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UT (Tax & Chancery) Case Number: UT/2021/000111

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: Royal Courts of Justice, London
26 May 2022

Judgment given on 11 July 2022

Before

UPPER TRIBUNAL JUDGE SWAMI RAGHAVAN
UPPER TRIBUNAL JUDGE GUY BRANNAN

Between

CONSERVATORY ROOFING UK LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Tim Brown, Counsel

For the Respondents: Joanna Vicary, Counsel, instructed by the General Counsel and Solicitor for Her Majesty's Revenue and Customs

DECISION

Introduction

1. The appellant, Conservatory Roofing UK Limited, appeals against a decision ("the Decision") of the First-tier Tribunal ("FTT") published as *Conservatory Roofing UK Limited v Revenue and Customs Commissioners* [2020] UKFTT 0506 (TC).

2. The appeal concerned the rate of VAT which applied to works the appellant carried out to home conservatories. The FTT rejected the appellant's case that its supplies for VAT purposes were "insulation for…roofs" within the meaning of Note 1(a) of Group 2 to Schedule 7A VAT Act 1994 ("Note 1(a)") and therefore subject to the reduced rate of 5%. Instead, the FTT found they were supplies of a "composite insulated roofing system". Those were standard-rated supplies subject to VAT at 20%. With the permission of the Upper Tribunal ("UT"), the appellant raises two grounds of appeal on points of law.

3. The first is that the Decision displayed a lack of reasons, thereby failing to attain the standard of a properly and fully reasoned judgment. The second ground is that the FTT failed to correctly apply a test derived from CJEU case law (*Mesto Zamberk v Finanani feciltelstvi v Hradci Kralove* (Case C-18/12) ("*Mesto*"). That test dealt with how a single VAT supply with multiple elements was to be treated for VAT purposes, the test being that the predominant element of a supply had to be ascertained from the view of the typical consumer and that this was done having regard to objective factors.

4. Before we turn to the Decision it is worth setting out Note 1(a) in its context and briefly mentioning the body of case-law at UT level that has developed around it.

Legal provisions

5. The standard VAT rate on supplies of goods and services is set out in s2 Value Added Tax Act 1994 ("VATA"). That provision is subject to s29A VATA, which provides that any supply of a description specified in Schedule 7A is charged to VAT at the reduced rate of 5%.

6. Schedule 7A must, further to s96 VATA, be interpreted with the notes contained in the Schedule. The provisions of Schedule 7A relevant to this appeal appear in Group 2 as follows:

> **Group 2**
>
> **Installation of Energy-Saving Materials**
>
> Item No
>
> 1 Supplies of services of installing energy-saving materials in residential accommodation.
>
> 2 Supplies of energy-saving materials by a person who installs those materials in residential accommodation.
>
> Notes:
>
> Meaning of "energy-saving materials"
>
> 1 For the purposes of this Group "energy-saving materials" means any of the following:
>
> (a) **insulation for** walls, floors, ceilings, **roofs** or lofts or for water tanks, pipes or other plumbing fittings; [*emphasis added*]

7. Three prior cases in Upper Tribunal have considered the interpretation of Note 1(a) with regard to the various supplies undertaken by the particular taxpayer business but which all involved installation of conservatory roofing panels with insulating properties: *HMRC v Pinevale* [2014] UKUT 204 (TCC) ("*Pinevale*"), *HMRC v Wetheralds Construction Limited* [2018] UKUT 173 (TCC) (*"Wetheralds")* and *Greenspace (UK) Limited v HMRC* [2021] UKUT 0290 (TCC) (*Greenspace*). We mention these cases only briefly, in order to give context to the FTT Decision's references to those cases, and because the appellant's grounds do not extend to saying the FTT misapplied the legal principles from those cases. (That position, we note, is perhaps not surprising given the appellant's first ground is that the Decision lacked sufficient reasons). As HMRC's skeleton argument helpfully pointed out, the last case, *Greenspace*, although it came out after the FTT gave the Decision, summarised the propositions of law in the earlier cases. It did this by reference to *Wetheralds* (which in turn had considered *Pinevale*) at [19]:

> (1) The statutory question remains whether a particular supply is "insulation for… roofs" and in determining this question the Tribunal must follow *Pinevale* and draw a distinction between the supply of a roof and the supply of insulation for a roof.
>
> (2) Considerations of the "extent" of a supply can, in principle help the FTT to determine whether a particular supply is of either a roof or of insulation for a roof.
>
> (3) The question whether an item is "insulation for" a roof is not determined conclusively by considering whether it is "attached or applied" to the roof. Nor is it determined conclusively by asking whether the item is a "roof panel".
>
> (4) Evidence of extraneous materials such as patents, LABCs [*local authority building certificates]* and marketing literature may be of relevance in particular cases. But it is a matter for the FTT to assess the relevance and weight of such material.

