rated supply of registration services or for an exempt supply of payment services. At [66], the FTT quoted some paragraphs from the CJEU's judgment in Case C-425/06 *Ministero dell'Economia e delle Finanze v Part Service Srl* [2008] STC 3132 ('*Part Service*') to support the proposition that a trader is entitled to structure his business so as to limit his tax liability. That point was made in paragraph 47 of *Part Service* but the FTT also set out paragraphs 48 to 55 in which the CJEU discusses whether a transaction involving a number of services should be regarded as a single supply or several separate supplies. The relevant paragraphs are as follows:

> "49. That question is of particular importance, for VAT purposes, for applying the rate of tax or the exemption provisions in the Sixth Directive (see Case C-349/96 *CPP* [1999] ECR I-973, paragraph 27 and Case C-41/04 *Levob Verzerkeringen and OV Bank* [2005] ECR I-9433, paragraph 18).
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> 50. In that regard it follows from Article 2 of the Sixth Directive that every transaction must normally be regarded as distinct and independent (see *CPP*, paragraph 29 and *Levob Verzerkeringen and OV Bank*, paragraph 20).

> 51. However, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent.
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> 52. Such is the case for example, where, in the course of a purely objective analysis, it is found that there is a single supply in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service (see, to that effect, *CPP*, paragraph 30 and *Levob Verzerkeringen and OV Bank*, paragraph 21). In particular, a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (*CPP*, paragraph 30 and the facts of the dispute in the main proceedings giving rise to that judgment).
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> 53. It can also be held that there is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (*Levob Verzerkeringen and OV Bank*, paragraph 22).
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> 54. It is for the national court to assess if, the contractual structure of the transaction notwithstanding, the evidence put before the court discloses the characteristics of a single transaction.
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> 55. In that context, it may find it necessary to extend its analysis by seeking evidence of indications of the existence of an abusive practice, which is the concept with which the question referred is concerned."

85. As regards paragraph 55 of *Part Service*, we discuss the principle of abuse of law below but we note here that it was not suggested by Mr Beal that the introduction of the registration fee in 2008 was an abusive practice.

86. The issue is whether, in relation to patients entering into a plan on or after 1 January 2012, the registration fee of £10 is consideration for a service that is ancillary to the supply of services by DPAS to the patients in return for the charges deducted by DPAS from the monthly payments. The registration fee is referred to in the New Brochure, which may or may not have been seen by patients entering into a dental plan from 1 January 2012, and the DPAS Authorisation Form, which was signed by all new patients from that date. Those documents do not state what the registration fee was for but merely describe it as a registration fee. As those documents enabled the patients to register for the dental plan and without registering they would not be able to receive any of the benefits provided by the plan, it seems to us that the fee related to all services provided under the plan, ie services supplied by the dentists, DPAS and ACE. In our view, the fact that the £10 registration fee is paid to and retained by DPAS shows that it is consideration for a supply by DPAS. We were not shown any evidence to support the FTT's finding that the registration fee was consideration for a supply of monthly services by DPAS nor do we consider that it can be said that the registration on the plan was ancillary to the monthly services provided by DPAS. As is clear from paragraph 52 of *Part Service*, a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied. In this case, it is clear that no patient would pay the £10 registration fee in order to receive or better enjoy the supply of payment services by DPAS. As is made clear in the Old and New Brochures, the purpose of joining the dental plan is to

obtain dental care. It is obvious that patients paid the registration fee to join the dental plan primarily in order to obtain dental care and not to obtain payment services from DPAS. We consider that the only possible conclusion on the facts is that the supply by DPAS in return for the £10 registration fee is separate from the supplies of services made by DPAS in return for the charges that it retains from the monthly payments made by the patients. Mr Walters did not contend that, if it was a separate supply, the service of registration was exempt. We consider that the supply by DPAS of registration on the dental plan is chargeable to VAT at the standard rate and such liability does not depend on the CJEU's decision in *Bookit II* and *NEC*. Accordingly, we allow HMRC's appeal on this ground.

Abuse of law

87. Mr Beal submitted that, if and to the extent that the services supplied by DPAS are held to fall within the exemption in Article 135(1)(d) of the Principal VAT Directive, they should be regarded as an abuse of law contrary to the principle prohibiting abusive practices identified by the CJEU in *Halifax* and redefined so as to re-establish the situation that would have prevailed in the absence of the transactions constituting that abusive practice.

