[2018] UKUT 55 (TCC)

Appeal numbers: UT/2015/0094
UT/2015/0095

VAT – Builder's Block restricting deduction of input tax for certain items on a supply of a new dwelling – whether Claim Items were incorporated in any part of the building – whether certain Claim Items were ordinarily installed by builders as fixtures – whether input tax on any Claim Items which were the subject of a separate standard-rated supply, where time limits precluded an assessment of output tax on that supply, must be offset by that output tax – VATA, s 81(3), (3A)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

TAYLOR WIMPEY PLC **Appellant**

- and -

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

TRIBUNAL: SIR NICHOLAS WARREN
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 17 – 19 January 2018

Jonathan Peacock QC and James Rivett, instructed by PricewaterhouseCoopers LLP, for the Appellant

Andrew Macnab and Ewan West, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. A number of outstanding issues in these appeals remained open following our decision ("the first UT decision") released on 7 February 2017 (published under the neutral citation [2017] UKUT 0034 (TCC)). By the first UT decision, we decided a number of issues in principle and left it open to the parties to revert to the tribunal for further determinations to the extent they remained unable to agree.

2. As we described in the first UT decision, the appeals concern claims by Taylor Wimpey Plc ("Taylor Wimpey"), as representative member of its VAT group, for recovery of input tax incurred by group members during the period between 1 April 1973 and 30 April 1997 ("the Claim Period"). The claims relate to the installation in new-built homes of (i) built-in ovens, (ii) surface hobs, (iii) extractor hoods, (iv) washing machines, (v) microwave ovens, (vi) dishwashers, (vii) washer driers, (viii) tumble driers, (ix) refrigerators, (x) freezers, (xi) fridge freezers and (xii) carpets and carpeting materials ("the Claim Items"). As we also explained, the claims are *Fleming* claims, made on 30 March 2009, within the extended transitional limitation period for historic claims provided for by s 121 of the Finance Act 2008, following the decision of the House of Lords in *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners; Condé Nast Publications Ltd v Revenue and Customs Commissioners* [2008] STC 324.

3. The FTT released two decisions. We shall describe those respectively as "FTT1" and "FTT2". We refer to the first UT decision, at [10] – [25], for a description of issues considered by the FTT, and the FTT's findings and conclusions in each of those decisions.

4. In the evidence before the FTT, and in FTT1 itself (at [5]), the Claim Items were sub-divided into three categories. The built-in ovens, surface hobs and extractor fans were grouped together as "Low Specification Appliances"; the other items were described as "High Specification Appliances" apart from the carpets and carpeting materials, which was the third category.

5. The basis for Taylor Wimpey's claims was that, whether as a matter of EU law or domestic law, the restrictions in the domestic legislation on the deductibility of input tax on expenditure on certain goods incorporated in a new dwelling supplied by way of a zero-rated supply, described as "the Builder's Block", did not apply to the Claim Items in the Claim Period.

The Builder's Block

6. We described the Builder's Block in the first UT decision, at [5] – [7], in the following way:

> "[5] The block, which was first introduced by the Input Tax (Exceptions) (No 1) Order 1972, with effect from 1 April 1973, applies only to goods which are incorporated into any part of the building or its site. It excludes (and so allows

recovery of input tax in these respects) certain items, namely materials, builders' hardware, sanitary ware and other articles of a kind ordinarily installed by builders as fixtures (or, since 1 March 1995, ordinarily incorporated by builders in the building or site). But as a result of legislative changes, there have been introduced successive exceptions to those exclusions, thus blocking input tax recovery on certain specific classes of goods incorporated in the building, even where they are ordinarily installed as fixtures, or ordinarily incorporated in the building or site.

[6] Thus, from 1 June 1984, by virtue of Article 2 of the Value Added Tax (Special Provisions) (Amendment) (No 2) Order 1984 ("the 1984 Order"), input tax was specifically blocked in relation to (a) finished or prefabricated furniture, other than furniture designed to be fitted in kitchens, (b) materials for the construction of fitted furniture, other than kitchen furniture, and (c) domestic electrical or gas appliances, other than those designed to provide space heating or water heating or both. From 21 May 1987, by the Value Added Tax (Construction of Buildings) Order 1987 and its replacement, the identical Value Added Tax (Construction of Buildings) (No 2) Order (taken together "the 1987 Order"), a further specific block was introduced, this time for carpets or carpeting materials.

[7] The legislation changed again with effect from 1 March 1995. The Builder's Block continued to apply to goods incorporated in any part of a building as described in the zero-rating schedule (Schedule 8 to the Value Added Tax Act 1994 ("VATA")), including a dwelling or its site, but not to building materials. The expression "building materials" was itself to be found in Schedule 8, and meant goods of a description ordinarily incorporated in a building (which included installation as fittings), other than goods of the specific descriptions already excluded (and thus blocked), with the exception of electrical and gas appliances designed to heat space or water (as before) and new exceptions (thereby affording input tax recovery) for such appliances to provide ventilation, air cooling, air purification or dust extraction and door entry systems, waste disposal units and machines for compacting waste, if intended for use in a building designed as a number of dwellings, burglar alarms, fire alarms, fire safety equipment and other appliances designed solely for the purpose of enabling aid to be summoned in an emergency."

7. As we did in the first UT decision, we have attached for convenience a schedule which sets out the text of the legislation on the Builder's Block as it applied from time to time in the Claim Period.

The first UT decision

8. Our decisions on the issues of principle are set out in full in the first UT decision, with which this decision should be read. By way of introduction only, as some of the issues require more detailed analysis, we can summarise the conclusions we arrived at in the following way:

(1) Contrary to Taylor Wimpey's case, and contrary to the decision of the FTT in FTT1, we determined that the Builder's Block, as varied from time to time, was not unlawful as a matter of EU law. Accordingly, the Builder's Block could in principle, and according to its terms, apply to prevent the deduction of input tax incurred in respect of the Claim Items during the Claim Period.

(2) We decided that for the purposes of the Builder's Block an item will be incorporated in a building if it is a fixture and also if it is "installed as a fitting" (first UT decision, at [111]).

(3) We decided that, with one exception, the decision of the FTT as to whether Claim Items were fixtures had been correct. The consequence was that white goods that were wired in and attached by screws to the carcass of the kitchen units and/or work surface and/or a kitchen unit door or (in the case of a hood) to the kitchen wall, were fixtures, but white goods that were merely plugged in, or were plugged in and attached to the water supply and drains, were not fixtures (first UT decision, at [113], [118]). The exception was that, in relation to fitted carpets, we held that the FTT had been wrong to find that these were fixtures; we found that they were not, but that they were "installed fittings" (first UT decision, at [120]).

(4) With regard to the exclusion from the Builder's Block of items that are "ordinarily installed" as fixtures or (from 1 March 1995) "ordinarily incorporated" (including ordinarily installed as fittings) (and which are not specifically brought back into the Block), we decided that something would be ordinarily installed or incorporated unless its installation would be out of the ordinary, uncommon or unusual. We found that the test was whether the installation or incorporation of the item by builders is at the relevant time commonplace or not out of the ordinary (first UT decision, at [127]). We also decided (at [138]) that ordinariness should be tested, not by reference to all dwellings, but by reference to buildings which most closely accord with the use of the building in question and (at [139]) that the time by reference to which the question should be determined was not the date of the legislation or legislative change, but the time at which the right to deduction of input tax would arise.

The outstanding issues

9. The parties have agreed that there are the following remaining issues of dispute:

(1) The Incorporation Issues: whether the Claim Items which are not fixtures are "fittings" and "incorporated" for the purposes of the Builder's Block.

(2) The Ordinarily Installed Issues: if and to the extent that any of the Claim Items are found by the tribunal to be "incorporated" for the purposes of the Builder's Block, whether such items were excluded from the Builder's Block, in respect of prescribed accounting periods before input tax deduction on those items was specifically blocked by the amendments to the Block in 1984, by reason of being articles of a kind "ordinarily installed by builders as fixtures". (In this regard Taylor Wimpey continues to dispute all or some of the FTT's

findings in relation to this aspect on *Edwards v Bairstow* grounds. HMRC rely on and support the FTT's findings of fact and conclusions on the evidence.)

(3) The Single Supply/Multiple Supplies Issue: if and to the extent that any Claim Items are found by the tribunal not to be "incorporated" within the meaning of the Builder's Block, whether any such items were the subject of a separate standard rated supply of goods (as HMRC contend), or whether they formed part of a single, composite, zero-rated supply of a new-build house (as Taylor Wimpey contends).

(4) The Offset Issue: if and to the extent that any items are found by the tribunal not to be incorporated for the purposes of the Builder's Block, and are the subject of a separate standard-rated supply, whether (as HMRC contend) input tax deduction should be offset by the output tax that ought to have been accounted for on such supply (whether pursuant to general principles or the provisions of s 81(3A) of the Value Added Tax Act 1994 ("VATA")).

Issue 1: the Incorporation Issues

10. It is a condition of the application of the Builder's Block that the taxable person constructing the building in question "incorporates" the relevant goods in any part of the building or its site. In the first UT decision, we rejected Taylor Wimpey's argument that for an item to be so incorporated it had to be attached to the land or property so as to become part of it in the sense of becoming a fixture. We also concluded that the meaning of the statutory expression was not co-extensive with what is part of the single zero-rated supply. Put shortly, we decided that "incorporates" includes both installation as a fixture and installation as a fitting.

11. We went on to describe what we considered should in principle be regarded as having been "installed as a fitting". Our conclusions in that regard were as follows:

> "[112] That leaves the question of the criteria that should be applied in order to determine if an item, which is not a fixture, is installed as a fitting. The test must be such as to be consistent with the statutory language of incorporation in a building. Without setting a prescriptive test, there must in our view be a material degree of attachment to the building, albeit less than the degree of annexation required for something to be a fixture. In our judgment mere attachment to an electricity supply by a removable plug is not, on its own, sufficient for the item to be regarded as installed as a fitting, or incorporated. Some other feature or features of installation is necessary, whether by housing the item in a particular structure, or by fixing the item in a manner designed to be other than temporary either to a physical part of the structure or to a supply of electricity, gas or water or means of ventilation or drainage.
>
> …
>
> *Installed fittings*
>
> [119] … Our view essentially is that, from the list of Claim Items, the only items that will be neither fixtures nor installed fittings will be white goods that are free-standing and attached to the building by

> means only of a removable plug or other temporary attachment to the mains services, in circumstances where the equipment is of its nature portable in the ordinary course.
>
> [120] Without making any findings in relation to the Claim Items themselves, it would be expected, for example, that a built-in oven, a surface hob (to the extent they were not fixtures), an extractor hood, a wired and plumbed-in washing machine and a wired and plumbed-in dishwasher would all be installed fittings. Stand-alone washer driers and tumble driers would likewise be installed fittings if either they were attached in a non-temporary manner to ventilation or were installed in a location with some reasonable expectation of permanence, in the sense of the expected working life of the appliance. If the latter criterion were met, the same would apply to refrigerators, freezers and fridge freezers, and to microwave ovens. It is only if such items are essentially free-standing and properly regarded as portable, even if attached to the mains, that they would not qualify as fittings, but would be mere chattels, and thus outside the meaning of 'incorporated' for the purpose of the Builders' Block. An example would be a microwave oven that is simply placed on the kitchen work surface, and which is plugged in for use. Finally, fitted carpets would clearly be fittings."

