[2019] UKUT 108 (TCC)

Appeal number: UT/2017/0180

VAT– Single or multiple supply – whether supply of children's skates as part of a "skating with skates" package is a separate zero-rated supply – HMRC's appeal allowed – taxpayers' cross-appeal dismissed – case remitted to FTT for reconsideration

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
-and-	
(1) THE ICE RINK COMPANY LIMITED **(2) PI (MILTON KEYNES LIMITED)**	**Respondents**

TRIBUNAL	**JUDGE JONATHAN RICHARDS** **JUDGE JONATHAN CANNAN**

Sitting in public at The Royal Courts of Justice, Strand, London on 28 February 2019

Raymond Hill, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Charlotte Brown instructed by Hopwood VAT for the Respondents

DECISION

Introduction

1. The Respondents, (who we will refer as "IRC" and "PIMK" respectively and together as "the Companies"), operate separate ice rinks. In a decision ("the Decision") of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 20 September 2017, the FTT concluded that a "skating with skates" package supplied by the Companies consisted of a standard-rated supply of admission to the ice rink and a separate zero-rated supply of the hire of children's skates. The Appellants ("HMRC") appeal to this Tribunal arguing that the package consists of a single standard-rated supply applying familiar principles set out in Case C-349/96 *Card Protection Plan Ltd v Commissioners of Customs and Excise* [1999] ECR I-973 and Case C -41/04 *Levob Verzekeringen v Staatsecretaris van Financien* [2005] ECR I-9433.

2. In case HMRC are successful in their appeal, the Companies have served a Respondents' Notice arguing that, contrary to the FTT's conclusion, even if on a *Card Protection Plan* or *Levob* analysis, they made a single standard-rated composite supply, the hire of children's skates can be "carved out" and a zero-rate applied to that element of the supply.

The Decision and the grounds of appeal against it

The FTT's findings of fact

3. No challenge has been made to the FTT's findings of primary fact and the Companies and HMRC confine their criticisms to the legal conclusions that the FTT drew from those facts. Therefore, we need only give a very high-level summary of the salient facts.

4. The Companies were, at all material times registered for VAT and operated ice rinks, though PIMK had ceased trading by the time of the hearing before the FTT[1].

5. Customers of the Companies could choose:

> (1) to hire skates without paying separately to use the Companies' ice rinks. This option was referred to in the proceedings as "skate hire only". For example, a customer could hire skates, take them to a different venue to use them and return them after use. In addition, sometimes a third party, such as an ice-hockey club, might hire the rink for a match. If the match finished early, the Companies would allow the rink to be used by members of the public who were present. The Companies would not charge those members of the public for admission to the rink (since they had already received

[1] For that reason, while there was substantial evidence as to the nature of the business and operations of IRC, there was much less evidence relating to PIMK. However, the FTT inferred that the evidence relating to IRC also applied to PIMK and both parties were content with that approach.

payment for access to the rink from the club) but the Companies would charge for skate hire.

(2) to pay for admission to the Companies' ice rinks during a particular time window using their own skates. This was referred to in the proceedings as "skating without skates" because although the customers would obviously need skates, they would not be hiring the Companies' skates specifically. We prefer the expression "rink admission only" and will use that expression in this decision.

(3) to buy a package consisting of both admission to the Companies' ice rink during a particular time window and the hire of skates during that window. This was referred to in the proceedings as the "skating with skates" package.

(The Companies provided other services to their customers for a fee such as the use of lockers, but these other services are not relevant to this appeal).

6. It appears that the prices the Companies charged varied depending on the day, or time of day. However, the FTT recorded illustrative figures indicating that, in one time window, the charge for skating with skates was £10 and the price for rink admission only was £8. Those figures might suggest that, in that time window at least, the price of skate hire only would be just £2, the difference between the two prices. However, the FTT found at [51] of the Decision that skate hire only cost much more than this difference because skates taken off-site had to be inspected, and perhaps sharpened, on their return and, at [47] of the Decision found that, in the same time window, skate hire only would cost £8.50.

7. If a child was identified as being under 15 and opted for skate hire only or skating with skates, sales personnel would simply select "child" on the till system, but that would not result in a lower price being charged.