88. In its judgment in *Halifax*, the CJEU observed, at [71], that preventing possible tax evasion, avoidance and abuse was an objective recognised and encouraged by the Sixth VAT Directive. The CJEU noted, at [73], that taxable persons may choose to structure their business so as to limit their tax liability. The Sixth VAT Directive did not require a taxable person to choose the structure that involves paying the highest amount of VAT. The CJEU then set out the two elements necessary for a finding that arrangements constitute an abusive practice in relation to VAT at [74] and [75]:

> "74 In view of the foregoing considerations, it would appear that, in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.
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> 75 Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in point 89 of his Opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages."

89. At [80] of *Halifax*, the CJEU held that transactions that are contrary to the principle of fiscal neutrality are contrary to the purpose of the Directive.

90. The *Halifax* principle was considered again by the CJEU in *Part Service* which concerned two companies belonging to the same financial group that were involved together in leasing transactions, mostly in relation to motor vehicles. One company made taxable supplies of leasing while the other company purported to make exempt supplies of finance and insurance. In *Part Service*, the CJEU held, in [45], that it is not necessary to find that the sole aim of the transactions concerned is to obtain a tax advantage in order to find that an abusive practice exists. There can be a finding of an abusive practice when the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue. The CJEU also held that there could be an abuse

where two companies entered into separate contracts with a single customer for leasing, financing, insurance and intermediation in relation to the leasing of a motor car. The CJEU held in [59] - [61] that such transactions could be contrary to the provisions of the Sixth Directive as they would allow an exemption in respect of a transaction that is normally subject to VAT and that would be contrary to the objective that tax should be charged on all the consideration received from the customer. At [62], the CJEU stated:

> "As regards the second criterion [ie that the essential aim of the transactions is to obtain a tax advantage], the national court, in the assessment which it must carry out, may take account of the purely artificial nature of the transactions and the links of a legal, economic and/or personal nature between the operators involved (*Halifax and Others*, paragraph 81), those aspects being such as to demonstrate that the accrual of a tax advantage constitutes the principal aim pursued, notwithstanding the possible existence, in addition, of economic objectives arising from, for example, marketing, organisation or guarantee considerations."

91. The ability of a taxable person to choose to structure transactions so as to reduce his or her VAT liability, as noted by the CJEU in [73] of *Halifax*, was referred to in another reference from the United Kingdom on the subject of abuse of law, namely Case C-277/09 *HMRC v RBS Deutschland Holdings GmbH* [2011] STC 345. The case concerned the taxpayer's right to deduct input tax in relation to a leasing transaction where no output tax had been accounted for as a result of differences in the implementation of the VAT place of supply rules by the UK and Germany. The CJEU confirmed that the right to deduct input tax was not dependent on there being a payment of output tax and went on to consider whether the deduction was precluded on the grounds that there was an abuse of law. The CJEU held that it was not so precluded, stating at [52] - [54]:

> "52. In those circumstances, the fact that services were supplied to a company established in one member state by a company established in another member state, and that the terms of the transactions carried out were chosen on the basis of factors specific to the economic operators concerned, cannot be regarded as constituting an abuse of rights. RBSD in fact provided the services at issue in the course of a genuine economic activity.
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> 53. It is important to add that taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens.
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> 54. The court has held that a trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the neutral system of VAT (see *Customs and Excise Comrs v Cantor Fitzgerald International* (Case C-108/99) [2001] STC 1453, [2001] ECR I-7257, para 33). In that connection, the court has made clear that, where it is possible for the taxable person to choose from among a number of transactions, he may choose to structure his business in such a way as to limit his tax liability (see *Halifax* (para 73))."

92. We consider that, if the CJEU in *NEC* rules that the services such as those supplied by DPAS are debt collection and thus standard rated, the issue of abuse does not arise. If, however, the CJEU decides that such services fall within the exemption

then that strongly suggests that structuring the contractual arrangements to achieve that result cannot be considered to be abusive. Nevertheless, as we heard argument on the issue, we set out briefly our view on whether the arrangements entered into by DPAS, the dentists and the patients with effect from 1 January 2012 constitute an abusive practice.