12. That formulation did not provide the clarity that we had intended that it should. The parties took different views as to what was meant, in the context of the Claim Items themselves, by an "installed fitting".

13. For Taylor Wimpey, Mr Peacock submitted that Claim Items which meet any of the following criteria would fall not to be "incorporated" for the purpose of the Builder's Block, namely: (1) Claim Items that are free-standing; (2) Claim Items that are attached to the building by means only of a removable plug or other temporary attachment to the mains services; and (3) Claim Items that are goods properly regarded as "portable" even if attached to the mains.

14. With respect to Mr Peacock, that is not a fair reading of what we said at [119] of the first UT decision. It is, we think, clear from that paragraph that all of the criteria we referred to would have to be present if an item included in the sale of the building were not to be an installed fitting.

15. Mr Peacock submitted in the alternative that even if it were the case that all those criteria had to be met, the Claim Items would satisfy that test, and should thus be found not to have been incorporated in the buildings at the relevant times. As part of this submission, Mr Peacock argued that our description of the required feature or features of installation in [112] would exclude an item, albeit one that was plugged-in, that was merely placed in a space left for it in a kitchen as that would not amount to the item being housed in a particular structure. He submitted that, on the basis of the FTT's findings of fact, all the High Specification Appliances were up to 1996 free-standing and not integrated, attached to the building by means only of a removable plug and inherently portable.

16. Mr Peacock points to the finding of the FTT, at FTT1, [177], that "in the 1980s the high specification appliances were merely plugged and plumbed in. They were not built in or installed." He refers also to the FTT's finding, at FTT1, [62], that "Wimpey Homes' marketing strategy changed [in 1996] to provide fully integrated kitchens. This meant that installed appliances (where appropriate) would be integrated into the fitted kitchen units (normally by having a matching door) …". Mr Peacock submits in this regard that the conclusion to be drawn from this is that prior to 1996 all appliances were freestanding and merely plugged and plumbed in, and that they were consequently not "incorporated" for the purposes of the Builder's Block according to the tests set out in the first UT decision. He further submits that even during 1996 and 1997 (the end of the Claim Period), the majority of white goods would still have been freestanding as the change to having fitted kitchens only began to be rolled out from this time in respect of certain brands. In relation to so-called "wet appliances", namely dishwashers, washing machines and washer driers (except insofar as they may have been self-condensing), Mr Peacock submitted that the only evidence before the FTT was that wet appliances were freestanding until 1996 and that such freestanding appliances were not wired-in but were connected to the water and waste through temporary connections.

17. We do not accept Mr Peacock's submissions in this respect. First, we regard it as clear from the first UT decision that it is not necessary that an item should be integrated, in the sense of being fixed to the fabric of the building or a structure within it such as a cabinet or door. Such integrated items would, according to our decision at [113] – [118], be fixtures; and it is clear that items other than fixtures may be regarded as installed as fittings and thereby be incorporated in the building.

18. Secondly, the suggested distinction between items that are free-standing and those which are integrated does not have sufficient regard to our description at [120] of the first UT decision of installed fittings as including items such as washer driers and tumble driers that are attached to ventilation in a non-temporary manner, or those and other items such as refrigerators, freezers, fridge freezers and microwave ovens, that are installed in a location with some reasonable expectation of permanence, in the sense of the expected working life of the appliance. Items may be free-standing, in the sense that they are not screwed in but merely rest on their own weight, but nonetheless be installed fittings by being fitted into a kitchen in a location where they can reasonably be expected to remain and not be moved on a regular basis.

19. Thirdly, our conclusion that free-standing items that were properly regarded as portable, even if attached to the mains, would be mere chattels, and not installed fittings does not depend, as Mr Peacock suggested that it should, on whether the item may be removed at any stage, for example by being capable of being taken by the owner to a new home on the sale of the house in question. Our reference in [120] to an item being "properly regarded as portable", is a reference back to the requirement we had identified at [119] that for a Claim Item not to be an installed fitting (and thus not incorporated in the building), not only would it have to be free-standing and attached to the building by means only of a removable plug or other temporary attachment to the mains services, it would also have to be of its nature portable in the ordinary course.

20. It is apparent that some confusion might have been caused by our use of the expression "portable in the ordinary course". By that we meant to confine the cases where the Claim Item would not be an installed fitting to those where the item itself was portable as a matter of its general day-to-day use. We had in mind, though by analogy only as they were not Claim Items, appliances such as toasters or irons, which in their day-to-day use might reasonably be expected to be moved from place to place. Our conclusion in principle with regard to microwave ovens that are merely placed on a work surface and are plugged-in in a temporary manner was based on the essential day-to-day portability of such an appliance (it may in the normal course of its use as such be moved from place to place on the work surface), and not on the fact that it could be taken by the householder to a new house on removal from the existing property.

21. It is thus the case, in our view, that Claim Items that are placed in a space in a kitchen designed or intended to accommodate those items, are installed as fittings and are to be regarded as incorporated in the building for the purposes of the Builder's Block. As Mr Macnab submitted, the evidence in relation to the High Specification Appliances was that those items were, at the least, removed from their packaging, positioned into the slots or spaces designed or intended to accommodate them, plugged in, plumbed in (where appropriate) and operational (see FTT1, at [148]). The FTT found, at FTT1, [83], that even in the 1970s, kitchens would be fitted such that appliances might be installed by the buyers in the spaces left for that purpose. By the time, in the 1980s, that High Specification Appliances began to be included, those appliances, although self-standing and not at that stage yet integrated, were fitted and installed by the builders themselves, or their sub-contractors, into designated spaces in the fitted kitchen units. For example, as the FTT found at FTT1, [101], by reference to a 1982 plan for a four-bedroomed house, the kitchen units were fully fitted, with spaces for "a dishwasher and built under fridge".

22. High Specification Appliances, other than any microwave ovens that are merely placed on the work surface in the manner we have described, also lack the essential element of portability in their day-to-day use in order not to be regarded as installed fittings. We do not regard such items, even if they are free-standing in the sense of not being integrated by being screwed-in or otherwise fixed to the fabric of the building or the kitchen units, as being outside the description of installed fittings.

Microwave ovens

23. We turn to consider whether any of the microwave ovens that form part of the Claim Items fall within the category of such items we have identified as not qualifying as installed fittings. The evidence before the FTT on the subject of microwave ovens was limited, and focused to a large extent on whether, and if so at what stage in the Claim Period, the installation of such ovens became standard. Having reviewed that evidence, we find that there was no evidence of microwave ovens having at any time been included in the sales of the dwellings by being merely placed on a work surface and plugged in.

24. Mr Southcombe, who was construction manager for George Wimpey from 1983, explained in evidence that in the 1980s the standard Wimpey package comprised an oven, hob, fridge and washing machine. He described microwave ovens as a later addition. When asked by Mr Macnab when and where Wimpey had started to install microwaves, Mr Southcombe replied that it had been in April 1989 that microwave ovens, along with other white goods, had been installed as standard into a development described as the Maidenblower development (Transcript, Day 2, p 99). In re-examination by Mr Peacock (Transcript, Day 2, p 124), Mr Southcombe confirmed that when discussing microwave ovens he had been referring to a Wimpey advertisement from January 1990, which referred to a "fully fitted kitchen with oven, hob, hood, fridge, washing machine and microwave". Mr Southcombe referred to microwaves being "trialled" at this time at London sites or sites close to London. It is, we consider, reasonable to conclude that the late 1980s and early 1990s were the early stage of the installation of microwave ovens by the claimant companies. Furthermore, the contemporaneous evidence relied upon by Mr Southcombe supports the conclusion that microwave ovens were part of a fully fitted kitchen, and that they too therefore were fitted, and not merely placed on a work surface.

25. The evidence of Mr Phillips, who joined Bryant Group plc in 1981, was to like effect. He said (Transcript, Day 3, p 46), when discussing the inclusion in his evidence of an advertisement for Taylor Woodrow dated 17 October 1985, which made no reference to, amongst other things, microwave ovens, that Taylor Woodrow had increased their specification (we infer to include microwave ovens) in the 1990s. Mr Bishop, a divisional managing director of Taylor Wimpey but who started his career with Laing Homes Ltd, referred only briefly to microwave ovens. His evidence exhibited a brochure for a development by Laing Homes at Brandon Gate in the late 1990s: that brochure described a fitted kitchen including a "multi function microwave". Mr Bishop described the appliances generally as fitted appliances. A photograph, not of the development itself but included as an illustration of quality, shows the microwave oven as built-in to the kitchen cabinet structure.

26. Evidence of installation was given by Mr S Firth-Bernard, the owner and manager of DBD Distribution Limited, a kitchen appliance distributor and installation company which had been established in 1988. However, Mr Firth-Bernard made no reference to microwave ovens in particular. His evidence concerning kitchen appliances supplied to Taylor Wimpey itself referred to a period outside the Claim Period. There is nothing in that evidence to suggest that the microwave ovens that form part of the Claim Items were anything other than fitted appliances, or that they were provided as free-standing ovens simply to be placed on a work surface.

27. Our conclusion, therefore, is that on the evidence before the FTT all of the Claim Items were either fixtures or installed fittings, and so were incorporated in the buildings for the purposes of the Builder's Block. For the reasons we have given, none of those items, including microwave ovens, fell outside the category of fixtures and installed fittings, as those terms are to be understood according to the first UT decision.

Issue 2: the Ordinarily Installed Issues

28. Having decided that the Claim Items were incorporated into the buildings for the purposes of the Builder's Block (and thus were prima facie subject to the block), it is necessary to consider if the relevant items could nonetheless be excluded from the block by being "ordinarily installed as fixtures" (or, to the extent material, "ordinarily incorporated", including ordinarily installed as fittings, from 1 March 1995).