8. A single price was charged for the skating with skates package. That price was not broken down into a part relating to admission to the rink and a part relating to the hire of skates. The prices chargeable for the various options were publicised on, for example, the Companies' websites. At [63] of the Decision, the FTT found:

> We accept Mr Lloyd's assertions that "It is clear to the customer that skate hire is an optional and additional purchase" and "there is a clear distinction between the skate only option and the option to purchase a skating with skates package" are true of IRC and PIMK.

9. The FTT found that around 45.1% of the Companies' customers owned their own skates, and around 54.9% did not. However, the FTT found that those customers who owned their own skates tended to use the rinks more frequently than those who relied on hiring them from the Companies. Therefore, at [66], the FTT inferred:

> It follows … that while a minority (just) may have their own skates, a majority of visits in any one year will be by those who have their own skates.

10. At [59], the FTT found that the Companies both had shops in their reception areas that sold skates. Therefore, although the FTT did not say so expressly, it was possible that a customer might arrive at a rink without skates intending to purchase a skating with skates package but, on arrival, decide instead to buy a pair of skates and, having done so, pay only for admission to the rink. The FTT was not, however, presented with much evidence as to how common it was for customers to do this, or on matters that might have enabled the FTT to form its own judgement on that issue (for example, the cost of skates in the Companies' shops).

The FTT's conclusion on the "composite supply" issue

11. Having directed itself on the applicable law with particular reference to the decisions of the CJEU in *Card Protection Plan* and *Levob*, the FTT concluded that the supply of a skating with skates package involved two separate supplies. The core of its reasoning is set out at [106] to [109] of the Decision which we set out in full:

> 106. In our view in the light of the decisions in these two cases it is plain that in this case there are two supplies, a supply of the use of a skating rink and the supply of hire of ice skates. Neither is ancillary to the other as they both can be, and are, purchased on their own. Far from it being artificial to split the package into two, that is precisely what is in effect done in a substantial percentage of the appellant's transactions with those using its facilities.
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> 107. We do not think it matters at all that there is one price for the package which is different from the combined prices of the two elements taken separately, any more than it mattered in *Levob* that there were separate prices for the elements of a single supply.
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> 108. From the customers' viewpoint a consumer of the package is getting the two things they want. The two elements are dissociable, not because of any spatial separation between the ticket office and the skate hire booth, but because that is the only appropriate way of looking at the supply of the elements.
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> 109. It is also a notable feature of this case that is not present in *CPP*, *Levob* or any other similar case of which we are aware that a substantial percentage of customers will choose to buy one or other of the element but not both, and that it is possible that the same customer may at one time buy a package and at another buy only one of the elements. Therefore it makes no sense to say that the elements are not dissociable when on a majority of the occasions that users enter the reception to use the rinks they choose only one of the two main elements, entry to the rink.

12. That conclusion was sufficient for the FTT to allow the Companies' appeals. However, at [111] to [116] of the Decision, even though it did not need to do so, the FTT went on to consider what it described as the Companies' "first fall-back argument". That involved a contention that, even if, applying EU law principles set out in *Card Protection Plan* and *Levob*, a skating with skates package consisted of a single standard-rated supply, domestic law set out in s30 of the Value Added Tax Act 1994 ("VATA 1994") nevertheless permitted the supply of skate hire to children to be

"carved out" from that supply. The FTT dismissed that argument at [113] of the Decision deciding that it was bound by the Court of Appeal's judgment in *Colaingrove v HMRC* [2017] EWCA Civ 332 which provided a conclusive answer to the point.

HMRC's grounds of appeal against the Decision

13. HMRC appeal against the Decision on the essential ground that the FTT should have assessed the skating with skates package from the perspective of customers of that package but instead assessed it from the perspective of customers of the rinks as a whole. HMRC submit that a typical customer of a skating with skates package would certainly have regarded it as artificial to split the package into a supply of admission and a supply of skates since their interest was in obtaining the composite whole and this conclusion would not be affected by the fact that other customers might purchase skate hire only or rink admission only.

