**[2019] UKUT 0404 (TCC)**

**Appeal number: UT/2018/0065**

***Value Added Tax – zero rating – whether electronic editions of newspapers zero rated as "newspapers"***

**UPPER TRIBUNAL**
**(TAX AND CHANCERY CHAMBER)**

**NEWS CORP UK & IRELAND LIMITED** **Appellant**

**-and-**

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

**TRIBUNAL** **MR JUSTICE ZACAROLI**
**UPPER TRIBUNAL JUDGE GREG SINFIELD**

**Sitting in public at The Rolls Building, Fetter Lane, London on 15 and 16 October 2019**

**Jonathan Peacock QC and Edward Brown, instructed by Deloitte LLP for the Appellant**

**Nigel Pleming QC and Eleni Mitrophanous, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

## Introduction

1. The principal question at issue in this appeal is whether digital versions of newspapers published by the appellant, News Corp UK & Ireland Limited ("News UK") are "newspapers" within the meaning of Item 2, Group 3 of Schedule 8 ("Item 2") to the Value Added Tax Act 1994 ("VATA") and are therefore zero rated for VAT purposes.

2. News UK is the representative member of a VAT group that publishes, principally, *The Times*, *The Sunday Times*, *The Sun* and *The Sun on Sunday*.

3. In a decision released on 8 March 2018 (the "Decision"), the First-tier Tribunal, Judge Guy Brannan, ("FTT") concluded that, although the digital versions are the equivalent to the newsprint editions, they are not "newspapers" within the meaning of Item 2. News UK appeals against that decision, with the permission of the FTT granted on 7 June 2018.

4. This appeal relates to the periods September 2010 to June 2014, and 28 January 2013 to 4 December 2016.

## The Legislation

5. The only provision of Council Directive 2006/112/EC ("Principal VAT Directive" or "PVD") which deals with zero-rating is Article 110. This provides:

> "*Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates.*
>
> *The exemptions and reduced rates referred to in the first paragraph must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer*."

6. The purpose of Article 110 is to permit the preservation in each Member State (so far as zero-rating is concerned) of the treatment under that Member State's domestic law for zero-rating of items, which existed as at 1 January 1991. This was intended to be a temporary measure, pending introduction of "definitive arrangements": Article 109. No such definitive arrangements have yet been introduced.

7. So far as the UK is concerned, Article 110 has the effect of preserving the measures for zero-rating that were enacted immediately prior to the UK joining the EU, it being common ground that the relevant UK legislation has not changed in any material respect since 1972. The relevant provisions are now to be found in s.30 and Schedule 8 of VATA. Section 30(2) provides:

> "*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.*"

8. The relevant part of Schedule 8 is Group 3, which lists the following items:

> "*1 Books, booklets, brochures, pamphlets and leaflets.*
> *2 Newspapers, journals and periodicals.*
> *3 Children's picture books and painting books.*
> *4 Music (printed, duplicated or manuscript).*
> *5 Maps, charts and topographical plans.*
> *6 Covers, cases and other articles supplied with items 1 to 5 and not separately accounted for."*

9. These provisions were first enacted as part of the Finance Act 1972. The wording of s.30(2) and Group 3 of Schedule 8 VATA is precisely the same as the wording of s.12(2) and Group 3 of Schedule 4 to the Finance Act 1972. The notes to Group 3 have, however, been added to since 1972. Given the importance placed on the notes by the FTT (as we explain below), we here set out their development.

10. In the Finance Act 1972 there was a single note to Group 3, which read:

> "*This Group does not include plans or drawings for industrial, architectural, engineering, commercial or similar purposes.*"

11. This note was deleted by the VAT (Consolidation Order) 1978 which substituted the following:

> "*Items 1 to 6:-*
> *(a) do not include plans or drawings for industrial, architectural, engineering, commercial or similar purposes;*
> *(b) include the supply of services, in respect of goods comprised in the items, described in paragraph 1(1) of Schedule 2 to this Act.*"

12. In VATA, the order of the wording, and the cross-reference, in note (1)(b) were immaterially altered. Note (1)(b) now reads:

> *"[Items 1 to 6] ... include the supply of the services described in paragraph 1(1) of Schedule 4 in respect of goods comprised in the items."*

13. Paragraph 1(1) of Schedule 4 provides as follows:-

> "*1(1) Any transfer of the whole property in goods is a supply of goods; but, subject to sub-paragraph (2) below, the transfer-*
> *(a) of any undivided share of the property, or*

*(b) of the possession of goods,*
*is a supply of services.*"

14. In the Finance Act 2011, the existing note to Group 3 was renumbered (1)(a) and (b) and new notes (2) and (3) were added:

*"(2) Items 1 to 6 do not include goods in circumstances where:*
*(a) the supply of the goods is connected with a supply of services, and*
*(b) those connected supplies are made by different suppliers.*

*(3) For the purposes of Note (2) a supply of goods is connected with a supply of services if, had those two supplies been made by a single supplier:*
*(a) they would have been treated as a single supply of services, and*
*(b) that single supply would have been a taxable supply (other than a zero-rated supply) or an exempt supply."*

15. HMRC place reliance on the provisions of the PVD relating to reduced rating for VAT. News UK disputes the relevance of these provisions. We refer to the relevant provisions when we address this dispute below (see paragraphs 92 and following).

**The Decision**

*The facts*

16. The FTT reviewed the print and digital editions for the relevant newspapers for three days in December 2016. It heard evidence on behalf of News UK from Mr John Witherow, the editor of *The Times* and former editor of *The Sunday Times*, Mr Chris Duncan, the Managing Director of Times Newspapers Limited and Mr Alan Hunter, Head of Digital, *The Times* and *The Sunday Times*. It also heard evidence on behalf of HMRC from Mr Mark Flanagan, an officer of HMRC's Large Business Tax team with specific responsibility for News UK and from Mr Andrew Higgins, an officer in HMRC's Large Business in the Media Sector. It undertook a site visit of *The Times* newsroom.

17. The Decision contains (at paragraphs 18 to 146) a comprehensive description of the various digital versions of the relevant newspapers, including how the content was gathered and displayed, the additional features offered by the digital versions and a comparison with the printed versions. At paragraphs 147 to 159 of the Decision, the FTT set out its findings of fact. We refer in the following paragraphs to a very high-level summary of the relevant facts.