8. The appellant in this case sought, in correspondence prior to the FTT hearing, to rely on the FTT's decision in Wetheralds where the taxpayer had won. By the time of appellant's hearing before the FTT however, the UT in *Wetheralds* had overturned the FTT decision. The appellant argued that made no difference and sought to distinguish the facts of its supply from that of the taxpayer in *Wetheralds.*

The Decision

9. Given the nature of the appellant's primary challenge, which is to the adequacy of reasoning in the Decision, it is helpful to begin with an overview of the structure of the Decision. After introducing the issue under appeal, it set out background, which largely recited the evidence, the legislation, the appellant's case, HMRC's case, and then set out its reasoning in a Conclusion section. As a preliminary observation there are two features which stand out.

10. First, it is striking the FTT did not, as we would expect, include a section clearly setting out the findings of fact it made regarding the supply. Rather, such findings as there are, are dispersed through the various sections of the decision. Moreover, they are frequently embedded within statements prefaced with reports of what the appellant stated (e.g., "the appellant says that….").

11. We take this opportunity to reinforce the reminder the Upper Tribunal gave in *Grzegorz Sczcepaniak T/A, PHU Greg-Car v The Director of Border Revenue* [2019] UKUT 295 (TCC). There the Upper Tribunal noted that the "vast majority" of the decision in that case "some 78 out of 108 paragraphs" was "taken up with a recitation of evidence and submissions". The UT continued:

> "We would remind First-tier Tribunals that while it is perfectly acceptable to summarise evidence and submissions, a finding of fact is made only when a conclusion,

> appropriately reasoned, is expressed on the evidence in the light of the submissions made."

12. On the basis the appellant does not challenge the lack of clear fact-finding in the Decision, we will proceed on the basis that findings of fact can nevertheless be inferred from the FTT's recitation of the evidence.

13. The second striking feature, (and this is a matter which the appellant does refer to in its first ground regarding insufficiency of reasons) is the disparity between the text the FTT devoted to summarising the appellant's submissions (6 paragraphs) compared to HMRC's submissions (24 paragraphs). Quantitative analysis of this kind will, of course, reveal very little without understanding the content and context of the case. It might for instance simply reflect the different level of detail that each party advanced. But, in this case, the disparity, when coupled with reasoning which, as we will see, simply adopted the winning party's extensive submissions in their entirety with little further comment, flags up that something may have gone awry in the FTT's decision-making process. Simply as a matter of impression, it risks leaving the party who lost with the perception that their submissions did not receive fair consideration as compared with their opponent's.

14. Turning then to the facts which could be gleaned from the background section, and the appellant's and HMRC's submissions, the following facts may be taken to have been found by the FTT and to provide sufficient background to the supplies that were in issue for the purposes of the appeal before us:

> (1) In 80% of cases a new external light-weight roof tile system is secured to the outside of the existing poly-carbonate roof, whilst on the inside insulating material is provided and plasterboard applied to a bespoke frame ready for the application of decorative finishes and the insertion of LED downlights.
>
> (2) In the remaining 20% of cases where the roof panels are too heavy (when they are made of glass) to safely leave in situ, the roof panels are removed. Otherwise, no alteration is made to the existing conservatory roof structure.
>
> (3) The typical install, in more detail was as follows (FTT [30]):
>
> > (a) Plastic coverings are stripped from the roof frame exposing the aluminium or wooden frame in place.
> >
> > (b) On the top side, a frame is put over the roof frame; marine ply is screwed to the existing frame to hold the marine ply in the shape of the original structure/roof area.
> >
> > (c) Waterproof membrane is installed over the ply which is then tiled with Tapco slate. New fascia and gutters, and breather vents in the fascia are installed so the roof breathes. (The panels are drilled to allow for the circulation of air [39]).
> >
> > (d) On the underside, the ceiling is plaster boarded and plastered. LED down lights are fitted.
> >
> > (e) The process is the same where the roof is made from glass as opposed to polycarbonate, except the glass sheets are removed. The original roof frame is left in place.