14. In response, the Companies accept that it is the viewpoint of customers of the skating with skates package (and not the Companies' customers as a whole) that is relevant, although they deny that the viewpoint of these customers is the only relevant consideration. However, they submit all circumstances must be taken into account and that the viewpoint of purchasers of the skating with skates package would be informed by their awareness of the total package of options available to them. Therefore, the Companies deny that the FTT followed the wrong approach.

The Companies' cross-appeal

15. If HMRC are successful in their appeal, the Companies cross-appeal against the FTT's rejection of their "carve out" argument summarised at [12] above.

16. The parties were agreed that a necessary condition for the Companies' cross appeal to succeed is that s30 of VATA 1994, properly construed, includes within the scope of zero-rating a supply consisting of the hire of children's skates that forms part of a single standard-rated supply of a skating with skates package. The parties were not, however, agreed that this was a sufficient condition and Mr Hill made submissions to the effect that, even if s30 of VATA 1994 had the meaning for which the Companies argue, as a matter of EU law it is not open to the UK to treat a hire of skates to children as zero-rated when that hire is part of a skating with skates package.

Consideration of HMRC's appeal

The authorities on composite supplies and the conclusions we have drawn from them

17. Since the parties had different views on whether the FTT followed the correct approach in the Decision, and since they were not entirely agreed on what the correct approach was, we will start by setting out what we consider to be the correct approach.

18. In *Card Protection Plan*, the European Court of Justice ("ECJ") said this:

> 27….[It] is not possible to give exhaustive guidance on how to approach the problem correctly in all cases.
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> 28. However, as the court held in *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94) [1996] STC 774 at 783, [1996] ECR I-2395 at 2411–2412, paras 12 to 14, concerning the classification of restaurant transactions, where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place.
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> 29. In this respect, taking into account, first, that it follows from art 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.
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> 30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (see *Customs and Excise Comrs v Madgett and Baldwin (trading as Howden Court Hotel)* (Joined cases C-308/96 and C-94/97) [1998] STC 1189 at 1206, para 24).

19. The "typical consumer" is mentioned in paragraph 29, not as an arbiter of whether it would be artificial to split a single service into constituent parts, or whether one element of a supply is ancillary to another but rather as an aid to identifying precisely what has been supplied and whether that amounts to a single composite supply or several separate supplies. It therefore necessarily follows that the "typical consumer" must be a recipient of the package of supplies whose characterisation is in dispute, and not simply a general customer of the business.

20. In *Levob*, the ECJ[2] affirmed the approach that had been set out in *Card Protection Plan* and articulated the relevant principle as follows. In addition to the situation where one supply is "principal" and others are "ancillary" (which had been discussed at [30] of the ECJ's decision in *Card Protection Plan*) the ECJ identified another situation in which composite supplies might arise:

> 22. The same is true where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.
>
> …

[2] Strictly the court was by then known as the "Court of Justice of the European Communities", but in the interests of brevity we will use the term "ECJ" throughout this decision.

> 24. With regard to the dispute in the main proceedings, it is apparent, as held by the Gerechtshof te Amsterdam whose decision was the subject of the appeal in cassation pending before the referring court, that the economic purpose of a transaction such as that which took place between FDP and Levob is the supply, by a taxable person to a consumer, of functional software specifically customised to that consumer's requirements. In that regard, and as the Netherlands Government has correctly pointed out, it is not possible, without entering the realms of the artificial, to take the view that such a consumer has purchased, from the same supplier, first, pre-existing software which, as it stood, was nevertheless of no use for the purposes of its economic activity, and only subsequently the customisation, which alone made that software useful to it.

21. Again, the concept of a "typical consumer" is relevant as it focuses attention on what is supplied and whether the elements or acts supplied are so closely linked as to form a single indivisible economic supply. It follows that the points made at [19] apply with necessary adaptations.