18. *The Times* and *The Sunday Times* are produced in two, and sometimes three, editions. The later edition(s) contain(s) any number of updates ranging from corrections to completely new articles.

19. We are concerned on this appeal with the following digital versions:

(a) An e-reader edition. This is an exact facsimile of the 2nd edition of the printed newspaper. It is available for download onto a tablet or personal computer.

(b) A tablet edition. This is an almost exact copy of the 2nd edition, but with some formatting changes. It is available for download onto a tablet computer. It is rarely, but occasionally, updated in the event of breaking news later in the day.

(c) A website edition. This may be viewed on any internet browser. It is published as a complete edition overnight. Since 31 March 2016, it has been updated three times the following day (at 9am, 12 noon and 5pm). Prior to 31 March 2016, it was also updated, but not at fixed intervals. We will return to the position prior to 31 March 2016 when considering HMRC's challenge to the FTT's findings of fact.

(d) A smartphone edition. This is derived from the website version. It is available for download overnight. Each of the three updates during the following day are also available for download.

20. Additional content is available with each of the editions. These comprise the following:

(a) News and feature videos: typically four or five short news or feature videos in each digital edition;

(b) Sports videos: including footage of certain sporting events which accompany the match or event report in respect of which News UK has the digital rights;

(c) Interactive puzzles, charts and graphics (the latter being ancillary to, and used to illustrate, particular news stories);

(d) Links to podcasts (spoken word files available for download);

(e) Some different or additional photographs.

21. In addition, the digital versions included Scottish editions, containing Scottish-focused articles.

22. There was less evidence relating to the editions of *The Sun* and *The Sun on Sunday*. These consist of the *Sun Classic App*, which consists of a digital replica of each print edition of *The Sun* each day. In May 2014 The *Sun Interactive App* was launched, with the intention of creating a templated edition to which could be added digital features such as video. This was not successful and was cancelled in 2015. In 2013 a bundle, including entitlement to view Premier League football goals, was introduced as *The Sun+*. This was also not successful and was withdrawn in November 2015.

23. It was common ground below that it is an essential characteristic of a newspaper that it is produced in periodic editions (in contrast, for example, to the "rolling news"

available on websites such as the BBC or competitors such as *The Guardian*, which are updated continually throughout the day).

24. The FTT found that the digital editions (with the exception of the *Sun Interactive App*, in respect of which there is no appeal to this Tribunal) were essentially periodic edition-based publications. It found that although the tablet, website and smartphone editions permitted updates, these were relatively minor and in some cases were, in essence, broadly the equivalent of further editions of the newsprint editions as regards content (noting that only 10% of readers read the updated stories on the website and smartphone editions).

25. The FTT found that the content (in the sense of the written content comprising the news and other stories) of *The Times* and *The Sunday Times* was "fundamentally the same or very similar" as between the digital editions and the printed editions.

26. So far as the additional content available on the tablet, website and smartphone editions of *The Times* and *The Sunday Times* is concerned, the FTT found, noting that it was "only very lightly used", that it was "a relatively minor aspect of those digital editions".

27. The FTT also found that "…from the point of view of subscribers, it was the content rather than the medium of its delivery to which most value was attached, although subscribers also valued the additional convenience of the digital platform."

28. The FTT noted that there was relatively little evidence in relation to *The Sun* and *The Sun on Sunday*, but concluded that *The Sun Classic App* – being a PDF version of the newsprint edition – was "essentially similar in content to and shared the same characteristics as the newsprint editions". Finally, the FTT found that *The Sun+*, on the basis that its contents closely mirrored that of the newsprint editions, had similar characteristics to the newsprint version.

*The interpretation of Item 2*

29. The FTT addressed the submissions of the parties as to the interpretation of Item 2 at paragraphs 160 to 180 of the Decision, and set out its conclusions at paragraphs 181 to 206.

30. It was common ground between the parties that the digital editions constituted a supply of services. The FTT concluded that this was fatal to News UK's case that the digital editions were "newspapers" within Item 2. That was because "the text of Items 1 to 5 and the Notes … supports the view that the whole of Group 3 (except as otherwise provided for in the Notes) is confined to the supply of goods and does not include the supply of services."

31. The FTT separately considered the "always speaking" doctrine of statutory construction (which we address in more detail below). News UK relied upon this doctrine (in the alternative to its case that the word "newspaper" in Item 2 as enacted in 1972 included digital versions) to submit that the word, as used in 1972 legislation, must be interpreted in a way which keeps pace with technological developments since

1972. The FTT rejected that argument. It held that Item 2 should be construed strictly, and that this prohibited the application of the "always speaking" doctrine. The requirement for a strict interpretation arose, first, because zero rating is a derogation from the general principle that all supplies of goods and services should be subject to VAT and, second, because Article 110 was a "standstill" which precluded the extension of the scope of zero-rating provisions beyond their 1991 limits.

*Fiscal neutrality*

32. News UK contended, in the alternative, that the principle of fiscal neutrality applied such that the similarities between the print and digital versions of the newspapers (viewed from the perspective of consumers) required them to receive the same VAT treatment.

33. The FTT accepted (at paragraph 230 of the Decision) that (save for *The Sun Interactive App*) the digital editions were similar to the newsprint editions from the point of view of the consumer, but nevertheless rejected the argument based on fiscal neutrality. Its decision was based on its conclusion that "newspapers", in 1991, applied only to the supply of goods, i.e. printed matter, and that the principle of fiscal neutrality could not be applied so as to extend the scope of the zero-rating provision to services.

**The issues on this appeal**

34. News UK's appeal raises two issues:

> (a) whether the digital editions of the newspaper titles are "newspapers" within the meaning of Item 2; and, if not,
>
> (b) whether the application of the principle of fiscal neutrality nevertheless requires zero-rating.

35. By a Respondents Notice, HMRC raised the following additional issues:

> (a) whether the FTT's finding that the digital editions were similar to the print versions of the newspapers was one which no reasonable tribunal could have reached (on the basis of the test in *Edwards v Bairstow* [1955] 3 All ER 48); and
>
> (b) whether the Decision was supported on the additional ground that News UK's case was inconsistent with Articles 96 to 99, 110 and 114 of the PVD

**Interpretation of Item 2**

*Introduction*

36. News UK's appeal against the Decision as to the proper construction of the word "newspaper" in Item 2 requires consideration of the following issues:

> (a) Whether the meaning of the term "newspapers" was sufficiently broad, interpreted at the time of the initial enactment of the provision in 1972, to include the digital versions now available;

(b) If not, whether it is permissible to have regard to the "always speaking" doctrine, or whether that is precluded by reason of either (i) the fact that Item 2, as an exempting provision, must be construed strictly, or (ii) Article 110 of the PVD; and

(c) If the "always speaking" doctrine does apply, whether the term "newspapers", interpreted in light of the doctrine, includes the digital versions now available.