15. The appellant's marketing material, which the FTT noted, through its acceptance of HMRC's submissions in relation to that, referred to the appellant as "the original conservatory roof replacement company" "roofing specialists". The material stated the benefits of its "…bespoke conservatory roof

system" which provided "a new insulated lightweight conservatory roof." (FTT [35]). The FTT agreed with HMRC that the material from the appellant's website contributed to the impression the appellant was providing a "tiled conservatory roofing system", a "unique roof remodelling and insulation solution" and "new insulated lightweight conservatory roof".

16. The FTT summarised the appellant's submissions, reciting its grounds of appeal, which included that the purpose of the product was to provide insulation in cold weather and keep the conservatory cool in hot weather. It was emphasised the specialised energy saving products were fitted to the existing roof structure which was left intact. That distinguished it from the supplies in *Wetheralds* (in relation which the UT considered the typical consumer would have described as the supply of a "thermally efficient replacement roof") where the roof panels were removed leaving only the spars in place. The installation here involved much more than installation of energy-saving materials but extended to work carried out to the structure of the roof both internally and externally.

17. Over the next four and half pages, the FTT then set out HMRC's submissions on the facts and law in some detail. These submissions included details of the evidence, such as the excerpts from marketing material which HMRC relied on. In summary, HMRC contended that the term "insulation for…roofs" in Note 1(a) meant the energy saving material should serve no other function apart from insulation, and excluded material which, for example, served a structural function. Under the case-law (*Wetheralds* UT), the question was whether what was supplied was confined to insulation or extended further than that to a roof or a replacement roof itself. Before and after pictures of the work undertaken conveyed the impression, HMRC submitted, that the customer was getting a new roof. That was reflected in the appellant's own marketing. A typical consumer would have regarded the supply as a thermally efficient replacement roof rather than merely new insulation. The appellant's solid roof system changed the character of a conservatory roof in a way that just insulating it would not.

18. HMRC's arguments went on to consider, if it were considered the supply was a single complex supply, how the character of the supply was to be considered from the viewpoint of a "typical customer" in accordance with the principles established in *Mesto* (which we will discuss when we come on to Ground 2). HMRC submitted (FTT [50]) "a typical customer when inviting friends around might take the opportunity to show off the work that had been done to the conservatory. That customer is more likely to say, "look at my new conservatory roof" rather than "come and see my newly-insulated roof".

19. The FTT then proceeded to its Conclusion section which set out its reasoning. Given the challenge made under the appellant's Ground 1 concerns the lack of adequate reasons, it is convenient to set this out in full:

> "52. The facts in the present matter are indeed very similar to those in *Wetheralds*. In correspondence with HMRC the appellant's agent stated that the appellant's roofing system is "almost identical to the supplies made by *Wetheralds*". The statement was made prior to HMRC's successful appeal to the Upper Tribunal which concluded that a typical consumer of the 'Solid Roof System' provided by Wetheralds would have described the supply as a thermally efficient replacement roof, and not merely as the insulation included within the roof system.
>
> 53. We concur with HMRC's reasoning as set out in paragraphs 27-51 above. The supplies made by the appellant in this case extend far beyond installing insulation to a roof. The work is materially, the construction of an entirely new roofing system. The 'specialist energy saving products' which the appellant says are 'fitted to existing conservatory roofing structures' is only one component part of a new roof.

54. The appellant refers to *Mesto* and argues that we should look at the primary or predominant supply, which in its view is the installation of insulation, and classify the product accordingly.

55. In our view there is a single supply. The product supplied by the appellant is essentially a composite insulated roofing system. Although there are several elements to the supply to the customer, they are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

56. The expressed purpose of the appellant's product is to provide insulation in cold weather and keep the conservatory cool in hot weather. If only insulation material was supplied without the installation of a timber, plaster boarded sub frame and tiles to the roof exterior, that purpose would not be achieved.

57. The majority of materials and services that were provided by the appellant are not covered by the exhaustive list set out by Note 1(a), as they are materials for the construction or reconstruction of a roof, rather than insulation, and cannot therefore be classified as reduced-rate supplies.