29. The FTT took the view, at FTT1, [369], that for an item to be "ordinarily installed" it was necessary only that it be "usually" or "commonly" installed. That would include items that were regarded as installed as standard, the evidence being that this would mean that most houses would have the item installed. But the FTT held that the test was not confined to items that were installed as standard: the FTT's view was that "ordinarily" means no more than that the item in question was more likely to be installed than not. The FTT also concluded (at FTT1, [359]) that, prior to 1995, "ordinarily" had to be measured against all dwellings, and after that time by reference to one of the descriptions of dwellings in Item 1 of Group 5 of Schedule 8 VATA (namely those designed as a dwelling, those designed as a number of dwellings, those intended for use solely for a relevant residential purpose and those intended for use for a relevant charitable purpose), and (at FTT1, [367]) that the test should be applied not at the time of the supply but at the date of the legislation and each legislative change.

30. On that basis, the FTT concluded on the evidence that:

(1) Low Specification Appliances were not ordinarily installed by builders in the 1970s or 1980s, but they were from 1990.

(2) High Specification Appliances were not ordinarily installed at any time in the Claim Period.

31. In the first UT decision, we took a different view from the FTT as to the test of ordinariness. First, we decided (at [129] – [130]) that the test was not whether an item would be more likely than not to be installed, but one of ordinariness or commonness, not requiring there to be an industry standard or that the item be installed in most dwellings. The question was one of judgment, having regard to the evidence as to the relative frequency of installation by builders of the item in question at the material time. Secondly, we held, at [139], that the material time for this purpose was not the date of the legislation, but the date when the right to input tax deduction would arise. And thirdly, at [138], we held that at all times the proper comparator was with buildings that most closely accorded with the use of the building in question (such as a single dwelling house on the one hand, and a building in multiple occupation on the other).

32. The result is that we found that the FTT had erred in law in those respects in its analysis of the "ordinarily installed" test. As that was the test applied by the FTT in its assessment of the evidence before it, it necessarily follows that that assessment must be revisited. We accordingly set aside the decision of the FTT in that respect. Having heard argument on the evidence before the FTT, we consider it is appropriate for us to re-make the decision in this respect accordingly to our own findings.

33. That re-assessment of the evidence is not, however, without its limitations. First, there are the provisions which expressly apply the Builder's Block even if items are ordinarily installed at the relevant time; the effect of that in relation to the Claim Items is that, as domestic electrical appliances, input tax was specifically blocked from 1 June 1984. Secondly, prior to 1 March 1995, the question whether an item was ordinarily installed was confined to fixtures. With the exception of fitted carpets, we endorsed the FTT's findings in that respect: accordingly, the only items that were fixtures in the 1980s were those which were wired-in and screwed-in (and not merely plugged-in or plumbed-in), thus confining the enquiry to the Low Specification Appliances between 1980 and 1 June 1984. The enquiry is further confined, to extractor hoods alone, by the fact that input tax was recovered on split-level ovens and hobs between August 1975 and 31 August 1984, so that those items were not Claim Items.

34. Mr Peacock submitted that the enquiry should go further. He argued that it should not be limited by the specific application of the Builder's Block to domestic electrical appliances. It remained the contention of Taylor Wimpey (based on Article 17(6) of the Sixth Directive) that changes to the block, including that introduced with effect from 1 June 1984 and the extension to carpets in 1987, were unlawful. If a higher court were to find in Taylor Wimpey's favour on that question, the effect would be that the question whether High Specification Appliances and carpets were ordinarily installed from 1990 onwards would become material. He submitted that it would be unsatisfactory if those matters were left unresolved at this stage if there was the prospect that they would need to be determined at some stage.

35. Mr Peacock also submitted that the enquiry should not be confined to those items that had been determined to be fixtures, but should also consider those items which we had concluded should be regarded as incorporated in the building by reason of being "installed fittings". The basis for this submission is an argument that, in its context, the legislation intends the question whether an item is within the category of items that are ordinarily installed to be coextensive with whether it is incorporated in the building. In support of that argument, Mr Peacock referred to the first UT decision, at [98], where we expressed the view that the change in the law in 1995 so as to bring items installed as fittings within the concept of "incorporation" did not stretch the meaning of incorporation, such that earlier iterations of the Builder's Block could include the installation of a chattel as a fitting. If, Mr Peacock submitted, it was right to treat the meaning of incorporated as the same before as well as after the 1995 changes, it should equally be the case that the reference to fixtures in the earlier versions of the block should include all items, such as installed fittings, that fell to be regarded as incorporated in the building.

36. We do not accept Mr Peacock's submissions. Turning first to the possibility that a higher court might take a view different from our own as to the lawfulness of elements of the Builder's Block, we do not regard that as a sufficient reason for us to apply our own test of "ordinarily installed" to items to which, if that were the outcome of an appeal, the relevant specific blocks of input tax recovery would not apply. We are invited to apply our own test on that hypothesis, but without regard to the equal possibility that that test will itself be found not to be correct in law, so that a different

test would fall to be applied to all relevant items. It is not the case that any analysis undertaken by us of items which, according to our decision, could not in any event fall outside the block by reason of being ordinarily installed by builders, would be determinative. In those circumstances, we do not consider it would be right for us to undertake such a speculative exercise.

37. We reject Mr Peacock's submission that the reference to "fixtures" in the expression "ordinarily installed by builders as fixtures" can be construed as including installed fittings. Fixtures means fixtures. It is a term which is readily understood as a matter of law, and the use of that term in legislation cannot be construed in any other way. That may be contrasted with the term "incorporates in any part of a building" which falls to be construed on normal principles of construction. We found that both on a literal and purposive construction such a term was apt to include both fixtures and installed fittings; it was not (as Taylor Wimpey had submitted) coextensive with "installation as a fixture". Mr Peacock's submission seeks essentially to run the same argument, but by arguing for the meaning of "installed … as fixtures" to be construed to equate with the meaning we have ascribed to "incorporates". That is not, in our judgment, a permissible construction. It also ignores the view we expressed at [99] of the first UT decision that the effect of the 1995 changes, by which the exclusion from the Builder's Block from one that depended on the item being of a kind ordinarily installed as a fixture to one that applied when the item was ordinarily incorporated in the building, operated in principle as a relaxation of the block. Mr Peacock's submission is incompatible with that view, and must be rejected.

38. We conclude, therefore, that the only question before us on the application of the "ordinarily installed" test is whether extractor hoods were, in the period from 1980 to 1 June 1984, ordinarily installed by builders. That, we observe, is consistent with the terms of the agreed issues in this regard. The terms of the Ordinarily Installed Issues, as we have outlined above, are necessarily confined to fixtures, and they are also limited to prescribed accounting periods before input tax deduction on the relevant items was specifically blocked by the amendments to the Builder's Block in 1984.

39. Our conclusion in this respect has been reached without any need to consider whether the arguments of Taylor Wimpey for a review extending beyond 1984 prejudiced HMRC, having regard to the terms of the agreed issue. Mr Macnab's position was that HMRC would be prejudiced if the Ordinarily Installed Issues were to be extended to include all items for all periods, as Taylor Wimpey had proposed; HMRC's case had been prepared on the basis of the terms of the agreed issue, namely that it extended only to periods before the specific block on those items in 1984.

40. Before us, Mr Peacock submitted that there had been further correspondence between the parties from which it was clear that Taylor Wimpey's case on this issue extended further than 1984. In view of that we invited the parties to make written submissions on this point. Having considered those submissions, we can say that there is nothing in the materials referred to that would reasonably indicate that the issue that the parties had agreed would be considered by the Tribunal would extend

any further than 1984. If Taylor Wimpey had wished there to have been a wider review at this stage (in light of our decision as to the lawfulness of the Builder's Block and the changes to it), it was necessary either for the agreed issue to be amended by agreement, or for there to have been a timely direction by the Tribunal as to the extent of the Ordinarily Installed Issues on which submissions should be made.

41. In their written submissions, Mr Peacock and Mr Rivett referred to a number of documents, including (i) an Appendix to the parties' Joint Statement, in which the terms of the agreed issue were set out, where the parties' respective positions had been outlined, (ii) a direction by the Tribunal on 10 April 2017, which directed that there be a single hearing of all outstanding issues and made consequential directions as to the identification of the parties' respective cases, (iii) HMRC's reply to, amongst other things, an Annex to one of the Joint Statement Appendices entitled "Evidence relating to the Ordinarily Installed Issues, and (iv) the parties' skeleton arguments. Whilst these documents do make reference to Taylor Wimpey's position on its wider case, it is clear that, for the purpose of these appeals, the Ordinarily Installed Issues are confined to the period prior to 1 June 1984. The parties agreed in the Appendix to the Joint Statement that those issues were not applicable to any items other than Low Specification Appliances. The Tribunal's directions made no amendment to the agreed issues. HMRC's consistent position, both in their reply and in their skeleton argument, was that the bulk of the Annex consisted of submissions and material that were irrelevant to the limited periods to which the Ordinarily Installed Issues related. If, therefore, the question were to be one of prejudice, we would find that to permit at this stage that issue to be extended beyond the terms of the agreed issue would be prejudicial to HMRC, and we would not consider submissions going beyond that issue in relation to extractor hoods between 1980 and 1 June 1984.

Extractor hoods between 1980 and 1 June 1984

42. Extractor hoods are identified as a specific item for consideration by reason of the fact that they are the only item out of the category of Low Specification Appliances for which input tax recovery is claimed in the relevant period. Input tax on the other items included in that category, built-in ovens and surface hobs, had been recovered during the period August 1975 and 31 August 1984, by virtue of an administrative practice of HMRC. Consequently, those items were not Claim Items for the purpose of these appeals.

43. As the evidence before the FTT, and the FTT's findings, ranged beyond the period 1980-1984, no principled distinction was drawn between the constituent items in the Low Specification Appliances category. The parties were content to proceed on the basis that a finding with respect to Low Specification Appliances generally would be a finding with respect to each of the individual items within that category. We shall therefore consider the FTT's findings and, to the extent relevant, the evidence on which those findings were based, in relation to the category of Low Specification Appliances as a whole.

44. The findings of fact made by the FTT which are material to the issue of the installation of Low Specification Appliances by builders in the 1980s may be summarised as follows:

(1) Apart from some split-level cookers installed by contract builders in the 1970s, there was no evidence that builders installed Low Specification Appliances at all in the 1970s (FTT1, at [150]).