*Approach to statutory construction*

37. It is trite law that in construing legislation the court's task is to seek to give effect to Parliament's purpose, to be gleaned from the statute as a whole in its historical context.

38. Since, however, zero-rating is an exception to the general rule as to standard rating, the provision must be construed strictly. The meaning of a "strict" interpretation was recently re-stated by the Supreme Court in *SAE Education Ltd v Revenue and Customs Comrs* [2019] 1 WLR 2219, per Lord Kitchin at [42]:

> "*In accordance with well-established principles, the terms used in articles 131 to 133 to specify exemptions from VAT must be construed strictly. Nevertheless, they must also be construed in a manner which is consistent with the objectives which underpin them and not in such a way as to deprive them of their intended effects.*"

39. Moreover, a strict interpretation does not mean "the most restricted, or most narrow, meaning that can be given to those words. A strict construction is not to be equated, in this context, with a restricted construction": see *Expert Witness Institute v C&E Comrs* [2002] STC 42, per Chadwick LJ, at [17].

40. The legislative purpose of Item 2 was a matter of common ground in this case, as recorded by the FTT at paragraph 17 of the Decision. It is to promote literacy, the dissemination of knowledge and democratic accountability by having informed public debate. This amounted, moreover, to "clearly defined social reasons" within Article 110 of the PVD, so as to justify the preservation of the zero-rating of newspapers upon the UK's accession to the EU.

41. It is News UK's case that the meaning of "newspapers", construed in the context as at the time of the original enactment of the provision which is now Item 2 of Group 3 of VATA, is broad enough to include the digital versions now available. Recognising, however, that the concept of a supply of digital versions of newspapers was not within the contemplation of the drafter of the legislation in 1972, News UK relies in the alternative on the "always speaking" doctrine of statutory interpretation.

42. The "always speaking" doctrine is defined in Bennion on Statutory Interpretation, 6th ed., p.798, as:

> "*a construction which takes account of relevant changes which have occurred since the enactment was originally framed but does not alter the meaning of the wording in ways which do not fall within the principles originally envisaged in that wording. Updating construction resembles so-called dynamic interpretation, but insists that the updating is structured rather than at large. This structuring is directed to ascertaining the legal meaning of the enactment at the time with respect to which it falls to be applied. The structuring is framed by reference to specific factors developed by the courts which are related to changes which have occurred (1) in the mischief to which the enactment is directed, (2) in the surrounding law, (3) in social conditions, (4) in technology and medical science, or (5) in the meaning of words.*"

> "*It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.*"

43. The doctrine was explained in *R (Quintavalle) v Secretary of State* [2003] 2 All ER 113, per Lord Bingham at [8]-[9] as follows:

> *"8. … The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.*
>
> *9. There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now."*

44. Lord Bingham cited with approval the dissenting opinion of Lord Wilberforce in *Royal College of Nursing of the UK v Dept of Health and Social Security* [1981] AC 800, at 822 (an opinion described as "authoritatively settling the proper limits of the type of extensive interpretation now under consideration" by Lord Steyn in the *Quintavalle* case, at [24]):

> "*In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend on the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the new subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take under the law of this country: they cannot fill gaps; they cannot by asking the question, "What would Parliament have done in this current case, not being one in contemplation, if the facts had been before it?", attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself."* (emphasis added)

45. Both sides placed reliance on this passage: News UK emphasising the first underlined passage, and HMRC placing particular reliance on the second underlined passage. We will address the application of the test to the facts of this case below, but merely note at this point that Lord Wilberforce did not suggest that the fact that an enactment was designed to be restrictive is a reason, per se, to exclude the operation of the "always speaking" doctrine. For that reason, insofar as the FTT concluded (at paragraph 198 of the Decision) that the fact that a provision is to be construed strictly (as in this case, for example, because it is an exception from the general rule as to standard rating for VAT) means that the "always speaking" doctrine cannot apply, we consider that it was wrong to do so.

46. The FTT also concluded that, if the "always speaking" doctrine might otherwise have applied to the interpretation of Item 2 in the 1972 Finance Act, it ceased to do so as from 1 January 1991, because Article 110 of the PVD imposed a "standstill" on UK domestic law as at that date. It relied, in this respect, on the decision of the CJEU in *Talacre Beach Caravan Sales v C&E Comrs* C-251/05 [2006] STC 1671. This case concerned provisions of UK domestic law which zero-rated caravans, but which excluded from zero-rating the contents of caravans. The taxpayer contended that, since the sale of a caravan and its contents constituted a single supply, the contents of the caravans should follow the zero-rating treatment for caravans.

47. The CJEU rejected that argument. At [16] of its judgment, it noted the observation of the UK government and the Commission of the EU that "the rate of VAT applied is linked to the establishment of a national derogation which the member state is authorised to adopt, subject to certain conditions, under art 28 of the Sixth Directive [the forerunner to Article 110 of the PVD]. Since one of those conditions is that that derogation had to be in force on 1 January 1991, the exemption with refund of the tax paid cannot be extended beyond the terms specifically laid down by the national legislation."

48. The CJEU held (at [19] to [21]) that since it was common ground that while caravans were zero-rated in the UK, their contents were not, "an exemption with refund of the tax paid in respect of those items would extend the scope of the exemption laid down for the supply of caravans themselves." It continued, at [22]:

> *"As the Advocate General observed in paras 15 and 16 of her opinion, art 28(2)(a) of the Sixth Directive can be compared to a 'stand-still' clause, intended to prevent social hardship likely to follow from the abolition of exemptions provided for by the national legislature but not included in the Sixth Directive. Having regard to that purpose, the content of the national legislation in force on 1 January 1991 is decisive in ascertaining the scope of the supplies in respect of which the Sixth Directive allows an exemption to be maintained during the transitional period."*

49. As these passages demonstrate, in the face of domestic legislation which explicitly excluded the contents of caravans from the zero-rating in respect of the caravans themselves, a conclusion that the contents were to be zero-rated would necessarily have involved an extension beyond the terms of the domestic legislation, and would thus fall foul of Article 110.