22. In his written and oral submissions, Mr Hill who appeared for HMRC relied heavily on the decision of the ECJ in *Finanzamt Frankfurt am Main v-Höchst v Deutsche Bank AG* [2012] STC 1951. In our view, this decision is illuminating as an example of an application of the principle in *Levob* rather than containing any refinement of that principle. In applying that principle in the context of portfolio management services that consisted of an "advisory service" (that would be taxable if supplied alone) and an "execution" service (that would be exempt if supplied alone), the ECJ said:

> 23. Having regard, in accordance with the case law referred to in para 18 of this judgment, to all the circumstances in which that portfolio management service takes place, it is apparent that the service basically consists of a combination of a service of analysing and monitoring the assets of client investors, on the one hand, and of a service of actually purchasing and selling securities on the other.
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> 24. It is true that those two elements of the portfolio management service may be provided separately. A client investor may wish only for an advisory service and prefer to decide on and make the investments himself. Conversely, a client investor who prefers to take the decisions on investments in securities and, more generally, to structure and monitor his assets himself, without making purchases or sales, may call on an intermediary for the latter type of transaction.
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> 25. However, the average client investor, in the context of a portfolio management service such as that performed by Deutsche Bank in the main proceedings, seeks precisely a combination of those two elements.
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> 26. As the Advocate General stated at point 30 of her opinion, to decide on the best approach to the purchase, sale or retention of securities would be pointless for investors within the context of a portfolio management service if no effect were given to that approach. Likewise, to make—or not, as the case may be—sales and purchases without expertise and without a prior analysis of the market would also be pointless.

> 27. In the context of the portfolio management service at issue in the main proceedings, those two elements are therefore not only inseparable, but must also be placed on the same footing. They are both indispensable in carrying out the service as a whole, with the result that it is not possible to take the view that one must be regarded as the principal service and the other as the ancillary service.
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> 28. Consequently, those elements must be considered to be so closely linked that they form, objectively, a single economic supply, which it would be artificial to split.

23. Again, the "average client investor" appears in this passage as a consumer of the services being supplied and as an aid to identifying what is supplied, and why a typical customer buys the services as a package.

24. Ms Brown referred us to *Middle Temple v HMRC* [2013] STC 2013 as authority for the proposition that the existence of a choice whether or not to take an element of a package of supplies was relevant to the question whether the package involved a single composite supply. In that case, at [60] of its decision, the Upper Tribunal, as part of a list of 12 principles said:

> (10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.

25. In their submissions on *Levob* and *Deutsche Bank* in particular, both parties invited us to draw conclusions from the underlying facts of those cases. For example, Mr Hill submitted that it was significant that, in paragraph 72 of her opinion in *Levob,* Advocate General Kokott considered the possibility of the purchaser of the software engaging a third party separately to customise it, but dismissed that possibility as unrealistic and that the ECJ apparently endorsed that conclusion at [24] of its judgment. By analogy, he submitted that the FTT should similarly have discounted as unrealistic the possibility of a customer who arrives at the rink without skates (and so would otherwise be expected to buy a skating with skates package) deciding at the last minute to buy skates and, having done so, opting to purchase rink admission only. That prompted Ms Brown to argue that the bespoke services being discussed in *Levob* were very different from the mass-market services that the Companies offered to their customers. Moreover, she argued that what the Advocate General was rejecting as unrealistic in *Levob* was the possibility of obtaining part of the package of services from someone other than the supplier. By contrast, in this appeal all constituents of the skating with skates package can be purchased separately from the Companies themselves.

26. We regarded such reasoning by analogy as being of limited utility since decisions of the ECJ serve to give guidance on the interpretation of EU law so that their principles, rather than their facts, are relevant. We will not attempt as comprehensive a survey of the relevant principles as the Upper Tribunal gave in *Middle Temple* but will limit ourselves to summarising how the relevant principles apply in the context of this appeal:

(1) The ECJ has not given exhaustive guidance that covers all situations.

(2) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.

(3) Given the nature of the supplies at issue in this appeal, we consider that the *Levob* line of authority is more relevant. Since skating cannot be enjoyed without both access to an ice rink and a pair of ice skates, the question of which element of a skating with skates package is "principal" and which is "ancillary" is unlikely to be of much assistance in determining whether the skating with skates package involves single or multiple supplies.