(2) There was no market standard for the installation of Low Specification Appliances in the 1980s. The evidence did not show that builders had to keep up with the competition (FTT1, at [149], [153]).

(3) George Wimpey and Bryant offered Low Specification Appliances as standard in the 1980s, but as a marketing strategy which distinguished them from the competition. McLean and Laing did not install Low Specification Appliances as standard at least until the very late 1980s (FTT1, at [152]). Low Specification Appliances were installed in *some* of the houses produced by *some* of the other builders including some of the other Claimant Companies (FTT1, at [372]). In 1984, the FTT rejected the submission that Laing did install Low Specification Appliances in 30-50% of new homes; there was no evidence for Wain and Wilcon; and while McLean did install such appliances in some homes there was insufficient evidence to ascertain what percentage.

(4) Low Specification Appliances were installed as standard from 1990 (FTT1, at [162]).

45. Contrary to Mr Peacock's submission, we do not consider that the findings of fact made by the FTT are wholly vitiated by reason of the FTT having applied to those facts what we consider to have been the wrong test of whether an item was "ordinarily installed". Unless those findings themselves can be impugned as an error of law, there is no basis on which this Tribunal can interfere with them. The test, as we have found it to be, must be applied to the facts as found by the FTT, subject to any error of law in those factual findings themselves. Accordingly, it is not appropriate for this Tribunal to revisit all the FTT's findings of fact in this regard.

46. Mr Peacock was also disposed to submit that, because the issue before the Tribunal relates to the right of a taxable person to an input tax deduction, and that right is an EU law right, albeit one available as a matter of domestic law applying the VAT Directives, the fact-finding exercise ought to be undertaken having regard to the EU principle of effectiveness. That principle, as is well-known, is aimed at safeguarding the rights derived from EU law by requiring that the exercise of those rights under national law is not rendered virtually impossible or excessively difficult. In our judgment there is no basis for an argument that the application of the ordinary principles of the burden and standard of proof in the finding of the relevant facts necessary to enable exercise of a right to deduct input tax could breach the principle of effectiveness. That principle cannot be applied so as to require any special approach to the fact-finding exercise purely because the right at issue is one derived from EU law.

47. Taylor Wimpey has, on the other hand, criticised certain of the facts found by the FTT as errors of law according to the principles of *Edwards v Bairstow* [1956] AC 14, on the basis that those findings of fact were such that no person acting judicially and properly instructed as to the relevant law could have come to those findings and/or that the findings of fact were controverted by the only evidence before the FTT. We consider in the following paragraphs only those criticisms that are capable of relating to the limited scope of the enquiry in relation to Low Specification Appliances in the 1980s up to 1 June 1984.

48. The first concerns the finding of the FTT at FTT1, [42]:

> "Mr Truscott's evidence was that he thought an advert which referred to a 'fully fitted kitchen' meant it included at the very least low specification items. I am unable to agree. Many adverts referred to a fitted kitchen and then separately to appliances included in the kitchen. It seems to me that a fitted kitchen, while it could be used to describe a kitchen with integrated appliances, could also simply refer to the fitted kitchen units without any fitted appliances. I reject what Mr Truscott says on this as it was simply not consistent with the adverts in front of me. I note that Mr Southcombe agreed that there was a distinction between fitted kitchens and fitted appliances, although he appeared to think a 'fitted kitchen' would be taken by the 1990s to include appliances and not just the sink and units. However, I am unable to agree on the basis of the evidence in front of me that people's expectations were higher in the 1990s than 1980s: some adverts in the 1990s continue to draw a distinction between fitted kitchens and fitted appliances and the evidence (see §60 and §73) was that after the housing crash of the late 80s builders on the whole offered less than before. My conclusion is that where the advert refers to 'fitted kitchen' I do not find it right to infer from that by itself that low or high specification items were included."

49. Taylor Wimpey's submission in this regard refers to the evidence of Mr Truscott, in particular to his recollection, expressed in cross-examination that a fully fitted kitchen would include "oven, hob and hood and the white goods". That response was, however, given in relation to an advertisement in relation to a Wimpey home which referred to a "fully fitted kitchen including white goods and carpets and curtains" and dated from October 1985. The other adverts referred to in support of Taylor Wimpey's submission in this regard all related to periods after 1984. Even leaving aside the fact that the evidence on which Taylor Wimpey seeks to rely in this respect is outside the relevant period of the enquiry, it falls far short in our judgment of establishing, as Taylor Wimpey sought to do, that the only finding open to the FTT on the evidence was that a reference in an advert to a "fully fitted kitchen" meant that the kitchen included at the very least the Low Specification Appliances. In our judgment, the FTT was entitled on the evidence to find as it did at FTT1, [42].

50. Taylor Wimpey has challenged the finding of the FTT at FTT1, [70]:

> "[Mr Southcombe] said that in around 1982/83 Wimpey adopted a new marketing strategy which was to sell homes rather than houses, and it

> was exemplified by Wimpey's new advertising logo of a domestic cat. This meant, he said, that Wimpey installed as standard low specification appliances plus a fridge, including a washing machine, dishwasher and extractor fan from the mid-1980s and from mid-1988 or 1989 including carpets and curtains. The Northern arm of Wimpey was exempt from this policy until 1984. Larger houses would have even more as standard, such as microwaves. The exhibited adverts support his position (some even include a picture of the cat) and I accept his evidence on this. It is consistent with the agreed position (save in respect of carpets, where it was agreed and I find they were installed as standard from an earlier date- see §17)."

51. Taylor Wimpey submits that, on the basis of Mr Southcombe's evidence, and evidence of certain advertisements in the 1980s, the only finding open to the FTT in relation to Low Specification Appliances was that they were installed as standard from 1982. That submission must be confined to Wimpey, as Mr Southcombe's evidence in this regard related solely to the change in strategy of Wimpey in 1982-1983. In fact, it adds nothing to the finding of the FTT at FTT1, [152] to which we referred above, to the effect that Wimpey offered Low Specification Appliances as standard in the 1980s. The FTT identified the mid-1980s as the relevant time when, on Mr Southcombe's evidence, it had become standard for Wimpey to install Low Specification Appliances on the basis of the evidence that its Northern arm was exempt from the new policy until 1984. On that basis, if a more precise year for when the installation of Low Specification Appliances became standard in Wimpey were required, it would be 1984. Indeed, the earliest relevant advert relating to the North of England to which we were referred in this connection (from the Manchester Evening News) was dated 14 June 1984. That, we note, is consistent with the finding at FTT1, [372], that as at 1984 Low Specification Appliances were installed in most Wimpey homes.

52. Taylor Wimpey criticised the FTT's refusal to accept the evidence of Mr O'Sullivan to the effect that by 1984 McLean installed at least Low Specification Appliances as standard. We do not accept that criticism. Mr O'Sullivan provided a witness statement, but he was not available for cross-examination. The FTT was entitled, for the reasons it gave at FTT1, [92] to find that the evidence was unreliable. The FTT found, in particular, that the modest amount of documentary evidence on which Mr O'Sullivan's statement appeared to rely did not appear to support what he had said. The only advertisements to which we were referred in this connection in the period to 1984 were from the Barnet Press dated 17 July 1981 and the Glasgow Evening Times dated 10 June 1982. As regards the former, the advert does not appear to us to refer to kitchens or Low Specification Appliances at all; as regards the latter, the text is unclear, but there is no specific reference to the appliances installed. We can see no argument on this basis that the FTT's conclusion that McLean did not install Low Specification Appliances as standard at least until the very late 1980s (FTT1, at [152]) was one that the FTT was not entitled to make.

53. Evidence in relation to Laing Homes was given by Mr Bishop. His evidence was that Laing Homes would install Low Specification Appliances as standard throughout the 1980s. The FTT considered both Mr Bishop's recollection of the

position and the brochures which he had produced in evidence. All of the evidence referred to by the FTT (FTT1, at 110-127), dates from a period after 1984. On that basis, the FTT concluded that in 1988, of the Low Specification Appliances, only the hood was standard, and (at [122]), that Taylor Wimpey had not made out a case that the standard specification for Laing before 1988 even included a hood. Having considered all those materials, we conclude that the FTT was entitled to reach that conclusion. None of the materials supports a case that Laing installed Low Specification Appliances as standard at any time before 1988, and even then the FTT was entitled to conclude that the only proof was that hoods, and not other appliances, were installed as standard from 1988. The single advertisement prior to 1985 referred to by Taylor Wimpey dated from 1981; it referred to a "high quality fitted kitchen", but made no reference to appliances. That is insufficient to found an *Edwards v Bairstow* challenge to the FTT's findings. The FTT had the advantage of hearing Mr Bishop's evidence first-hand, and of relating that to the contemporary documentary evidence. Its findings cannot be disturbed.

54. Having considered the evidence which Taylor Wimpey has submitted goes to controvert the FTT's findings of fact, we are entirely satisfied that the FTT was entitled to make those findings, and that no error of law has been identified which would enable us to reach a different conclusion of fact. Indeed, on examination, we have concluded that what Taylor Wimpey is essentially seeking is a different view of the evidence. That is not a proper basis for challenging the findings of the FTT on an appeal on a question of law. The attempt to characterise such a challenge on *Edwards v Bairstow* principles was, when given detailed consideration, in our view without foundation.

55. We now turn to consider the application to the facts of the test of "ordinarily installed" to extractor hoods in the period 1980 to 1 June 1984. That test, as we have explained, requires consideration of the ordinariness or commonness of the installation for which there must be an exercise of judgment having regard to the evidence as to the relative frequency of installation by builders of the item in question at the time the right to input tax would arise. The test is not whether the installation of extractor hoods, or the Low Specification Appliances generally, was standard in that period, or whether the installation of the item would have been more likely than not.

56. The FTT based its own conclusions on the evidence of the witnesses and on the contemporary documents, which largely consisted of advertisements. The FTT found that Wimpey and Bryant installed Low Specification Appliances as standard in the 1980s, that McLean and Laing did so only from the late 1980s and that there was in that period some installation by other builders. The documentary evidence supports those findings. But it does require to be re-appraised in the light of the test of "ordinarily installed" which we have found should be applied.