50. That is significantly different from the position in this case. There is no statutory provision excluding digital newspapers from zero-rating. The question, instead, is whether as a matter of the UK principles of statutory interpretation (which include the "always speaking" doctrine) the term "newspapers" is to be construed as including the digital versions that have come into existence since 1991.

51. It will be so construed (per Lord Wilberforce in *The Royal College of Nursing* case) if it is found to be "within the same genus of facts as those to which the expressed policy [of the relevant legislation] has been formulated." Accordingly, while it might be correct to observe that a decision that the digital versions of newspapers are zero-rated would result in an item being zero-rated under UK domestic law that was not zero-rated in 1991, that is solely because (1) that item did not exist in 1991 and (2) the item is properly to be characterized (according to principles of UK law) as within the genus of things that the pre-1991 legislation did exempt. In such circumstances, we do not think that this would constitute an extension of the category of zero-rated items so as to offend Article 110.

52. For this reason, if and to the extent that the FTT concluded (see paragraph 203 of the Decision) that the same "standstill" argument based on Article 110 that was fatal to the taxpayer's case in *Talacre Beach* necessarily precluded reliance on the "always speaking" doctrine, then we conclude that it was wrong to do so.

53. Some (albeit limited) support is provided for this conclusion in the decision of Judge Berner in the First-tier Tribunal in *Harrier LLC v Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 725 (TC). The case concerned the meaning of "books or booklets" in Item 1 of Group 3 of Schedule 8 to the VATA, in particular whether it extended to photo-books. Although no express reference was made to the "always speaking" doctrine, Judge Berner (at [40] to [44]) considered the relationship between Article 110 as applied in *Talacre Beach* and the fact that a UK domestic provision fell to be construed in accordance with ordinary principles of statutory construction. At [44] he said:

> *"Nor can the domestic provisions be construed so as to reflect only the circumstances applicable at the relevant date of 1 January 1991. Mr Thomas referred in argument to Article 110 being a "standstill" provision. It is that, in the sense that the domestic law had to provide for the zero-rating at 1 January 1991, and no new zero-rating could later be introduced. But a provision which provides for zero-rating for a category of goods cannot itself stand still, any more than the commercial world can (or will) do so. Technological advances in printing mean that products which in 1991 would not have been conceived of are now a reality, and fall to be classified for VAT purposes. If the construction of the domestic provisions encompasses those new products, they will fall to be zero-rated."*

*The meaning of "newspapers" in Item 2*

54. As we have noted, Mr Peacock invited us to approach the question of construction in two stages: first from the perspective of 1972; and second by reference to the "always speaking" doctrine. We find that exercise, however, somewhat artificial. The problem is that, tested against the circumstances existing in 1972, the word "newspaper" can only have been understood as referring to a physical thing, simply because there was no alternative then in existence. In order to conclude that "newspaper" in VATA includes digital newspapers, it is necessary to find that digital newspapers are within the legislative purpose as expressed in VATA as a consequence of the characteristics they share with the (physical) newspapers that existed at the time – in other words, because they fall within the same "genus" of facts to which the expressed policy has been formulated, in the words of Lord Wilberforce when explaining the "always speaking" doctrine in the *Royal College of Nursing* case cited above. We therefore address the interpretation of "newspapers" in Item 2 in the round, having regard to all applicable rules of construction including both (i) the requirement for strict interpretation of an exception to the general rule as to standard rating, and (ii) the "always speaking" doctrine.

55. The FTT's conclusion was based on its finding that the whole of Group 3 was concerned only with goods, not services. This was fatal to News UK's case given it was common ground that digital versions of the titles are services, not goods.

56. The FTT relied on four aspects of the text of Items 1-5 and the notes as support for that conclusion:

> (a) The wording of Item 6, which refers to covers, cases and other articles supplied with Items 1 to 5, suggested that Items 1 to 5 were confined to tangible goods;
>
> (b) Item 4, referring to "Music (printed, duplicated or manuscript)" envisaged music in paper form, and not music provided pursuant to a service such as music available for download from the internet;
>
> (c) The introductory words of the anti-avoidance provision in note (2) referred only to "goods", and thus operated on the assumption that the scheme at which it was directed would involve the zero rated supply of goods, rather than services.
>
> (d) The wording of (1)(b), which extended the ambit of Group 3 to include the supply of services described in paragraph 1(1) of Schedule 4 (which had the effect of including lending in respect of the Items in 1 to 6), "in respect of goods comprised in [Items 1 to 6]" also supported the view that Group 3 consists of goods not services.

57. The FTT noted, but was unpersuaded by, the fact that s.30 of VATA authorised zero rating in respect of both goods and services, noting that the question of whether a particular provision applies to the supply of goods or services (or both) can only be determined by reference to the wording of the Items of each Group.

58. For the following reasons, which largely reflect the submissions advanced by Mr Peacock on behalf of News UK, we conclude that none of the four points relied on by the FTT supports the conclusion it reached.

> (a) While we agree that Item 6 ("covers, cases and other articles") deals only with circumstances where Items 1 to 5 in fact consist of physical goods, it does not follow that Items 1 to 5 cannot include non-physical items. On the other hand, given that no digital version of any of the Items existed in 1972, it is fair to infer that the drafter was only contemplating the existence of physical items.
>
> (b) So far as Item 4 is concerned, even if it does refer only to music in printed (i.e. physical) form, it does not follow that the other Items must also only encompass physical goods. On the contrary, the fact that it was necessary to specify, in the case of music, that it meant "printed, etc" suggests that the absence of an express limitation in the other Items means that there is no such limitation at all. We note that, in the case of music, the words in brackets in Item 4 may well have been included so as to distinguish music in written form from recorded music (i.e. music in sound form). We think it highly unlikely that the drafter intended to distinguish written music

in physical form from written music in digital form, because the latter did not exist in 1972.

(c) So far as the FTT's reliance on the text of note 1(b) and note 2 is concerned, we consider that this was misplaced because neither of these notes existed in 1972 when Group 3 first appeared in legislation. While Mr Pleming did not formally accept that they are inadmissible as an aid to construction of the provision as enacted in 1972, he did not provide any support for the contention that they are admissible and he accepted that whatever meaning was to be ascribed to the provision in 1972 was not changed by reason of the later notes.