(4) Therefore, a relevant question in this appeal is whether the constituent elements of a skating with skates package as supplied to a typical customer of that package are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

(5) The question in paragraph (4) above must be answered by reference to all the circumstances in which a supply of skating with skates takes place.

(6) If a typical consumer has a choice as to whether or not to purchase one or more constituents of a skating with skates package, that is a relevant circumstance. If the freedom to choose is genuine and reflects the economic reality of the arrangements between the parties, it will be an important factor.

(7) If a skating with skates package involves a single supply, then the question of whether that single supply is standard-rated or zero-rated would fall to be determined by considering whether the supply of the children's skates, or the supply of admission to the rinks predominates. However, Ms Brown was not seeking to argue that, if there was a single supply, it was zero-rated and therefore we will not consider this issue any further in this decision.

Whether the FTT followed the correct approach in the Decision

27. We have concluded that the FTT followed the wrong approach in the Decision and that, accordingly, the Decision contains an error of law.

28. The first indication of the error appears in paragraph [106] of the Decision. That paragraph proceeds on the following basis:

(1) The individual constituents of a skating with skates package can be and are purchased on their own in a substantial percentage of the Companies' transactions with those using their facilities.

(2) Therefore, it follows that it would not be artificial to split the skating with skates package into two.

29. The problem is that, applying the correct approach, the conclusion at [28(2)] does not follow from the (undoubtedly correct) statement of fact in [28(1)]. A "typical consumer" of a skating with skates package has, by definition, not purchased either constituent of that package separately. Therefore, at [106] of the Decision, the FTT

makes the error of assuming that aspects of supplies made to someone other than the "typical consumer" are necessarily determinative of the nature of the supply to that typical consumer.

30. A similar error appears in paragraph [109] of the Decision where the FTT concludes:

> (1) A substantial percentage of customers choose to buy one or other constituents of a skating with skates package separately (but not both together). Alternatively on occasion, a customer may purchase skating with skates package but, on another occasion may purchase only one of the elements of that package[3].
>
> (2) From that factual statement, it necessarily follows that a skating with skates package comprises two separate supplies.

31. The error is that the conclusion summarised at [30(2)], which is a conclusion about the characterisation of supplies made to typical consumers of a skating with skates package, cannot necessarily follow from correct factual statements about different supplies made to potentially different consumers.

32. Ms Brown submitted that, when the Decision is read as a whole, in the passages quoted, the FTT was simply having regard to all relevant factors in what she described as the "unique factual matrix" of the appeal. One relevant factor, she submitted, was that the typical consumer of a skating with skates package knew that he or she had options. For example, even if that typical consumer arrived at the ice rink without skates, he or she could go to the shop and buy a pair of skates and, having done so, purchase rink admission only. Moreover, the FTT had found at [64] of the Decision that the typical consumer was aware of choices. Therefore, she submitted that, once the Decision is read as a whole, the FTT was simply having regard to all relevant circumstances, including the choices available to the typical consumer and the consumer's awareness of those choices. Having had regard to those circumstances, the FTT concluded that the typical consumer had "a genuine freedom to choose" of the kind discussed in *Middle Temple* and that it would not be artificial to split the supply of a skating with skates package. She argued that this was an evaluative conclusion that was open to the FTT.

33. That submission has given us pause for thought. However, we have concluded that it involves a recasting of the FTT's conclusions so as to make them quite different. We do not consider that the FTT could have evaluated the significance or otherwise of the options to which Ms Brown referred without having at least some evidence (and making some findings) as to whether those options were realistic or, in the words of the ECJ in *Levob*, "entering the realms of the artificial". For example, the FTT might have needed evidence on the price of skates in the Companies' shops and whether those prices were

[3] Although the FTT does not give this example, we take this as a reference to the possibility that a customer may own his or her own skates but, on one occasion, may forget to take them to the rink, necessitating the purchase of a "skating with skates" package but on another occasion may remember the skates and purchase rink admission only.

competitive, and on the number of customers who purchase skates from the Companies each year as compared with the number who purchase skating with skates packages. Bearing in mind that this appeal is concerned with supplies of skating with skates packages to children specifically, and that children's feet are still growing, it might have needed evidence on the average age of a child receiving a skating with skates package and how frequently the average child visits the Companies' ice rinks. To give an extreme example, if the evidence showed that the average child taking a skating with skates package was 10 years old (and so his or her feet could be expected still to be growing) and visited the ice rink just twice a year, the FTT might have been reluctant to conclude that the outright purchase of a pair of skates which the child might wear for just a year or so was a realistic alternative to the purchase of a skating with skates package.