57. The evidence included a number of advertisements for various developments by various builders in the period 1980 to 1984. A number of those advertisements referred to a "fitted kitchen" without reference to any appliances, including the Low Specification Appliances. As we have found, the FTT's finding (FTT1, at [42]) that

such a description did not indicate that Low Specification Appliances were included cannot be disturbed. It is not, however, the case that the FTT made a positive finding that Low Specification Appliances were excluded by such a description; the conclusion of the FTT was that it would not be right to make an inference that the appliances were included. The position is therefore neutral in terms of weight and the relative frequency of installation of the Low Specification Appliances. On the other hand, references to "high quality kitchen units", without any reference to appliances, can be regarded as evidence of non-installation (an example is that of the advertisement for Wimpey in the Glasgow Evening Times of 17 June 1982 in respect of a number of developments in Glasgow and West Scotland, and likewise an advertisement for McLean Homes in the Cambridge Evening News on 26 August 1982).

58. A number of advertisements in this period, up to 1 June 1984, made reference to Low Specification Appliances:

(1) an advert for Rush & Tompkins Homes Ltd in the Glasgow Evening Times of 17 June 1982 referred to a "kitchen fully fitted with cooker…";

(2) an advert for Barratt Anglia in the Cambridge Evening News of 26 August 1982 included a "modern kitchen complete with cooker …";

(3) an advert for Bryant Homes in the Solihull News of 6 August 1983 referred to "the most luxurious kitchens imaginable with built in cookers and hobs";

(4) adverts in the Solihull News of 6 January 1983 included a number that referred to ovens and hobs: Bovis Homes, Bryant Homes and Broseley Homes. The same issue also included an advert for Lovell Homes which did not refer to Low Specification Appliances, but only to "luxury fitted kitchens" amongst the typical features;

(5) an advert in the Solihull News of 13 January 1983 for Bryant Homes referred to "Neff oven and ceramic hob …". In the same edition, an advert for Broseley Homes described a "fabulous fitted kitchen with oven and hob units";

(6) an advert in the Solihull News of 5 May 1983 for Bryant Homes referred to built-in ovens and hobs. In the same edition, an advert for Bovis Homes referred to "fabulous kitchens with … oven, hob and cooker hood as standard";

(7) two adverts in the Solihull News of 5 May 1983, one for Bryant Homes and the other for Prowting, each referred to built-in ovens and hobs;

(8) an advert in the Midlands Property Extra of 4 June 1983 for Wimpey refers to a fully fitted kitchen including hob and oven. In the same publication, an advert for Broseley Homes describes "split level cooking";

(9) an advert for Wimpey in the Cambridge Evening News, Property section of 11 August 1983 refers to "hob and oven"; and

(10) an advert in the Solihull News for Bryant Homes refers to an oven and ceramic hob

59. We accept, as Mr Macnab submitted, that the evidence is limited having regard to the wide geographical scope of Taylor Wimpey's claim, and the number of houses for which the claim is made. But we have concluded that on the basis of the FTT's own findings and our review of the documentary evidence Low Specification Appliances, including therefore extractor hobs, were "ordinarily installed" in the period in question. However, we consider that the evidence goes only to show that this was the case from 1982, thus limiting the claim to input tax on extractor hobs installed in the period 1 January 1982 to 31 May 1984.

60. Although Wimpey itself generally installed Low Specification Appliances as standard only from around 1984 (when its Northern arm adopted the policy), the policy had been introduced from 1982. Wimpey itself was a substantial contributor to the market for dwellings; it was agreed between the parties that Wimpey completed roughly 10,000 homes per year in the 1980s (FTT1, at [10]) and the FTT found, at FTT1, [11], that Wimpey's share of a housing market in which between 150,000 and 200,000 new houses were built in each year was between 5% and 10%. In 1982, Wimpey installed appliances in 66.67% of new homes and from 1983 the percentage of homes in which Wimpey installed Low Specification Appliances was never less than 95% (FTT1, at [16] – [17]).

61. It is apparent from the documentary evidence that Wimpey was not alone in the installation of Low Specification Appliances in the 1980s, though the evidence does not support a finding of prevalent installation before 1982. From that time the adverts demonstrate that it had become common for developments to include the installation of Low Specification Appliances. Although the evidence was limited, on the balance of probability we consider that it is appropriate to draw the inference that the practice of the builders in question was not confined to the particular developments, or the particular geographical areas, to which the evidence of the advertisements related. It is evident that it was not so confined in the case of Wimpey itself, and there is no reason to suppose that other builders who were clearly offering Low Specification Appliances in their developments would have limited their practice of doing so to the narrow range of developments to which the adverts related.

62. We have had regard to the finding of the FTT, based on the evidence of Mr Southcombe and Mr Truscott, that the policy of Wimpey (and Bryant) of offering Low Specification Appliances as standard in the 1980s was as a marketing strategy to distinguish them from the competition (FTT1, at [152]). We agree with the FTT that the evidence does not point to other companies offering such appliances as standard. But as the FTT itself found the evidence does show that a number of other builders were installing such items, and it is clear that they were doing so in more than isolated developments.

63. An advertisement in the Cambridge Evening News, property section, from 6 September 1984, which is outside the relevant period but nonetheless material, was for a development by Wilcon Homes. It demonstrates not only the commercial and marketing policy of Wilcon itself, but also the prevalent practice of other house builders in the period leading up to 1984. The text of the advert read:

> "Over the last few years it has become the policy of home builders to offer various incentives to purchasers. Those have included reduced mortgage rates, free fitted kitchens, free holidays, free carpets and curtains and many other gimmicks.
>
> These free offers can clearly be seen reflected in the higher prices of their houses. Wilcon Homes does not believe in this policy. We feel that the best incentive to a home buyer is to give the maximum space for the lowest cost. This results in either an extra room for the same price or a much lower price for the same sized house."

64. The advertisements in evidence showed that Wilcon itself had advertised fitted kitchens in 1980, 1982 and 1983. It was nonetheless, by 1984, seeking to distinguish itself from the policies of other house builders. The evidence for the period from 1982 is of a policy of Wimpey to install Low Specification Appliances as standard, and of other builders also installing such items in their developments. The statement by Wilcon, seeking to distinguish itself from other builders generally, supports a conclusion that, whilst the installation by other builders of Low Specification Appliances could not be found to have been standard, it was nonetheless an identifiable practice, sufficiently apparent and common for Wilcon to have adopted it as a distinguishing feature.

65. In the first UT decision we referred to the judgment of Stamp J in *F Austin (Leyton) Ltd v Customs and Excise Commissioners* [1968] 1 Ch 529, a case concerning analogous provisions in the Purchase Tax Act 1963, but which is relevant in its analysis of the test of "ordinarily installed" in that context. The rule of thumb adopted by Stamp J was to pose the question whether a prospective purchaser would have been surprised at the inclusion or, as the case may be, exclusion of the item in question. The evidence in this case with respect to Low Specification Appliances, including extractor hoods, between 1982 and 1 June 1984 is such that a prospective purchaser of a dwelling, considering the market as a whole by reference to the marketing applied to the offerings by various builders, would have expressed no surprise at the installation of the Low Specification Appliances in the kitchen. Such a prospective purchaser would have observed from the marketing materials available from a number of builders that such an installation was commonplace and not out of the ordinary. That, in our judgment, is sufficient for us to conclude that Low Specification Appliances, and specifically for this purpose the extractor hoods, were ordinarily installed by builders as fixtures in that period.

66. For these reasons we have concluded that from 1982 Low Specification Appliances, including extractor hoods, were ordinarily installed by builders as fixtures for the purpose of the exclusion from the Builder's Block. Taylor Wimpey's claim in respect of extractor hoods falls to be allowed from 1 January 1982 to 1 June 1984, when the input tax on extractor hoods was, in common with the input tax on most electrical goods, specifically blocked.

Issue 3: the Single Supply/Multiple Supplies Issue

67. In the first UT decision, we described, at [143], the single supply/multiple supply issue as arising only to the extent that Claim Items might be found not to be

either fixtures or installed fittings, and thus not incorporated in buildings for the purpose of the Builder's Block. That is because, to the extent that items are found to be incorporated, there is no issue between the parties; it is Taylor Wimpey's case that all the Claim Items are part of the zero-rated single supply, and HMRC accept that is the position to the extent those items are "incorporated" in a building.

68. We have found that all of the Claim Items were "incorporated" in a building according to our construction of that term. There is therefore no dispute between the parties on the Single Supply/Multiple Supplies Issue. The agreed position is that all the relevant supplies were single zero-rated supplies. That accords with the terms in which the agreed issue in this respect has been couched. It arises only to the extent that any Claim Items are found by this Tribunal not to be "incorporated" within the meaning of the Builder's Block; there are no such items.

69. We have considered whether it would be helpful nonetheless for us to express a view on this issue. We have decided that it would not for the following reasons. First, there is no material dispute as to the underlying law. The exercise is one of applying the law to the facts. Where there is no dispute between the parties, that exercise has no value either to the parties or to the wider community. Secondly, the supply question cannot readily be determined on a hypothetical basis, as it depends on evidence as to the particular item or items in question. As we said in the first UT decision, at [143], that question may be addressed more productively if it focuses on the particular items in question at the material time. Absent those particular items, we consider that the exercise would be unproductive.

Issue 4: the Offset Issue

70. Similar considerations apply to the Offset Issue. That, as the agreed terms of the Offset Issue confirm, arises only if and to the extent that any items are found by the tribunal not to be incorporated for the purposes of the Builder's Block, and are the subject of a separate standard-rated supply. As there are no such items, the issue does not fall to be resolved as regards any of the Claim Items.

71. There is, on the other hand, a difference between this issue and that of the single supply/multiple supplies. Consideration of the issue is a matter of law; it does not depend on the nature of the particular Claim Item or Claim Items that conceivably might have been found to have been the subject of a separate standard-rated supply. It is not a question of applying settled law to a particular set of facts where the substitution of a hypothetical set of facts would produce nothing of any wider significance. The question whether a putative liability to VAT on a standard-rated supply which cannot be assessed by HMRC because of a limitation period may be offset against a liability on the part of HMRC to make a payment to a taxable person in respect of an input tax deduction referable to that supply is one of general application. It is a question that was addressed by the FTT in FTT2, albeit in a different context from the one we have held must apply, and it is one in respect of which we have had full argument. In those circumstances, acknowledging that they are obiter, we shall set out our views on this issue.

72. HMRC's case is that any claim of Taylor Wimpey to a payment in respect of the deduction of input tax on a Claim Item must be offset against the output tax chargeable in respect of the standard-rated supply of that item, notwithstanding that HMRC would be out of time to assess that output tax. The case is put in two ways. First, Mr Macnab submitted that the offset would apply on general principles of EU and UK VAT law. Alternatively, Mr Macnab argued that the offset would apply by virtue of the specific provisions of s 81(3) and (3A) VATA.