(d) The fact that 1(b) expands the ambit of Group 3 to, for example, those cases where goods are loaned rather than sold, does not require that Items 1 to 6 are limited to goods. At most, it demonstrates that the drafter of the note (whose intention is irrelevant to the construction of the provision enacted in 1972) assumed that Items 1 to 6 were limited to goods. Similarly, the fact that the anti-avoidance provision in note 2 excludes "goods" in the circumstances specified (and does not similarly exclude Items 1 to 6 insofar as they are not goods) does not require that Items 1 to 6 are limited to goods but, at most, demonstrates that the intention of the drafter of this note (whose intention is equally irrelevant to the construction of the provision enacted in 1972) assumed that Items 1 to 6 were limited to goods.

59. Accordingly, we disagree with the FTT's conclusion that on its proper construction Group 3 was intended to be *limited* to items that were goods, as opposed to services. The most that can be said is that each of the Items in Group 3 existed in 1972 in a physical form and thus satisfied the legal test for "goods". That is not sufficient, in our view, to lead to the conclusion that it was the legislative intent to *exclude* from Group 3 (and in particular from Item 2) something which did not satisfy the legal test for goods.

60. It is in this respect that s.30 of VATA is relevant. The fact that it authorised zero rating for the various goods *and services* that were identified in Schedule 8 demonstrates that the characterisation of a particular item as "goods" or "services" was not what mattered. In other words where a particular Item existed only in the form of "goods" in 1972, it was not its characterisation as "goods" that was the defining, or even a relevant, factor in its inclusion in Schedule 8.

61. Having concluded that the FTT's reasoning did not justify the conclusion that the fact that digital newspapers are services is itself sufficient to exclude them from Item 2, the question remains whether – applying the principles of construction identified above (including the "always speaking" doctrine) – the word "newspapers" is to be interpreted as including the relevant digital versions of *The Times*, *The Sunday Times* and *The Sun* newspapers in this case.

62. The starting point in this exercise is the findings of fact made by the FTT, including the core finding (expressed at paragraph 155) that the digital editions (in relation to all but the *Sun Interactive App*) "were essentially, when the evidence was viewed in the round, the same as or very similar to the newsprint editions". This encompassed

findings that the digital versions were edition-based publications, that they had similar characteristics to the print versions, that the content was fundamentally the same or very similar, that the updates to the digital versions were relatively minor, and that the additional content which could not be provided in newsprint was a relatively minor aspect of the digital editions: see paragraphs 115 and 150 to 155.

63. As we have noted, however, HMRC by their Respondents' Notice challenge those findings of fact. We turn to address that issue.

**Respondents Notice: Edwards v Bairstow challenge to the FTT's findings of fact**

64. The function of an appellate tribunal when faced with a challenge to the FTT's findings of fact is well known. In *Edwards v Bairstow* itself, Lord Radcliffe said, at p.57G-H

> "*I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law.*
>
> *But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test.*"

65. The task of an appellant seeking to challenge findings of fact was elaborated upon by Evans LJ in *Georgiou v C&E Comrs* [1996] STC 463, at p476 h-j, as follows:

> "*It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong.*"

66. HMRC challenge, in this appeal, two particular findings of the FTT. First, that the digital editions were "essentially periodic edition-based" as opposed to providing "rolling news." Second, that the digital versions were similar to the print version.

*Rolling News*

67. HMRC pointed, first, to the fact that the digital services (at least the web and smartphone versions) permitted more regular updates than the printed versions. In our judgment, this complaint gets nowhere near establishing an error of law on the part of the FTT. Leaving aside the position prior to March 2016 (which we address separately) the most that could be said was that there were typically three updates to the web and smartphone versions, but normally only two editions of the print version. The FTT's conclusion that the web and smartphone versions were nevertheless edition-based is clearly one that it was entitled to come to on the evidence.

68. HMRC's main focus, however, was on the position pre-March 2016. Mr Pleming QC, for HMRC, pointed, first, to the acceptance by Mr Witherow that prior to March 2016 there was a "rolling news" element to the web and smartphone editions (as recorded at paragraph 90 of the Decision) and, second, to a document placed on the news section of News UK's website on 30 March 2016 announcing the launch of a new website and smartphone service, characterising it as "moving to an edition-based digital publishing model" and as a move "from rolling news to edition-based model". Mr Pleming submitted that the FTT's decision to dismiss this evidence, on the basis that it was "aimed at investors rather than ordinary readers/subscribers", was wrong.

69. The principal obstacles to this submission are: (1) the evidence to which HMRC point was undoubtedly considered by the FTT, and (2) it was accompanied by other evidence which contradicted the implication that prior to March 2016 there had been a "rolling news" service. In fact, there was no primary evidence as to the allegedly "rolling" nature of the service prior to March 2016. The term "rolling news" is not a term of art. The description of the pre-March 2016 service (for example in the document on News UK's website) as "rolling news" was the subjective view of whoever drafted that document. Mr Duncan's evidence (as recorded by the FTT at paragraph 93 of its decision) was that prior to March 2016 the web and smartphone versions consisted mostly of an overnight addition with "relatively minor updates to stories during the day". At paragraph 114 of its Decision, the FTT expressly preferred the evidence of Mr Duncan, on the basis that it was more specific and based on first-hand knowledge of the content of the web and smartphone versions prior to March 2016. We consider

that the FTT's decision to prefer this evidence over the subjective description of the pre-March 2016 in the document uploaded to News UK's website, was one which it was entitled to reach. Accordingly, we conclude that HMRC's attack on this finding of fact fails to reach the threshold required by *Edwards v Bairstow*.

*Similarities between the digital and print editions*

70. In support of his submission that the FTT came to "an unreasonable conclusion not open to it on the evidence", Mr Pleming referred us to the fact that the digital versions, unlike the print versions, give access to updates, including the possibility of urgent, ad hoc, updates. He also referred us to evidence demonstrating the different functionality of the digital versions, such as the search function, video clips (including matters as diverse as a clip from the TV series Fawlty Towers, footage from rugby and football matches, and a video of two drivers involved in a road rage incident), interactive puzzles and archive editions of the newspaper. These are all features which are inherently unavailable in a printed newspaper.