58. The scope of reduced rating for supplies within Note 1(a) is not determined by whether or not the materials are "attached to or applied", but by whether what is supplied is confined to insulation or extends further than that, as in this case, to a new roof or replacement roof. The installation of only energy-saving materials with ancillary supplies would of course be reduced rated. An ancillary supply is a supply of goods or services that allows a better means of enjoying the principal supply. The insulation provided by the appellant is part of and assists with the enjoyment of a new roof and therefore is ancillary.

59. The predominant element must be determined from the point of view of the typical consumer. The marketing material demonstrates that the supply is of a roofing system, to which the insulation is an incidental part. We agree with HMRC that a typical consumer would, on the basis of both the appellant's marketing material and the nature of the finished product, consider that they were receiving a new roofing system.

60. As Judge Berner said in *Wetheralds* at para 31:

> "as *Pinevale* sets out, in interpreting the statutory language the critical question is whether the supply of energy-saving materials is "for" a wall, floor, ceiling etc., or is a more extensive supply, such as the wall, floor, ceiling etc. itself."

61. We have to conclude that the appellant does not make a supply of "insulation for roofs" within the meaning of Note 1(a) of Group 2 Schedule 7A VATA94 and that as such the appellant's supplies cannot be classified as reduced-rated for VAT purposes."

Grounds of appeal

Ground 1: Lack of reasons

20. The appellant argues the Decision did not meet the requirements, established by case-law authority, that reasons must be given which are adequate and of sufficient detail to explain the decision that has been arrived at in the particular circumstances of the case. The FTT did not engage with the appellant's submissions and made no reference to the evidence of the appellant's sole witness who gave live evidence and was cross-examined.

21. There was no real dispute around the relevant legal principles regarding the requirement to give reasons and the adequacy of those.

(1) The justification for a requirement to give reasons put "at its simplest" is that "justice will not be done if it is not apparent to the parties why one has won and the other lost" at *(English v Emery Reimbold & Strick* [2002] EWCA 605 at [16]).

(2) The adequacy of reasons depends on the nature of the case. (*English* [17]) In *South Bucks District Council v Porter* (No 2) [2004] UKHL 33 at [36], Lord Brown's judgment made clear "Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision."[1]

(3) The judgment must enable the appellate court to understand why the judge reached the decision. This does not mean that every factor which weighed with the judge in the judge's appraisal of the evidence has to be identified and explained. The issues, the resolution of which, was vital to the judge's conclusion should be identified and the manner in which the judge resolved them should be explained (*English* [19]). Similarly, in *Weymont v Place* [2015] EWCA Civ 289, Patten LJ made the point that the judge is not required "…to deal with every point raised in argument however peripheral, or with every part of the evidence. The process of adjudication involves the identification and determination of relevant issues."

(4) The proper approach by the UT, where the challenge is that it cannot be understood why the tribunal reached the decision it did is "to review the judgment in the context of the material evidence and submissions at the hearing in order to determine whether, when all of these are considered, it is apparent why the lower tribunal reached the decision that it did (*Synectiv Limited v HMRC* [2017] UKUT 0099 (TC) referring to [26] of *English*).

22. Following on from this last point, Mr Brown, who also represented the appellant before the FTT, accordingly detailed the submissions and evidence which the Decision failed to address despite those being relevant matters.

23. In particular Mr Brown highlights that the appellant's marketing material, although not determinative, was clearly relevant. He criticises the FTT for only referring to the excerpts which HMRC relied on to support its submissions. He recounted how he had taken the FTT to other wording in the materials and had in his closing submission made the point that these portrayed a rather more "mixed message" than HMRC advanced. For example, he pointed to excerpts in a marketing leaflet and estimate which stated:

(1) "Our unique insulation system is installed…without any alteration or removal of your existing conservatory roof structure".

(2) The estimate provided to customer began "your roof will be integrated with our premium roof frame system".

24. Mr Brown also placed reliance on witness evidence which the appellant's sales manager, Mr Messenger gave. Mr Messenger had provided a short witness statement which the tribunal was invited to accept as his evidence in chief. Mr Brown said he asked further questions, getting Mr Messenger to "walk the tribunal through" what a typical transaction looked like. That evidence included Mr Messenger's perception of how a typical customer would view the supply and was to the effect that a customer would not have engaged the appellant's services if the customer was not after an insulated roof. It emphasised that in the vast majority of cases the existing roof remained as it was. Mr Messenger was also cross-examined by HMRC (this was by an HMRC litigator – Ms Vicary who

[1] Although we note this observation comes from Lord Brown's summary of the authorities governing the proper approach to a reasons challenge in the planning context ([35]) there is nothing to suggest this cannot stand as a wider proposition and *the* fact the same point in substance is made by the Court of Appeal in *English* suggests that it does.

appeared before us did not appear below). Mr Brown points out it might have been expected that the tribunal would refer to this evidence and deal with whether it was accepted as being truthful.