73. A number of factors are common ground. First, if HMRC are right, and output tax is to be set off against input tax, that would reduce Taylor Wimpey's claim in respect of the relevant Claim Items to zero. Secondly, and as helpfully confirmed by Mr Macnab following the hearing, Taylor Wimpey's claims were made, or treated by HMRC as made, by virtue of the power conferred on HMRC to "otherwise allow or direct" within the meaning of regulation 29(1) of the Value Added Tax Regulations 1995 (SI 1995/2518) ("the VAT Regulations 1995"). Thirdly, Taylor Wimpey's claims were for "deduction of input tax that became chargeable, and in respect of which the claimant held the required evidence" in prescribed accounting periods ending before 1 May 1997 and as such benefitted from the disapplication by s 121(2) of the Finance Act 2008 of what was then the three-year cap on claims.

Offset under general principles

74. In FTT2, the FTT decided the Offset Issue in favour of HMRC by applying general principles of EU law. As we observed, however, in the first UT decision at [144], the FTT's decision in this respect was made in the different context of the FTT having held (wrongly as we have found) that the Builder's Block was probably unlawful and in consequence Taylor Wimpey having relied on the direct effect of EU law so that the supplies of the Claim Items were standard-rated as a matter of EU law.

75. That is a different context from the one we postulate for this purpose. Our context is one in which the Builder's Block is lawful. There is no reliance by Taylor Wimpey on direct effect. Instead, as a matter of domestic law (applied as usual with reference to EU law), it is assumed that certain Claim Items have been found to have been the subject of a standard-rated supply (and not to have been part of a single zero-rated supply with the dwelling).

76. In those circumstances, although seeking to support the overall conclusion of the FTT on the Offset Issue as correct, Mr Macnab did not adopt the same reasoning in argument. Although it considered a number of authorities, the FTT based its decision on the Offset Issue primarily on *Minister Finansów v MDDP sp z o.o. Akademia Biznesu, sp komandytowa* (Case C-319/12) [2014] STC 699 ("*MDDP*") (see FTT2, at [114]). Mr Macnab did not seek to argue HMRC's case specifically by reference to *MDDP*; he relied he said on *MDDP* for its description of the general principles of VAT law. His principal focus, however, was on the case of *Senatex GmbH v Finanzamt Hannover-Nord* (C-518/14) [2017] STC 205.

77. *Senatex* was a case concerning the lawfulness, as a matter of EU law, of a provision of German law which precluded the correction of a VAT invoice from

relating back to the year in which the invoice was originally drawn. The consequence of it relating instead to the year in which it was corrected was that there was an underpayment of VAT for the earlier year giving rise to a charge to interest for late payment under German law. The CJEU decided that national legislation, such as the German law in issue, under which the correction of an invoice does not have retroactive effect back to the year (or period) in which the invoice was originally drawn, was precluded by EU law.

78. The principal basis for the judgment of the CJEU can be found in [37]:

> "It should be recalled here, first, that the court has repeatedly held that the right to deduction of VAT provided for in art 167 et seq of Directive 2006/112 is an integral part of the VAT scheme and in principle may not be limited, and that the right is exercisable immediately in respect of all the taxes charged on transactions relating to inputs (see, to that effect, judgment of 13 February 2014, *Maks Pen EOOD v Direktor na Direktsia* (Case C-18/13) [2014] SWTI 752, para 24 and the case law cited). The deduction system, as pointed out in para 27, above, is meant to relieve the operator entirely of the burden of the VAT due or paid in the course of all his economic activities. However, national legislation, such as that at issue in the main proceedings, which applies interest for late payment on the amounts of VAT it considers to be due before correction of the invoice originally drawn up imposes a tax burden deriving from VAT on those economic activities, even though the common system of VAT guarantees the neutrality of that tax."

79. The imposition of a tax burden of this nature thus offended the neutrality of VAT which, as the Court noted, at [38], requires deduction to be allowed if the substantive requirements are satisfied, even if the taxable persons have failed to comply with some formal conditions.

80. In reaching its conclusion, the Court relied on a number of fundamental principles. The first, at [26], is the right of taxable persons to deduct from the VAT which they are liable to pay the VAT due or paid on goods purchased and services received by them as inputs. The second, at [27], is that the deduction system is intended to relieve the operator entirely of the burden of the VAT due or paid in the course of all his economic activities; that is one aspect of the principle of neutrality.

81. Mr Macnab submitted that the right to deduct claimed by Taylor Wimpey is just that: a right to deduct input VAT from its output tax liability. He argued that this right was not an abstract, independent or freestanding right to claim payment (or repayment) of VAT incurred by it on relevant purchases of Claim Items. Any right to deduct input tax (and the exercise of that right) and any right to a "VAT credit" after deducting input tax from output tax accrues on a period-by-period basis. The right to deduct input tax from output tax guarantees the neutrality of the tax as regards the taxable person.

82. By parity of reasoning, submitted Mr Macnab, the principle of neutrality would be infringed if the taxable person could "deduct" input tax from output tax for which

it had not accounted. Consistent with that principle, in seeking to exercise the right to deduct, Taylor Wimpey must bring into account the (*ex hypothesi* unaccounted for) output tax due in respect of the onward supplies of those Claim Items.

83. Turning to the UK legislation, Mr Macnab submitted that this reflected the position at EU level. He referred us to *Benridge Care Homes Ltd and others v Revenue and Customs Commissioners* [2012] STC 1920. In that case, a care home partnership and company became registered for VAT in 2008, but with effect from 1980 in the case of the partnership and 1986 for the company. The company submitted a final VAT return for the period 1986 to 1992 (when it had ceased to trade), and the partnership did likewise. Both sought to reclaim amounts of VAT. It was accepted that the taxpayers had under-declared their output tax, and that if the taxpayers' annual accounts had been used to estimate the output tax, they would have shown that the output tax in each period had been greater than the corresponding input tax. HMRC decided to reduce the taxpayers' repayment claims to nil.

84. The dispute concerned the means by which HMRC had denied the taxpayers' claims. The taxpayers argued that HMRC had no power simply to reduce the input tax claims; the only lawful option had been to assess the amount of output tax to HMRC's best judgment under s 73 VATA. The Upper Tribunal held that HMRC's letters informing the taxpayers of their decision had not been assessments and there was no need to assess where no amount of tax was due by the taxpayer. The taxpayers' appeal was accordingly dismissed.

85. At [19], the Upper Tribunal said this:

> "Section 25(2) [VATA] entitles the taxpayer to credit input tax for the prescribed accounting period and to deduct that amount from any output tax 'that is due from him'. The language of the subsection indicates that input tax is a credit entry in the calculation of the tax that must finally be paid for the period. It also indicates, however, that the right of deduction arises by reference to the output tax that is properly due and not some deliberate understatement of that amount. Section 25(3) is also explicit that the amount that a taxpayer can claim to be paid is not the input tax per se but only that amount of input tax net of the output tax due at the end of the period. The appellants' case rests therefore on the proposition that the respondents are bound to pay them the input tax declared in the return net of the output tax figure stated even in a case in which it is acknowledged that the return understates the output tax due in respect of the period in question."

86. Mr Macnab submitted that *Benridge* represents both the correct legal position and the answer to Taylor Wimpey's claim on the Offset Issue. He argued that where a taxable person is allowed to make a late claim to deduct input tax, that late claim to deduct is made on a period-by period basis, in respect of previously accrued rights to deduct. Any claim to a "VAT credit" (and payment of the same) is determined on the same basis, by deducting allowable input tax from liability to output tax as provided by s 25(2) and (3) VATA (which reflect the Directive).

87. In our judgment, neither *Senatex* nor *Benridge* can resolve the Offset Issue in HMRC's favour. Furthermore, there is in our view no general principle, either of EU law or domestic law, that requires the offset against an input tax deduction in respect of particular goods of the output tax on the corresponding supply of the same goods in circumstances where the tax authority is out of time to recover that output tax. It cannot assist HMRC to argue that there must be an offset on a period-by-period basis: the output tax on the supply of goods in respect of which an input tax deduction is claimed will not necessarily (and will more likely not) arise in the same accounting period as the input tax deduction.

88. Turning first to *Senatex*, there is in our view nothing in that case that goes to the question of offset. There was no doubt that the input tax in that case was to be a deduction from an amount of output tax; the issue was one of timing. The Court's focus on the principle of fiscal neutrality was not directed at any principle of offset, but at the relief afforded by the deduction system of the burden of VAT due or paid in the course of a taxable person's economic activities, the availability of that relief notwithstanding that formal conditions may not be met, and the offence against that principle if a further tax burden, in the form of interest up to the date of correction of the invoice, were to be imposed.

89. Mr Peacock submitted that there was no general principle of "benefit and burden", such that a taxpayer should be prevented from recovering input tax without accounting for output tax where it is the provisions of national law (in this case time limits) that give rise to such a result. He referred us to *Revenue and Customs Commissioners v GMAC UK plc* (Case C-589/12) [2014] STC 2603, which concerned a claim by GMAC for bad debt relief in respect of the unpaid part of the consideration for the supply of a car on hire purchase, where the customer had defaulted and the vehicle had been repossessed and sold at auction, with the auction proceeds deducted from the outstanding balance. Under UK law, the sale at auction was treated neither as a supply of goods or as a supply of services. The effect of the claim was to obtain relief for VAT purposes for the whole of the amount of the default by the customer, without taking into account the auction proceeds.

90. The Court held that GMAC could rely on EU law with respect to the reduction in consideration received from the customer without regard to the consideration received with respect to the auction proceeds. Any "windfall" arose solely from the application of national law, namely that there was no taxation of the auction proceeds. The ability of GMAC to invoke direct effect of the Sixth Directive in order to obtain bad debt relief could not be denied on the basis that the cumulative application of the provisions of the Directive and those under national law would produce an unintended overall fiscal result.

91. It is not, however, possible for a taxable person to seek to take advantage of an EU law right to deduct input VAT whilst at the same time seeking to benefit from an exemption under national law which is incompatible with EU law. That was the position in *MDDP*. The Court decided (at [45]) that, even where an exemption provided for by national law is incompatible with the Principal VAT Directive, so that the supply should properly be a standard-rated supply, Article 168 of that Directive

(Article 17 of the Sixth Directive) does not permit a taxable person both to benefit from the domestic exemption and to exercise the right to deduct tax on the basis of the supply being standard-rated as a matter of EU law. That conclusion followed from the basic principle that there is no input tax deduction in respect of supplies used for an exempt transaction.