71. It is not HMRC's case that these matters were not taken into account by the FTT. They clearly were, as the reference to each of them in the Decision shows. Mr Peacock QC, appearing for News UK, characterised HMRC's approach as mounting a "roving selection of evidence" that was before the FTT, coupled with the assertion that the conclusions of the FTT were wrong. That approach, as confirmed by the passage from *Georgiou v C&E Comrs* cited above, is impermissible.

72. We accept that characterisation as to much of HMRC's attempt to challenge the findings of fact. We were taken to only a very small portion of the evidence before the FTT, namely just a few paragraphs in the written statements and a handful of the exhibits. In contrast, we were not taken to any of the cross-examination of the witnesses. We do not suggest that we should have been taken to more of the evidence; but we note that the assertion that the FTT could not reasonably have reached the conclusions of fact that it did, on the basis of only a partial reference to the evidence below, is a difficult one to sustain.

73. Mr Pleming made, however, two specific attacks on the FTT's reasoning which require greater consideration.

74. First, he submitted that the FTT's conclusion as to the similarities between the digital and print versions was confined to matters of content, and that it failed to consider the far more important differences relating to additional features and functionality. The focus of this submission was paragraph 155 of the Decision, where the FTT concluded as follows:

> "*I do not think that my conclusions as to similarity of content as regards the digital and newsprint versions of the titles can be altered by the "additional content" contained on the tablet, website and smartphone editions.*"

75. We would accept the proposition that if the FTT had reached its conclusion on the basis of the similarity of the written content alone, then that would constitute a serious flaw. We do not think, however, that the FTT's conclusion was so limited.

76. Although the FTT's use of the word "content" is potentially ambiguous, we are satisfied that when referring to "additional content" in this paragraph it was clearly intending to encompass all of the additional features and functionality upon which HMRC place reliance. In the first place, the FTT in paragraph 155 of the Decision explicitly brought into account matters that went beyond content, in the sense of the information contained in news and other articles. Content, in the latter sense, is dealt with in paragraph 153. Paragraph 154 then refers to "additional content which could not be provided in newsprint". It is this which is addressed in paragraph 155. Secondly, the FTT uses the same phrase "additional content" at paragraph 64 of the Decision when introducing the additional features rendered available by reason of the digital technology, including videos, interactive puzzles and links to podcasts. This strongly supports the conclusion that the same phrase, when used in paragraph 155, was intended to have the same broad meaning.

77. Secondly, Mr Pleming submitted that the FTT erred in law in concluding that the additional features and functionality were irrelevant because they were little used. He relied on the decision of the Upper Tribunal in *Metropolitan International Schools* [2017] STC 2423, at paragraph 99(1), where the tribunal (Mann J and Judge Greenbank) said:

> "*One also has to bear in mind that the question is not so much one of measuring take-up, but what the offering was and how it would be perceived by students as typical consumers. It was not suggested that the offer was a sham, or that the School did not intend to offer (for example) tutorials or practicals to students who wanted them, or that they were in substance valueless. They were real, and apparently useful (at least to some) and in our view have to be viewed as significant parts of the offering. We do not consider the FTT Decision to reflect that adequately*."

78. The focus of this submission was also (principally) the conclusion in paragraph 155 of the Decision, where the FTT said "In my view, the 'additional content', which was only very lightly used by subscribers, was a relatively minor aspect of the digital editions."

79. We do not accept Mr Pleming's characterisation of this conclusion as being that the additional features were irrelevant *because* they were little used. Rather, the conclusion is based on the finding that these features were "a relatively minor aspect" of the digital editions. The final sentence of paragraph 155 makes it clear that the FTT reached its conclusion on the basis of the evidence "in the round". The fact that the features were little used was a relevant factor in supporting that finding, but we do not accept that it was the only factor relied on by the FTT. We consider that in reaching its conclusion on the basis of the evidence "in the round", the FTT was entitled to take into account, as a relevant factor, evidence as to their usage. We agree, in this respect, with Mr

Peacock's submission that evidence as to how the editions *are* used can assist in informing an appreciation of the significance of how they *could be* used. Overall, we do not think that the FTT's reliance on evidence as to usage undermines its conclusion as to the ancillary nature of the additional features.

**Application of the legal principles of construction to the facts as found by the FTT**

80. Having rejected (1) the FTT's conclusion that the fact that the digital versions are not goods precludes them from being newspapers within Item 2; (2) the FTT's conclusion that either or both of Article 110 of the PVD and the requirement for a strict construction precludes reliance on the "always speaking" doctrine; and (3) HMRC's challenge to the FTT's findings of fact, the remaining question is whether, on the basis of those findings, including that the digital versions are the same or very similar to the newsprint editions, the application of the "always speaking" doctrine leads to the conclusion that the digital versions are "newspapers".

81. We note, as a preliminary matter, that we were referred by both sides to dictionary definitions of "newspaper", and to authorities concerned with the meaning of "newspaper" in other contexts.

82. We were referred, for example, to the Oxford English Dictionary (1989 edition) which defined newspaper as "a printed, now usually daily or weekly, publication containing news, commonly with the addition of advertisements and other matters of interest". The online Cambridge English Dictionary (current UK edition) on the other hand defines it as "a regularly printed document consisting of large sheets of paper that are folded together, or a website, containing news reports, articles, photographs, and advertisements." We did not find these to be of any assistance. In 1989 it would still have been the case that newspapers were published predominantly (if not exclusively) in paper form and the Cambridge dictionary includes "websites" which it is common ground between the parties in this case would not fall within Item 2.

83. So far as authority is concerned, we were referred to *Downland Publications Ltd v Deputy Commissioner of Taxation* [1982] FLR 216, a decision of the Supreme Court of Victoria upon the question whether a weekly publication containing a guide to sporting events for betting purposes was a newspaper for the purposes of legislation relating to sales tax in Australia. The court's conclusion (that it was not a newspaper) was based solely on its analysis of its contents. It concluded that the dominant purpose was to provide a guide to sporting events, not news. This is of less relevance to the issue raised in this case, where we are concerned predominantly with the form of the publication. Nevertheless, it provides support for the conclusion that in determining whether a publication is a newspaper it is necessary to look at its dominant purpose or character. That is, in substance, the exercise undertaken by the FTT.

84. News UK also relied on the colloquial use of the phrase "digital newspaper" (pointing in particular to HMRC's acceptance in its Statement of Case that there are such things as "digital newspapers"), which suggests that newspaper is not limited to a printed form. This, too, is of little help.