25. In summary, Mr Brown says the FTT did not engage with appellant's submissions e.g., on the marketing material and what a typical customer believed was being purchased. That was an insulating system (where the internal decorative element and external tiles were ancillary in order to enabled better use and enjoyment of the principal supply).

26. Ms Vicary's answer on behalf of HMRC, regarding the marketing material was, in essence, that it was so obvious from the content of the marketing material that there was *no* mixed message that no further explanation was required: 1) The leaflet had a prominent banner "The original conservatory roof replacement company". 2) The estimate was headed "Estimate for roof installation" (emphasis added). In her submission, if there was a failure on the part of the FTT, it was not one that was material to the FTT's decision. As for the witness statement, the contents were, she submitted, addressed in the course of the Decision even if those contents were not explicitly tied back to the statement. There was no obligation according to the case-law principles discussed above regarding adequacy of reasoning to make a particular reference to the witness.

Discussion

27. We have, in line with *Synectiv,* considered the materials and submissions before the FTT which Mr Brown and Ms Vicary took us too. We agree with HMRC that reading the decision as a whole, as one must, the FTT did take account of the points in the appellant's short witness statement. (So for example, with a generous reading, given the atypical structure the FTT adopted, Mr Messenger's evidence regarding the objective of the business activity, the way it was marketed was to keep the conservatory cool in summer and warm in winter, and the way in which this was achieved – including giving adequate ventilation was covered in various paragraphs in the Decision ([20] [30] [36]). We can also see that certain of the appellant's submissions were considered. For instance, the FTT dealt with the appellant's submission that the appellant's facts were different from the supplier in *Wetheralds* (at [52]). As Mr Brown acknowledges, it also dealt with the submission regarding the conservatory cooling and warming purpose, as it appeared in the appellant's grounds (and also in Mr Messenger's statement) at [56]. While the appellant clearly disagrees with the FTT's conclusion in relation to those points, there was no error in the points not being considered.

28. However, regarding the marketing material, there is no escaping that the Decision simply did not address the submission Mr Brown made on behalf of the appellant that this presented a "mixed message". Instead, the FTT adopted, in wholesale fashion, only the excerpts HMRC relied on. It is no answer to say the materials were so clearly in HMRC's favour that no explanation was required. If the materials as a whole (rather than the excerpts which HMRC relied on) were considered to be overwhelmingly in HMRC's favour it would have been very easy to say so and in doing so acknowledge that this evaluation had been made taking the excerpts the appellant relied on into consideration. The submissions on the marketing material went to a point of contention on a relevant issue. We cannot tell that the FTT considered the appellant's case on this still less the basis for why it rejected it.

29. Similarly, it is clear from Mr Brown's account of the further evidence that was extracted from his witness (which HMRC were not in a position to gainsay) that there was evidence which was at least prima facie relevant to the issue of how a typical consumer might view the transaction. Mr Brown's case did not go as far as saying that the FTT erred in law to recount that Mr Messenger had given evidence and was cross-examined on it. While tribunals typically do this, and it is useful to understand what evidence was before the tribunal and what view was taken of the witness' credibility and reliability, we agree with Ms Vicary this is not required as a matter of course by the legal principles

above. However, Mr Messenger's evidence on how a typical consumer might view the transaction was at least relevant, and moreover it was a contested issue insofar as HMRC advanced the countervailing view. In its Conclusion section the FTT stated (at [59]) that it agreed with HMRC that a typical consumer would consider that they were receiving a new roofing system on the basis of both the appellant's marketing material and the nature of the finished product. There was no indication however that the FTT had considered the point by reference to the appellant's evidence on the point and, as we have already mentioned, the only marketing material the FTT referred to were the excerpts set out in HMRC's submissions.