34. However, it does not appear that the FTT was provided with any significant evidence on these issues and it certainly did not make any findings on them. We do not, therefore, consider that the FTT's conclusions can be supported on the basis that Ms Brown identified. It follows that HMRC have established that the Decision contains an error of law. Later in this decision, after considering the Companies' cross-appeal, we will decide how to deal with the Decision in the light of that error.

Consideration of the Companies' cross-appeal

35. Section 30 of VATA 1994 provides, so far as material, as follows:

> **30 Zero-rating**
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> (1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section—
>
> (a) no VAT shall be charged on the supply; but
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> (b) it shall in all other respects be treated as a taxable supply;
>
> and accordingly the rate at which VAT is treated as charged on the supply shall be nil.
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> (2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified.

36. Item 1 in Group 16 of Schedule 8 deals with clothing and footwear and specifies the following description of goods as zero-rated:

> 1. Articles designed as clothing or footwear for young children and not suitable for older persons.

It was common ground that a hire of children's ice skates was in principle capable of falling within this description.

37. Ms Brown submitted that, properly construed, s30 of VATA 1994 provides for a supply of children's skates to be zero-rated even if that supply forms part of a single

composite supply that, under *Card Protection Plan* and *Levob* principles, is standard-rated. In *Colaingrove*, the Court of Appeal considered a similar argument in the context of the reduced rate of VAT provided by s29A of VATA 1994. That provision read, so far as material, as follows:

> **29A Reduced rate**
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> (1) VAT charged on—
>
> (a) any supply that is of a description for the time being specified in Schedule 7A, or
>
> (b) any equivalent acquisition or importation,
>
> shall be charged at the rate of 5 per cent.

38. In *Colaingrove,* the taxpayer supplied electricity (which could in principle benefit from the reduced rate of VAT set out in s29A) as part of a composite supply of a caravan holiday. That composite supply was standard-rated, but the taxpayer argued that the supply of the electricity could nevertheless benefit from the reduced rate. The Court of Appeal concluded that s29A applies the reduced rate to supplies "of a description" set out in Schedule 7A. Since Schedule 7A did not include composite supplies of the "description" that the taxpayer was making, and since there was no provision for apportionment where a service described in Schedule 7A was part of a wider composite transaction, it followed that the reduced rate did not apply to the electricity component.

39. The Companies argued that this conclusion should not apply to the different statutory provisions set out in s30 of VATA 1994 and relied on the following differences between s30 and s29A:

> (1) They argued that, for the purposes of s30 of VATA 1994, the term "supply" was specifically defined (in s5 of VATA 1994) so as to include "all forms of supply" but that definition did not apply for the purposes of s29A. In addition, there is a material difference between the wording of s29A which refers to "any supply of a description for the time being specified in Schedule 7A" and s30 which applies where "the supply is zero-rated". Therefore, the Companies argued that s30 embodied a Parliamentary intention which s29A lacked to prescribe a different treatment for supplies that were part of composite supplies.
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> (2) They observed that s30 provides for zero-rating treatment to apply "whether or not VAT would be chargeable on the supply apart from [s30]". The Companies argued that these additional words, which are not present in s29A, are consistent with a broad legislative intention to "carve out" zero-rated supplies from composite supplies.

40. We reject the submission at [39(1)]. In her written skeleton argument, Ms Brown referred to s30(5) of VATA 1994 as containing a "specific definition of 'supply'" for the purposes of s30 in support of an argument that Parliament intended the definition of "supply" in s30 to be different from that in s29. However, the version of s30(5) that has been in force since 1995 contains no such "specific definition". Rather, s30(5) operates to treat an export of goods by a charity to a place outside the Member States

as a supply in the UK (when it might otherwise be regarded as made outside the UK) and as a supply in the course of a business (when, since it is carried on by a charity, it might not otherwise be so regarded). We see no support from this provision for an argument that the definition of "supply" in s30 is to be different from that used elsewhere in VAT legislation.