85. In applying the "always speaking" doctrine, the essential question is whether the digital versions, with the characteristics found by the FTT, fulfil the legislative purpose of the statutory provision. That purpose is, as we have noted, agreed to be to promote literacy, the dissemination of knowledge and democratic accountability by having informed public debate.

86. Mr Peacock rightly accepted that it was not enough to show that a particular service satisfied that legislative purpose, but that it was also necessary to show that the service shared the essential characteristics of a "newspaper". That is why, for example, a rolling news website might not satisfy the test, notwithstanding that it furthered the legislative purpose of promoting literacy, the dissemination of knowledge and democratic accountability. If such a website lacks two features, namely that it be edition based and contains curated news, i.e. there is editorial judgment in deciding what stories to include in the newspaper, then it would not have two of the characteristics which News UK accepts are essential for newspapers.

87. These are as much characteristics of the digital versions as they are of the print versions. This is most easily demonstrated by the e-reader version, which consists of an exact facsimile of the printed newspaper made available for downloading onto a tablet or personal computer. From the perspective of the legislative purpose of Item 2, we consider that no relevant distinction can be drawn between this version and the print version. It promotes literacy, the dissemination of knowledge and democratic accountability by having informed public debate in precisely the same way as the print version. Once it is appreciated that its characterisation as a service, not a good, is not a reason in itself to disqualify it from falling within the definition in Item 2, it is difficult to discern any legislative purpose for excluding it.

88. Moreover, we consider that the invention of a digital form of newspaper is precisely the type of technological development (not contemplated at the time of the passing of the legislation) that the "always speaking" doctrine is intended to address. In the words of Lord Wilberforce cited above, the e-reader falls within the same "genus of facts" as those to which the expressed policy in VATA was formulated. Put another way, the legislative purpose is neutral as regards the manner in which the newspaper is supplied (physical, or digital) and, leaving aside that element, the e-reader and print versions are sufficiently similar that the legislative purpose extends to both.

89. We do not think that the fact that a strict construction is called for precludes the operation of the "always speaking" doctrine in this case. The question posed by Lord Wilberforce is whether the statutory provision was intended to be "restrictive or circumscribed" as opposed to "liberal or permissive". Although zero-rating of newspapers is an exception to the general rule as to standard rating, and so attracts a strict interpretation, that is not the same thing as saying that the provision was intended to be "restrictive or circumscribed". Similarly, although the provision permits newspapers to be zero-rated, we do not think it accurate to describe it as intended to be "liberal or permissive". Instead, we regard the provision as falling between the two extremes identified by Lord Wilberforce. As such, we do not see Lord Wilberforce's comment in the *Royal College of Nursing* case as precluding reliance on the "always speaking" doctrine on the facts of this case. As Lord Kitchin said (in the passage quoted

above from the *SAE Education Ltd* case), notwithstanding the requirement to apply a strict construction, it remains necessary to construe the relevant provision consistent with the objectives which underpin it, and not in such a way as to deprive them of their intended effects.

90. Similarly, we do not think that Article 110 precludes the operation of the doctrine on the facts of this case. Although it is true that our conclusion has the result that, for example, a digital edition of *The Times* which did not exist in 1990 will be treated as zero-rated (so, in that sense, there is an addition to the list of products that were zero-rated as at 1990), we do not consider that this is an extension of the scope of Item 2. Rather it is a recognition – through a permitted tool of construction – that Item 2 includes within its scope the digital versions of *The Times*.

91. Given that the FTT concluded there was no material distinction – in terms of similarity with the printed version – as between the different forms of digital version (and our conclusions in respect of HMRC's challenge to those findings of fact), it follows that the same reasoning and conclusion apply equally to the other digital versions.

**Respondents Notice: Articles 96 to 99, 110 and 114 of the PVD**

92. HMRC contend that the FTT erred in law in concluding that Article 98 of the PVD shed no light on the scope of the zero-rating provisions. Article 98 provides (as it applied during the applicable period):

> *"1. Member States may apply either one or two reduced rates.*
>
> *2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.*
>
> *(The reduced rates shall not apply to electronically supplied services).*
>
> *3. When applying the reduced rates provided for in paragraph 1 to categories of goods, Member States may use the Combined Nomenclature to establish the precise coverage of the category concerned."*

93. Annex III included the following throughout the relevant period:

> *"(6) supply, including on loan by libraries, of books on all physical means of support (including brochures, leaflets and similar printed matter, children's picture, drawing or colouring books, music printed or in manuscript form, maps and hydrographic or similar charts), newspapers and periodicals, other than material wholly or predominantly devoted to advertising."*

94. HMRC referred us to *Commission v Luxembourg* Case C-502/13, in which the CJEU rejected the argument that Article 110 (together with Article 114) permitted the

reduced rate to be applied to electronic books, giving as a reason that this would be contrary to Article 98(2). The Court's conclusion is set out at paragraphs 66-67 of its decision:

> *"66 As regards Article 110 of the VAT Directive, it must be recalled that, as is clear from the wording of that provision, the possibility open to Member States of applying reduced rates lower than the minimum laid down in Article 99 of the VAT Directive is conditional on four cumulative conditions being met, one of which is that the reduced rates must be in accordance with EU legislation (judgment in Commission v France, C-596/10, EU:C:2012:130, paragraph 75).*
>
> *67 As is clear from paragraph 63 above, the application of a reduced rate of VAT to the supply of electronic books does not comply with Article 98(2) of the VAT Directive. In those circumstances, without there being any need to consider whether the other conditions set out in Article 110 of that directive are met, the derogation provided for by the latter provision cannot justify the application by the Grand Duchy of Luxembourg of a reduced VAT rate of 3% to the supply of electronic books (see, to that effect, judgment in Commission v France, EU:C:2012:130, paragraphs 76 and 77)."*

95. HMRC contend on the basis of this decision that what is permitted by Article 110 is restricted by Article 98. While we accept that is true so far as reduced-rating is concerned, we disagree with that submission so far as the question of zero-rating raised by this appeal is concerned. In contrast to the position so far as *reduced* rates are concerned (to which Article 98 expressly relates) there is no provision of European law governing zero-rating apart from Article 110 itself.