93. Mr Beal contended that the arrangements are contrary to the purpose of the Principal VAT Directive in three respects, in that they are contrary to:

(1) the purpose of Article 135(1)(d) which is "to alleviate the difficulties connected with determining the tax base and the amount of VAT deductible and to avoid an increase in the cost of consumer credit" (see Case C 455/05 *Velvet & Steel Immobilien* [2007] ECR I 3225, at [24]);

(2) the purpose of the Directive generally which is that single supplies should not be artificially split into multiple supplies with a view to reducing the overall level of VAT which may be paid (see Case C-94/09 *Commission v France* [2010] ECR I-4261, at [32]); and

(3) the principle of fiscal neutrality which precludes treating similar goods and supplies of services, which are thus in competition with one another, differently for VAT purposes (see Joined Cases C-259/10 and C-260/10 *Rank Group plc v HMRC* [2012] STC 23, CJEU at [32]-[36]).

94. We do not accept that the only purpose of Article 135(1)(d) is the alleviation of difficulties connected with determining the tax base and the amount of VAT deductible in relation to the supply of consumer credit, thereby avoiding an increase in its cost. We accept Mr Walters's submission that Article 135(1)(d) exempts a number of financial transactions other than consumer credit. We do not find it easy to discern the purpose of the exemption for transactions concerning payments or transfers in Article 135(1)(d) beyond the words of the provision. If the CJEU's judgment in *Bookit II* and *NEC* leads to the conclusion that the services supplied by DPAS to the patients, ie those patients who signed and returned the DPAS Acceptance Form and patients who entered into dental plans from 1 January 2012, are exempt under Article 135(1)(d) of the Principal VAT Directive then we cannot see how those services could be regarded as contrary to the purpose of that provision.

95. Mr Beal submitted that the artificiality in this case was the splitting of the supply made by DPAS in order, as the FTT found at [65], to circumvent the CJEU's decision in *AXA*. Until the changes introduced with effect from 1 January 2012, DPAS had supplied services solely to the dentists for whom it managed and administered dental payment plans. Mr Beal contended that DPAS had artificially split its services between the dentist and the patient in order to produce a tax advantage, in the form of a reduction in the amount of VAT chargeable by DPAS on the supply of its services. He submitted that is a result that is not envisaged by the Principal VAT Directive and is contrary to its purpose. This argument is really only another way of saying that DPAS did not make real supplies to the patients. If, as we have found, DPAS made supplies of services to the patients (other than existing patients who did not sign and return the DPAS Acceptance Form) from 1 January 2012 both as a matter of contract and in economic and commercial reality, we cannot see how such transactions can be regarded as artificial. Accordingly, we do not accept that the contractual arrangements from 1 January 2012 are contrary to the purpose of the Principal VAT Directive on the ground of artificiality.

96. Mr Beal also submitted that, taking account of the arrangements as they existed before January 2012, it is clear that the VAT treatment sought by DPAS is contrary to the principle of fiscal neutrality. As we have stated at [38] above, the previous contractual arrangements may be relevant to a consideration of whether changes in the arrangements from 1 January 2012 were an abusive practice. We do not, however, accept that because there was a change in the contractual arrangements which resulted, if DPAS's submissions are accepted, in less VAT being chargeable overall, the principle of fiscal neutrality is necessarily contravened. We accept that the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with one another, differently for VAT purposes. As the CJEU makes clear in *Rank* at [34], the supplies in question must be identical or similar from the point of view of the consumer and meet the same needs of the consumer. In this case, the supplies of services under the old arrangements are not identical or similar from the point of view of the consumer precisely because the consumers are different. Before 1 January 2012, the only consumers of the services supplied by DPAS were the dentists. From that date, DPAS supplied services to the dentists and the patients. Moreover, the point of view of the two consumers is different because they receive the services in different capacities, namely as payer and payee. Those points are, in our view, sufficient to differentiate the two situations so that the principle of fiscal neutrality is not engaged.

Disposition

97. For the reasons discussed above, HMRC's appeal is allowed in relation to existing patients who did not sign the DPAS Acceptance Form and in relation to the £10 registration fee. Further consideration will need to be given to the appeal in relation to patients who signed the DPAS Acceptance Form or the DPAS Authorisation Form, following the release of the judgment of the CJEU in *Bookit II* and *NEC.*

The Hon Mr Justice Warren

Greg Sinfield
Judge of the Upper Tribunal

Release date: 5 November 2015