30. HMRC refer to *South Bucks District Council v Porter* (No 2) [2004] UKHL 33 for the proposition, which is not disputed by the appellant, that a court or tribunal can state reasons briefly, and that the degree of particularity required depends entirely on the nature of the issues falling for decision. Ms Vicary submits the reader of the Decision is left in no doubt that based on a "comprehensive multi-factorial analysis" the FTT formed a clear conclusion the supply did not fit the description "insulation for roofs". While we agree with her that the conclusion, in HMRC's favour, is certainly made clear by the FTT, it follows from what we have said above, that it is rather over-generous to depict the Decision that way as regards its level of analysis; that is certainly not the impression one gets from looking at the reasoning, which we have extracted in full above.

31. It is true we can see what facts the FTT relied on; namely it was simply those advanced by HMRC in its submissions. However, the above two points on the marketing material and Mr Messenger's evidence were matters which were relevant and which were disputed. In line with the principles set out in the authorities, all the FTT needed to explain – and it is clear it could do this succinctly – was why it rejected the appellant's arguments and evidence on issues which were relevant. Regrettably however the points were not dealt with at all. The appellant, having made the points and advanced the evidence was left in doubt, as are we, that the points were considered, and if they were, why HMRC's arguments in the other direction were accepted, while theirs were refused.

32. We therefore consider the reasons in the decision were inadequate and there was thus an error of law in the Decision.

33. A contributory factor to this outcome, in our view, was the way in which the FTT structured its decision, where it comprehensively recited the winning party's submissions, yet as we have established, incompletely reflected the losing party's contrary arguments on relevant points. The superficially attractive short-cut of reciting the winning party's submissions at length and then simply saying that the FTT concurred with these was unlikely to lay a sound foundation for an adequately reasoned decision. It is a route we would discourage FTTs from taking.

34. As to HMRC's submission that any error regarding inadequacy of reasons was not material, this does not detract from such inadequacy constituting an error of law. There is also the difficulty that, without knowing the FTT's reasoning for its conclusion, we cannot say with any confidence what difference the points the appellant raised, but which were not considered, would have made to the outcome of the decision. The error being a material one, we consider we should set aside the Decision.

35. The next question is whether we should remit the decision to the FTT or re-decide the matter ourselves. As we have already mentioned, the Decision in our view lacked a clear set of findings of fact, and while we were taken to excerpts of the evidence that were before the FTT, we did not hear the live evidence, which clearly went beyond the terms of the Mr Messenger's one page witness statement. There is no comprehensive account of it that was before us because as, understandably, given the scale of the case, no transcript was taken. With some reluctance, given the inevitable extra cost and delay, we consider we must remit the appeal to be fully re-determined by the FTT. This will

be to a new FTT panel (the FTT judge who heard the matter, nearly two years ago now, having since retired).

Ground 2 – FTT failed to correctly apply the "predominant element" test in Mesto

36. Given our conclusion on Ground 1, although not necessary to decide the appeal, we will briefly address Ground 2, given we heard argument on it.

37. The "predominant element" test in *Mesto* which is the subject of this ground arose in relation to the categorisation of a single complex supply. (Such a supply arises where "two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single indivisible economic supply, which it would be artificial to split (*Levob*[2]) or where one more element is to be regarded as the principal supply while other elements are regarded as ancillary, sharing the tax treatment of the principal supply (*CPP*[3]*).*

38. The relevant issue concerned whether access to an aquatic park, which offered not only sporting facilities e.g., lane swimming, but also more recreational facilities such as a paddling pool and waterslides, fell within the VAT exemption in Article 132(1)(m) in Council Directive 2006/112 ("the VAT Directive) for the "supply of services closely linked to sport or physical education".

39. The appellant accepts the FTT set the test in *Mesto* out correctly (at [48]) where the following relevant paragraphs were extracted:

> "[29] In order to determine whether a single complex supply must be categorised as a supply closely linked to sport within the meaning of article 132(1)(m) of the VAT Directive, although that supply also includes elements not having such a link, all the circumstances in which the transaction takes place must be taken into account in order to ascertain its characteristic elements and its predominant elements must be identified (see, to that effect, in particular, *Faaborg-Gelting Linien AIS v Finanzamt Flensburg* (Case C-231/94) (19961 BVC 436, paras. 12 and 14; *Levob Verzekeringen* and *OV Bank*, para. 27; and *Bog*, para. 61).
>
> [30] It follows from the case-law of the Court that the predominant element must be determined from the point of view of the typical consumer (see, to that effect, in particular, *Levob Verzekeringen* and *OV Bank*, para. 22, and *Everything Everywhere Ltd (formerly T-Mobile (UK) Ltd) v R & C Commrs* (Case C-276/09) 120111 BVC 44, para. 26) and having regard, in an overall assessment, to the qualitative and not merely quantitative importance of the elements falling within the exemption provided for under article 132(1)(m) of the VAT Directive in relation to those not falling within that exemption (see, to that effect, *Bog*, para. 62).
>
> [33] As for the question whether, in the context of such a single complex supply, the predominant element is the opportunity to engage in sporting activities falling within article 132(1)(m) of the VAT Directive or, rather, pure rest and amusement, it is necessary to make that determination, as has been pointed out at paragraph 30 of the present judgment, from the point of view of the typical consumer, who must be determined on the basis of a group of objective factors. In the course of that overall assessment, it is necessary to take account, in particular, of the design of the aquatic park at issue resulting from its objective characteristics, namely the different types of facilities offered, their fitting out, their number and their size compared to the park as a whole."

[2] *Levob Verzekeringen and OV Bank v Staatssecretaris van Financien* [2006] STC 766 Case C-41/04
[3] *Card Protection Plan Limited v HM Customs and Excise* [1999] STC 270 Case C-349/96

40. Mr Brown submits however that the FTT failed to apply the correct test. For the reasons below none of his points persuade us the FTT erred in the way suggested.

41. First, he says the FTT was wrong to refer at [50] to what a typical consumer might say as that is not an objective factor.

42. The basis for this submission is the use of the word "might" in Paragraph 50 of the Decision (while that appeared in the section setting out HMRC's submissions, it will be recalled that the FTT adopted this in its reasoning). It is important however to see that term in context:

> "50. Case law has therefore established that when presented with a single complex supply the decision in Mesto requires the character of the supply to be established by looking at it through the eyes of the 'typical customer' to determine what she or he has obtained. A typical customer when inviting friends around might take the opportunity to show off the work that has been done to the conservatory. That customer is more likely to say, "look at my new conservatory roof" rather than "come and see my newly-insulated roof". It is the changed character of the roof and its visual impact, creating an aesthetic appeal that contrasts with what preceded it." (emphasis added) ….

43. It is plain that nothing of significance turned on the formulation the FTT adopted regarding what a typical consumer might say. It was simply one possible way of expressing the point of view of a typical consumer, in other words how would things look from the customer's view?

44. Second, Mr Brown submits, in essence, that the FTT prejudged the question of what the primary or predominant supply was at [54] of the Decision because it had earlier on (at [53]) already decided the supply was an entirely new roofing system. These paragraphs appear at [19] above.

45. We reject this ground. These paragraphs cannot, in our view, be properly read as building on each other. It is clear the FTT considered the predominant element test independently to reach the conclusion it did.

46. Third, Mr Brown submits the FTT was wrong (at [57]) to regard the fact that the majority of materials provided by the appellant were not covered by the list in Note 1(a) and therefore could not be classified as reduced-rate supplies. A typical customer would not know the VAT liability of such goods. Also, according to [30] of *Mesto* the qualitative and not merely quantitative importance of the elements had to be considered.

47. Again, there is nothing in this. Paragraph 30 of *Mesto* refers to the point of the view of the typical consumer "and having regard, in an overall assessment, to the qualitative and not merely quantitative importance of the elements falling within the exemption…" (emphasis added). The FTT was not constrained, in carrying out an overall assessment of what the predominant element was, from what was within the typical consumer's knowledge. No criticism can be made of the FTT considering quantitative aspects as the CJEU's decision clearly envisaged that the assessment might, (but should not be restricted to) such considerations. Indeed in [33] of *Mesto* the CJEU referred to quantitative aspects such as the number and size of the different types of facilities in the context of the aquatic park's objective characteristics.

48. If it were necessary to deal with this ground in order to deal with the appeal, we would therefore have refused the appellant's appeal on this ground.

Decision

49. The appeal is allowed, and the Decision is set aside.

50. The case is remitted to the FTT to be reheard by a new panel which is to be chosen by the President of the FTT.

Signed on Original

JUDGE SWAMI RAGHAVAN

JUDGE GUY BRANNAN

UPPER TRIBUNAL JUDGES

RELEASE DATE: 11 July 2022