41. Nor do we see any relevant difference in meaning between the reference to "any supply" in s29A and "the supply" in s30. In s29A, the provision directs attention to "any supply" that is of a description set out in Schedule 7A. Section 30 directs attention to whether "the supply" is zero-rated, but the definition of zero-rating set out in s30(2) then involves an examination of whether the goods or services being supplied are "of a description" set out in Schedule 8. Section 29A and s30 are, albeit with the use of slightly different language, asking the same question namely whether the goods or services being supplied answer to a description specified in Schedule 7A (in the case of s29) or Schedule 8 (in the case of s30).

42. Moreover, at [49] of *Colaingrove*, Arden LJ accepted the principle that clear Parliamentary words would be needed in order to exercise a derogation from the Principal VAT Directive (although, since she concluded that the statutory provisions were clear in any event, the outcome of *Colaingrove* did not depend on an application of this principle of construction). Even if a different concept of "supply" were to apply for the purposes of s30, we see no clear words indicating that the effect of this should be to treat as zero-rated supplies which, applying EU law and the Principal VAT Directive, should properly be treated as standard rated.

43. We also reject the submission at [39(2)]. The words that the Companies have identified set out the operative effect of s30(1) (as they are preceded by the word "then"). However, that operative effect is engaged only where "the supply is zero-rated", a concept that is defined in s30(2). Section 30(2) is in terms very similar to those of s29A that were considered in *Colaingrove* and provides for a supply of goods or services to be zero-rated if the goods or services are "of a description" set out in Schedule 8 (which contains the relevant provisions that enable supplies of children's skates to be zero-rated). It is true that s29A requires a "supply" to be of a particular description whereas s30 requires "goods or services" to be of a particular description. However, we do not consider that alters the effect of the provision. It certainly does not indicate a clear Parliamentary intent to enable zero-rated supplies to be "carved out" of supplies that would otherwise be treated as standard-rated under the Principal VAT Directive.

44. In oral and written argument, Mr Hill for HMRC put forward an alternative theory as to the significance of the stipulation that s30(1) is to apply "whether or not VAT would be chargeable on the supply apart from this section". He suggested that the purpose of these words is to ensure that if a supply is capable of being treated as both zero-rated and exempt (for example a financial service supplied to someone outside the EU), it should be treated as zero-rated and he referred to a decision of the VAT & Duties Tribunal in *CGI Pension Trust Limited* (Decision 15926). However, we do not need to decide whether Mr Hill's alternative theory is correct: it is sufficient that we reject the interpretation that the Companies have put forward.

45. Finally, Mr Hill argued that, applying principles of EU law, it would not even be open to the UK to enact domestic legislation "carving out" a zero-rated supply from what would otherwise be a standard-rated composite supply. Since the Companies have not satisfied us that s30 of VATA 1994 has the effect for which they argue, we do not need to address this point and we will not do so.

46. Overall, for reasons we have given above, the FTT made no error of law in concluding that the reasoning and decision in *Colaingrove* meant that, if the supply of a skating with skates package was a standard-rated composite supply, it was not possible to "carve out" a zero-rated supply from it. We dismiss the Companies' cross-appeal.

Disposition

47. We have, therefore, concluded that the Decision contains an error of law. In those circumstances, s12 of the Tribunals, Courts and Enforcement Act 2007 provides that:

> (1) We may, but need not, set aside the decision of the FTT; and
>
> (2) If we do set aside the decision, we must either:
>
> > (a) remit the case to the FTT with directions for its reconsideration or
> >
> > (b) re-make the decision.

48. Since the error of law we have identified was material to the Decision, we are in no doubt that the decision must be set aside.