96. HMRC also contend that a clear distinction between printed matter such as books and newspapers and electronically supplied services is reflected in Article 7 of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 (laying down implementing measures for the PVD), which provides as follows:

> *"1. 'Electronically supplied services' as referred to in Directive 2006/112/EC shall include services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology.*
>
> *2. Paragraph 1 shall cover, in particular, the following:*
>
> *(a) the supply of digitised products generally, including software and changes to or upgrades of software;*
>
> *(b) services providing or supporting a business or personal presence on an electronic network such as a website or a webpage;*

*(c) services automatically generated from a computer via the Internet or an electronic network, in response to specific data input by the recipient;*

*(d) the transfer for consideration of the right to put goods or services up for sale on an Internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a computer;*

*(e) Internet Service Packages (ISP) of information in which the telecommunications component forms an ancillary and subordinate part (i.e. packages going beyond mere Internet access and including other elements such as content pages giving access to news, weather or travel reports; playgrounds; website hosting; access to online debates etc.);*

*(f) the services listed in Annex I.*

*3. Paragraph 1 shall not cover the following:*

*(a) broadcasting services;*

*(b) telecommunications services;*

*(c) goods, where the order and processing is done electronically;*

*(d) CD-ROMs, floppy disks and similar tangible media;*

*(e) printed matter, such as books, newsletters, newspapers or journals."*

97. Annex I of the same Regulation includes the following:

*"Article 7 of this Regulation*

*...*

*(3) Point (3) of Annex II to Directive 2006/112/EC:*

*(a) Accessing or downloading desktop themes;*

*(b) accessing or downloading photographic or pictorial images or screensavers;*

*(c) the digitised content of books and other electronic publications;*

*(d) subscription to online newspapers and journals;*

*(e) weblogs and website statistics;*

*(f) online news, traffic information and weather reports;*

> *(g) online information generated automatically by software from specific data input by the customer, such as legal and financial data, (in particular such data as continually updated stock market data, in real time);*
>
> *(h) the provision of advertising space including banner ads on a website/web page."*

98. We consider, however, that these provisions of EU law are of no relevance to the issue raised by this appeal. It is common ground that the EU has so far not legislated in respect of zero-rating, aside from the standstill provision in Article 110. Since that defers to the domestic law of each Member State, it is the domestic law of the UK which we must apply. The fact that within EU legislation relating to related subject matter (reduced-rating for VAT purposes) there is a clear distinction drawn between printed matter and electronically supplied services is not relevant, in our view, to the question of statutory construction of UK law with which we are faced.

99. Moreover, we do not find HMRC's reliance on the recently enacted Directive 2018/1713 ("EC 2018/1713"), persuasive. HMRC first rely on recital (1), which states that while the PVD permitted Member States to *"apply reduced rates of value added tax (VAT) to publications on any physical means of support. However, a reduced VAT rate cannot be applied to electronically supplied publications, which have to be taxed at the standard VAT rate*." As above, since this relates to reduced rates, we do not find it of assistance in construing the UK legislation relevant on this appeal.

100. Secondly, HMRC rely on recital (3), and the amendment to the PVD effected by Article 1, of EC 2018/1713. Recital (3) provides:

> *(3) In its communication of 7 April 2016 on an action plan on VAT, the Commission outlined that electronically supplied publications should be able to benefit from the same preferential VAT rate treatment as publications that are supplied on physical means of support. In its recent judgment in case C-390/15 (4), the Court of Justice considered that the supply of digital publications on physical means of support and the supply of digital publications electronically amount to comparable situations. Therefore, it is appropriate to introduce the possibility for all Member States to apply a reduced VAT rate to the supply of books, newspapers and periodicals, irrespective of whether they are supplied on physical means of support or electronically. For the same reasons, it is appropriate to allow those Member States that, in accordance with Union law, currently apply VAT rates lower than the minimum laid down in Article 99 of Directive 2006/112/EC* ***or that grant exemptions with deductibility of the VAT paid at the preceding stage to certain books****, newspapers or periodicals supplied on physical means of support, to apply the same VAT treatment to such books, newspapers or periodicals when supplied electronically.* (emphasis added)

101.The amendment effected by EC 2018/1713 to the PVD is as follows:

(a) In Article 98(2), the second subparagraph is replaced by the following:

*"The reduced rates shall not apply to electronically supplied services with the exception of those falling under point (6) of Annex III."*

(b) In Article 99, the following paragraph is added:

*"3.By way of derogation from paragraphs 1 and 2 of this Article, and in addition to the rates referred to in paragraph 1 of Article 98, Member States which, on 1 January 2017, applied, in accordance with Union law, reduced rates lower than the minimum laid down in this Article or granted exemptions with deductibility of the VAT paid at the preceding stage to the supply of certain goods referred to in point (6) of Annex III, may also apply the same VAT treatment where that supply is supplied electronically, as referred to in point (6) of Annex III."*

(c) In Annex III, point (6) is replaced by the following:

*"(6) supply, including on loan by libraries, of books, newspapers and periodicals either on physical means of support or supplied electronically or both (including brochures, leaflets and similar printed matter, children's picture, drawing or colouring books, music printed or in manuscript form, maps and hydrographic or similar charts), other than publications wholly or predominantly devoted to advertising and other than publications wholly or predominantly consisting of video content or audible music."*

102.HMRC contend that, as these amendments permit Member States to zero-rate newspapers when supplied electronically, the clear implication is that such zero-rating was not permitted prior to this. They point out that this amendment was enacted since the release of the FTT's decision. Mr Pleming also relied upon a view expressed by the European Commission when consulting on the amendment in 2016 (where it was stated that "digital publications that are electronically supplied have to be taxed at the standard VAT rate"). We do not accept this submission. The views of the Commission, or of the legislature in Europe, expressed in 2016 or 2018 are not a relevant aid to construction of UK domestic legislation dating from 1972, even where that legislation is being construed with the benefit of the "always speaking" doctrine.

**Fiscal Neutrality**

103.In light of the conclusions we have reached on the interpretation of Item 2, we do not need to address News UK's alternative argument based on fiscal neutrality.

**Conclusion and Disposition**

104. For the reasons we have given, the appeal is allowed.

105. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision. As any order in respect of costs will, if not agreed, be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

**MR JUSTICE ZACAROLI**

**UPPER TRIBUNAL JUDGE SINFIELD**

**RELEASE DATE: 24 December 2019**