92. There is thus no universal rule. The essential difference between *MDDP* and *GMAC* is that, in the former case, the claim under EU law for deduction of input tax was one that was precluded by EU law itself in the case of a supply used for a transaction that was exempt under domestic law, whereas in the latter case there was nothing in EU law to preclude the reduction in the taxable amount, even though the treatment under UK law of the auction sale proceeds as not taxable gave rise to a windfall.

93. In this case, in the circumstances that are assumed for this purpose, no EU law right is relied upon. The postulated circumstance in which the Offset Issue arises is that, according to UK law, there was a standard-rated supply in respect of which a right to deduct input tax has arisen. There is no exempt supply as there was in *MDDP* which could preclude the right of deduction. The fact that under UK law HMRC is unable to collect the tax that was due in respect of the standard-rated supply cannot preclude the right of recovery of input tax which arises in consequence of that standard-rated supply. Nor can the fact that the right to deduct input tax arises by reference to a standard-rated supply require tax which cannot be collected as a matter of national law to be offset against any claim to recover input tax.

94. That conclusion cannot be affected by any argument that the claim for deduction of input tax must be related back to the period in which the right to deduct arose. It is the case that the right to deduct under Article 179 of the Principal VAT Directive (formerly Article 18(2) of the Sixth Directive) must generally be exercised in respect of the tax period in which the goods or services are supplied and in which the taxable person is in possession of the invoice (*Terra Baubedarf-Handel GmbH v Finanzamt Osterholz-Scharmbeck* (Case C-152/02) [2005] STC 525). But that relates the input tax to a period and not to specific supplies giving rise to output tax.

95. Furthermore, member states are, by Article 180 of the Principal VAT Directive (formerly Article 18(3) of the Sixth Directive), given a discretion to allow the making of deductions for input tax which have not been made in accordance with Article 179 (or Article 18(2)). In the UK, effect has been given to that discretion by regulation 29 of the VAT Regulations 1995. Mr Peacock referred us to *University of Sussex v Customs and Excise Commissioners* [2004] STC 1, a case that is relevant given the common ground that Taylor Wimpey's claim is made under regulation 29. That case concerned a claim in 1996 by the university for repayment of input tax which the university had, for various reasons, not claimed during the period 1973 to 1996. Counsel for the Commissioners argued that, under EU law, the right to deduct input tax arises when it becomes chargeable and there is a duty to deduct input tax arising in each period from output tax for the same period. That argument was rejected by the Court of Appeal. The leading judgment was given by Auld LJ. At [149], he referred to the judgment of Neuberger J in the High Court:

> "… 'Although the provisions of the 1994 Act may be neutral on this issue if read on their own, when read together with the Sixth Directive and reg 29, I believe that the overall effect is in accordance with Mr Cordara's submission. … Regulation 29(1) repeats the point that the primary course for a taxpayer wishing to claim input tax is to raise his claim in the return in respect of the period in which it was incurred. However, albeit in very general terms, it leaves open the possibility of the input tax being claimed later. Again, that seems to me to be consistent with the notion that a late claim permitted pursuant to the commissioners' allowance or direction under reg 29(1) is not a correction to the earlier relevant return, in the sense that it results in a retrospective overpayment of VAT. Rather, it is a permitted or directed claim, albeit a late claim, for a set off, payment, or credit in respect of the input tax in question. To put the point slightly differently, a late claim for input tax is a self-contained claim which stands or falls on its own merits, and does not bear on the original VAT return in which it should primarily have been included, or any payment of VAT made pursuant thereto.'"

Lord Justice Auld continued (at [150]):

> "In my view, Neuberger J's overall analysis of the relevant Community and domestic legislation is correct. Its effect is not to require tax neutrality for each registered trader within a single accounting period. That may be the primary objective of the 1994 Act and the 1995 regulations, but their clear provision, consistently with the Sixth Directive, is to identify from a registered trader's return for each accounting period the tax payable by, or to be credited to, him by reference to declared outputs and his claimed inputs. If he pays more tax than he need because he has under-claimed input tax, he has not overpaid tax for that period; the amount paid is simply the result of a mechanism which sets off against what is due from him what he claims is properly due to him. If and when he seeks to remedy that under-claim in a subsequent accounting period, the 1994 Act and the 1995 regulations, consistently with the discretion given by the Sixth Directive to member states in the matter, makes provision for him to exercise his right to that money by claiming to deduct it from his output tax due in future accounting periods."

96. In the case of a claim under regulation 29, therefore, there is no relation back of the input tax deduction to any earlier period. It is not the case, contrary to Mr Macnab's submission, that Taylor Wimpey's late claim to deduct is made on a period-by-period basis. The input tax is deductible in the period of the claim, in this case in the VAT period in which the claim was made on 30 March 2009. That input tax will, accordingly, be deducted from output tax for which Taylor Wimpey will have accounted in that period. That output tax will not be the output tax on the standard-rated supplies to which the right of deduction of input tax is referable, but there is nothing that requires such a deduction. *Benridge* cannot assist HMRC in this case. That case concerned a single VAT accounting period in which both output tax was due and a claim for deduction of input tax was made. There was no question of the output tax being irrecoverable by HMRC for any reason, nor any question of the claim for input tax deduction being related to any other period.

Section 81(3) and (3A) VATA

97. In consequence of our finding that there is no general offset principle applicable in the circumstances of this case, it falls for us to consider whether there is a statutory set-off under s 81(3) and (3A) VATA. Those provisions are as follows:

> "(3) … in any case where—
>
> (a) an amount is due from the Commissioners to any person under any provision of this Act, and
>
> (b) that person is liable to pay a sum by way of VAT, penalty, interest or surcharge,
>
> the amount referred to in paragraph (a) above shall be set against the sum referred to in paragraph (b) above and, accordingly, to the extent of the set-off, the obligations of the Commissioners and the person concerned shall be discharged.
>
> (3A) Where—
>
> (a) the Commissioners are liable to pay or repay any amount to any person under this Act,
>
> (b) that amount falls to be paid or repaid in consequence of a mistake previously made about whether or to what extent amounts were payable under this Act to or by that person, and
>
> (c) by reason of that mistake a liability of that person to pay a sum by way of VAT, penalty, interest or surcharge was not assessed, was not enforced or was not satisfied,
>
> any limitation on the time within which the Commissioners are entitled to take steps for recovering that sum shall be disregarded in determining whether that sum is required by subsection (3) above to be set against the amount mentioned in paragraph (a) above."

98. It is, we consider, plain that, in circumstances where HMRC are out of time to assess output tax, it cannot be said that the taxable person is "liable to pay" a sum by way of VAT. The output tax is an amount for which a liability arose in consequence of the fact that the supply in question was a standard-rated supply, but that is not a liability to *pay* the VAT, which can only arise to the extent that HMRC have an enforceable claim in that respect. If HMRC are out of time to recover that amount, there is no liability to pay. In those circumstances, s 81(3) VATA cannot apply on its own.

99. The question then is whether s 81(3A) operates so as to disapply the time limits which preclude recovery of the output tax on the standard-rated supplies in question. Again, on the face of s 81(3A), we would conclude that it plainly does. In the circumstances postulated for the Offset Issue, we would characterise the relevant mistake as being the failure to appreciate that there was a right to a deduction of input tax at the relevant time by reference to the supply being a standard-rated supply (and not, as was assumed to be the case, part of a zero-rated supply in respect of which input tax recovery was blocked by the Builder's Block). In consequence of that mistake, an amount falls to be paid in respect of that input tax deduction; that satisfies

s 81(3A)(b). The same mistake resulted in the liability to VAT on what is now understood to have been a standard-rated supply not being assessed (s 81(3A)(c)). The fact that such a liability is now out of time to be recovered is then disregarded. The result is that the set-off in s 81(3) is no longer precluded.

100. Mr Peacock made two submissions as to why this straightforward construction of s 81(3A) should not be adopted. He first referred to *University of Sussex*, and the proposition derived from that case that where a taxpayer does not claim input tax in a given period, the tax he pays over in that period is the "right" amount of tax. We accept that as a general proposition, but it holds good only for periods in which the correct amount of output tax (disregarding the late claim for input tax) is accounted for. It does not hold good for periods in which output tax has not been accounted for on the supplies that are discovered to be standard-rated supplies giving rise to the right to deduct input tax. As we have noted above, the mistake as to the nature of those supplies gives rise to both the liability on HMRC to pay an amount in respect of input tax and a liability to VAT on the standard-rated supplies themselves. That is the circumstance envisaged by s 81(3A) in order that the limitation on recovery of the output tax will fall to be disregarded.

101. Mr Peacock's second submission relied on *Birmingham Hippodrome Theatre Trust Ltd v Revenue and Customs Commissioners* [2014] STC 2222 in the Court of Appeal. That case concerned the application of s 81(3A). The taxpayer trust became entitled, in principle, to claim repayment of output tax for periods from 1990 to 1996 in respect of supplies of theatre tickets that ought to have been exempt supplies; by the same token it had claimed input tax deductions between 2000 and 2001, but HMRC were time-barred from making a free-standing claim to recover input tax that had been paid to the trust. It was held that, on the application of s 81(3A), HMRC were entitled to set off the payments they had made in respect of input tax against the output tax due to the trust. Section 81(3A) is a special provision which is not limited to certain accounting periods, but seeks to undo all the consequences of the same mistake (see Lewison LJ, at [59]).

102. *Birmingham Hippodrome* thus supports HMRC's case as to the application of s 81(3A), but for one point raised by Mr Peacock. He submitted that s 81(3A) was limited in its application to claims for repayment of output tax under s 80 VATA and not to claims, as Taylor Wimpey's claims are accepted to be, for deductions of input tax under regulation 29 of the VAT Regulations 1995. He based this submission on what Lewison LJ said, first, at [53]:

> "There are two preliminary points to make about the way in which s 81(3) operates. First, it only applies where a claim for repayment has been made by the taxpayer under s 80(2). So it is the taxpayer who chooses to invoke the statutory machinery. Thus in our case HMRC cannot initiate any action to recover the amount of payments made to the Trust in connection with the refurbishment, because (as is common ground) they are out of time under ss 73 and 77."