49. As we have noted, the parties were agreed that, if the skating with skates package consisted of a single supply, it was a standard-rated supply. They were also agreed that the existence of the option to purchase skate hire only or rink admission only separately from a skating with skates package was relevant to the question whether there was a single supply. However, they were not agreed on the conclusions to be drawn from the existence of the option: Mr Hill submitted that it was "unrealistic" that a potential customer of a "skating with skates" package would decide, instead to buy a set of skates and having done so, purchase rink admission only, but Ms Brown submitted that the existence of this option was important. Nevertheless, both parties asked us to remake the Decision and find such additional facts as are necessary to enable us to do so. To the extent that we considered that further evidence on this issue is relevant, the parties were hopeful that necessary further facts could be agreed. On behalf of HMRC, Mr Hill confirmed that HMRC would not seek to argue that the Companies should be precluded from putting forward further evidence on whether this option was "realistic" but argued that, if the Companies did so, HMRC should have the opportunity to challenge the additional evidence if it was in dispute.

50. We are sympathetic to the parties' wish for an early resolution of this dispute. However, as we have noted at [33], it is possible that testing whether the "option" on which Ms Brown relied was realistic might involve further detailed evidence. Even if that evidence is not disputed, the conclusions that flow from it may be. We consider

that the proper venue for any such analysis and debate is the FTT and we have therefore concluded that the case should be remitted to the FTT.

51. Neither party made submissions as to whether the matter should be remitted to the same, or a differently constituted, FTT. We have considered this question in the light of the Court of Appeal's guidance in *HCA International Limited v Competition and Markets Authority* [2015] EWCA Civ 492. In that case, the Court of Appeal said:

> 68.The principle as it seems to me must be that remission will be made to the same decision maker unless that would cause reasonably perceived unfairness to the affected parties or would damage public confidence in the decision making process. The basis on which the court will approach these two interlocking concepts of "reasonably perceived unfairness to the affected parties" and "damage to the public confidence in the decision making process" may depend heavily on the circumstances of the remission.
>
> 69.A variety of factors will undoubtedly be relevant to the application of these principles. I would not want to limit those factors by setting out anything that could be regarded as an exhaustive list as the Employment Appeal Tribunal seems to have attempted to do in the *Sinclair Roche* case. There will be many different situations which cannot be predicted from a single case.
>
> 70.It is, however, always the case that the presence of actual bias, apparent bias or confirmation bias would make remission to the original decision maker undesirable, because any such bias would amount both to reasonably perceived unfairness to an affected party and potentially serious damage to public confidence in the decision making process.
>
> 71.It is important also to understand the kind of unfairness that is relevant to the question of whether the decision should be remitted to the original decision maker. The unfairness concerned is such as contravenes the public law duty of fairness, not some abstract concept of unfairness based on a colloquial usage of that word. It is well-established that what fairness requires will vary with the factual circumstances, but what is required in order to achieve fairness is a matter of law, and not a matter of discretion for the decision maker.

52. Applying those principles, we have decided that the matter should be remitted to the same FTT, unless this would make it impracticable for the appeal to be re-heard within a reasonable time (in which case we would invite the President of the FTT to nominate a different panel). There is no suggestion that the FTT was actually biased, or gave the appearance of bias. Nor do we consider that there is a risk of "confirmation bias". We make no criticism of the FTT's handling of the appeal that might cause a reasonable observer to consider that the FTT might become "defensive" and so pre-disposed to reach the same decision again. Indeed, we are remitting the appeal to the FTT to enable it to find additional facts (relating to the significance of the option referred to at [49]) which it has not previously found. We are confident that, with the guidance set out in this decision, the FTT would be able to reconsider the matter afresh in a fair and just manner.

53. We will leave it to the parties to seek to agree case-management directions for the remitted appeal between themselves and apply to the FTT if they cannot do so. Our view would be that the re-hearing should take place on the basis that any findings of primary fact that the FTT made in the Decision should stand and that, accordingly, the re-hearing should only require the FTT to find additional facts and reconsider its conclusion on the basis of those additional facts and the guidance set out in this decision. However, if the parties think otherwise, they may apply to the FTT accordingly.

JUDGE JONATHAN RICHARDS
JUDGE JONATHAN CANNAN
RELEASE DATE: 8 April 2019