Secondly, Mr Peacock referred to Lewison LJ's judgment at [59]:

> "The purpose of s 81(3A) is, in my judgment, clear. It is that where a taxpayer makes a claim for repayment of VAT which has been paid owing to a mistake, all the consequences of the mistake are to be taken into account in assessing the quantum of his claim. That purpose is consistent with the overarching scheme of VAT under the Sixth Directive which treats the payment of output tax and the deduction of input tax as an 'inseparable whole'. This is borne out by s 81(3A)(b) which deals with amounts payable 'to or by' the taxpayer. It is clear from this that s 81(3A) was intended to allow HMRC to take into account both credits and debits. It is not, therefore, simply concerned with past claims by the taxpayer for credit of input tax. In evaluating those claims HMRC are also to look at amounts payable 'by' the taxpayer: in other words output tax. Section 81(3A)(b) is not limited to particular accounting periods. The main limiting factor is that the payment 'to or by' the taxpayer must derive from the same mistake as that which gave rise to the claim. Section 81(3A) is not part of the general scheme of VAT accounting, which requires a direct and immediate link between an input and an output. Rather it is a special provision, which seeks to undo the consequences (and all the consequences) of the same mistake."

103. We do not accept that *Birmingham Hippodrome* is authority for any such limitations. As Mr Macnab submitted, neither s 81(3) nor s 81(3A) is expressly limited to claims for repayment of output tax or claims for repayment under s 80 VATA. The remarks of Lewison LJ were not directed to any issue of the scope of those provisions, but merely reflected the facts of the case, which concerned a claim by the trust under s 80 for recovery of overpaid output tax for the relevant periods. We agree with Mr Macnab that the narrow construction of s 81(3) and s 81(3A) for which Taylor Wimpey contends is inconsistent with the reasoning and conclusions of the Court of Appeal in *Birmingham Hippodrome* and must accordingly be rejected.

104. We conclude therefore that, if we had found that there were any Claim Items that were not "incorporated" in the building for the purpose of the Builder's Block and were the subject of separate standard-rated supplies, the effect of s 81(3) and (3A) VATA would be to set the amount of output tax on the standard-rated supplies for which Taylor Wimpey is liable (ignoring any time limits on recovery) against the amount of input tax due from HMRC to Taylor Wimpey. As it is agreed that the amount of such output tax would exceed the amount of input tax, the net result would have been that Taylor Wimpey's claim in those respects would be reduced to zero.

Summary of conclusions

105. In summary:

(1) On Issue 1 (the Incorporation Issues), on the evidence before the FTT all of the Claim Items were either fixtures or installed fittings, and so were incorporated in the buildings for the purposes of the Builder's Block. None of those items, including microwave ovens, fell outside the category of fixtures and installed fittings, as those terms are to be understood according to the first UT decision.

(2) On Issue 2 (the Ordinarily Installed Issues), from 1982 Low Specification Appliances, including extractor hoods, were ordinarily installed by builders as fixtures for the purpose of the exclusion from the Builder's Block. Taylor Wimpey's claim in respect of extractor hoods falls to be allowed from 1 January 1982 to 1 June 1984, when the input tax on extractor hoods was, in common with the input tax on most electrical goods, specifically blocked.

(3) We make no determination on Issue 3 (the Single Supply/Multiple Supplies Issue). On the basis of our conclusion on Issue 1, and the agreed position in that event that all the relevant supplies were single zero-rated supplies, there is no dispute between the parties on the single supply/multiple supplies issue.

(4) On Issue 4 (the Offset Issue), on the hypothesis that we had decided that a Claim Item was not "incorporated" in the building for the purpose of the Builder's Block and was the subject of a separate standard-rated supply, then although there was no general principle of offset under EU or domestic law which was applicable in the circumstances of this case, the effect of s 81(3) and (3A) VATA would be to set the amount of output tax on the standard-rated supply for which Taylor Wimpey is liable (ignoring any time limits on recovery) against the amount of input tax due from HMRC to Taylor Wimpey. As it is agreed that the amount of such output tax would exceed the amount of input tax, the net result would have been that Taylor Wimpey's claim in those respects would be reduced to zero.

Decision

106. Taylor Wimpey's appeals are allowed to the extent of input tax on extractor hoods only in the period from 1 January 1982 to 1 June 1984, and are otherwise dismissed.

Application for permission to appeal

107. In the first UT decision we directed that, as the appeal had not been finally determined by that decision, the time for applying for permission to appeal did not start to run. This decision is the final determination of the appeals, and accordingly any application for permission to appeal must be made to the Upper Tribunal in writing so that it is received by the Tribunal within one month after the date of release of this decision.

SIR NICHOLAS WARREN
UPPER TRIBUNAL JUDGE ROGER BERNER

RELEASE DATE:26 February 2018

SCHEDULE

Builder's Block: UK legislation

The Input Tax (Exceptions) (No 1) Order 1972 (1972 No 1165)

1 April 1973

3. Where a taxable person constructing a building for the purpose of granting a major interest in it or in any part of it incorporates in any part of the building or its site which is used for the purposes of a dwelling goods other than materials, builder's hardware, sanitary ware or other articles of a kind ordinarily installed by builders as fixtures, tax on the supply or importation of the goods shall not be deducted by him as input tax under section 3 of the Finance Act 1972.

The Value Added Tax (Special Provisions) Order 1977 (1977 No 1796)

1 January 1978

8. Where a taxable person constructing a building for the purpose of granting a major interest in it or in any part of it incorporates in any part of the building or its site which is used for the purposes of a dwelling goods other than materials, builder's hardware, sanitary ware or other articles of a kind ordinarily installed by builders as fixtures, tax charged on the supply or importation of the goods shall be excluded from any credit under sections 3 and 4 of the [Finance Act 1972].

The Value Added Tax (Special Provisions) Order 1981 (1981 No 1741)

1 January 1981

8. Where a taxable person constructing a building for the purpose of granting a major interest in it or in any part of it incorporates in any part of the building or its site which is used for the purpose of a dwelling goods other than materials, builder's hardware, sanitary ware or other articles of a kind ordinarily installed by builders as fixtures, tax charged on the supply or importation of the goods shall be excluded from any credit under sections 3 and 4 of the [Finance Act 1972].

The Value Added Tax (Special Provisions) (Amendment) (No 2) Order 1984 (1984 No 736)

1 June 1984

8.-(1) Subject to paragraph (2) below where a taxable person constructing a building for the purpose of granting a major interest in it or in any part of it incorporates in any part of the building or its site which is used for the purpose of a dwelling, input tax on the supply or

importation of the goods shall be excluded from any credit under sections 14 and 15 of the Value Added Tax Act 1983.

(2) Paragraph (1) above shall not apply to materials, builder's hardware, sanitary ware or other articles of a kind ordinarily installed by builders as fixtures except –

(a) finished or prefabricated furniture, other than furniture designed to be fitted in kitchens;

(b) materials for the construction of fitted furniture, other than kitchen furniture; and

(c) domestic electrical or gas appliances, other than those designed to provide space heating or water heating or both.

The Value Added Tax (Construction of Buildings) Order 1987 (1987 No 781)

21 May 1987

3. Article 8 of the Value Added Tax (Special Provisions) Order 1981 shall be varied –

(a) by inserting in paragraph (1) after the words "taxable person constructing a building" and before the words "for the purpose of granting a major interest in it", the following words –

"or effecting works to any building, in either case"

(b) by inserting in paragraph (2) after sub-paragraph (c) the following sub-paragraph –

"(d) carpets or carpeting materials".

The Value Added Tax (Construction of Buildings) (No 2) Order 1987 (1987) No 1072

25 June 1987

3. Article 8 of the Value Added Tax (Special Provisions) Order 1981 shall be varied –

(a) by inserting in paragraph (1) after the words "taxable person constructing a building" and before the words "for the purpose of granting a major interest in it", the following words –

"or effecting works to any building, in either case"

(b) by inserting in paragraph (2) after sub-paragraph (c) the following sub-paragraph –

"(d) carpets or carpeting materials".

The Value Added Tax (Input Tax) Order 1992 (1992 No 3222)

1 January 1993

6.—(1) Subject to paragraph (2) below where a taxable person constructing a building or effecting works to any building, in either case for the purpose of granting a major interest in it or in any part of it, incorporates goods in any part of the building or its site which is used for the purpose of a dwelling, input tax on the supply, or acquisition or importation of the goods shall be excluded from any credit under section 14 of the [Value Added Tax Act 1983].

(2) Paragraph (1) above shall not apply to materials, builders' hardware, sanitary ware or other articles of a kind ordinarily installed by builders as fixtures except—

(a) finished or prefabricated furniture, other than furniture designed to be fitted in kitchens;

(b) materials for the construction of fitted furniture, other than kitchen furniture;

(c) domestic electrical or gas appliances, other than those designed to provide space heating or water heating or both;

(d) carpets or carpeting materials.

The Value Added Tax (Input Tax) (Amendment) Order 1995 (1995 No 281)

1 March 1995

6. For article 6 [of the Value Added Tax (Input Tax) Order 1992], there shall be substituted –

"6. Where a taxable person constructing, or effecting any works to a building, in either case for the purposes of making a grant of a major interest in it or any part of it or its site which is of a description in Schedule 8 to the [Value Added Tax Act 1994], incorporates goods other than building materials in any part of the building or its site, input tax on the supply, acquisition or importation of the goods shall be excluded from credit under section 25 of the Act."

The Value Added Tax (Construction of Buildings) Order 1995 (1995 No 280)

1 March 1995

2. For Group 5 of Schedule 8 to the Value Added Tax Act 1994 there shall be substituted –

"**GROUP 5 – CONSTRUCTION OF BUILDINGS, ETC.**

Item No

1. The first grant by a person –

(a) constructing a building –

(i) designed as a dwelling or a number of dwellings; or

(ii) intended for use solely for a relevant residential or a relevant charitable purpose; …

of a major interest in, or in any part of, the building, dwelling or its site.

…

Notes:

…

(22) "Building materials", in relation to any description of building, means goods of a description ordinarily incorporated by builders in a building of that description, (or its site), but does not include –

(a) finished or prefabricated furniture, other than furniture designed to be fitted in kitchens;

(b) materials for the construction of fitted furniture, other than kitchen furniture;

(c) electrical or gas appliances, unless the appliance is an appliance which is –

(i) designed to heat space or water (or both) or to provide ventilation, air cooling, air purification, or dust extraction; or

(ii) intended for use in a building designed as a number of dwellings and is a door-entry system, a waste disposal unit or a machine for compacting waste; or

(iii) a burglar alarm, a fire alarm, or fire safety equipment or designed solely for the purpose of enabling aid to be summoned in an emergency; or

(iv) a lift or hoist;

(d) carpets or carpeting material.

(23) For the purposes of Note (22) above the incorporation of goods in a building includes their installation as fittings.