[2015] UKUT 0080 (TCC)

Appeal number FTC/58/2013

VALUE ADDED TAX - supplies of holiday accommodation and power by the operator of a holiday camp to customers taking short term holidays in static caravans or chalets - separate charges in respect of the accommodation and power - but the charge for power was irrespective of actual use and did not relate to the power consumed by the customer concerned - no appeal from finding that in economic terms the provision of power was part of a single complex supply of serviced holiday accommodation - whether on the basis of European Commission v France *(Case C-94/09) the UK was entitled to legislate to provide for the reduced rate of VAT to apply to supplies of domestic fuel or power even in a case where such supplies formed an element in a large single complex supply which was not a supply of domestic fuel of power - interplay of that case with the* Card Protection Plan *jurisprudence (Case C349/96) - whether section 29A and Group 1, Schedule 7A, VATA provided for the reduced rate of VAT to apply to the charge made in respect of power in this case - held that it did not and that the standard rate of VAT must be applied to the entire single complex supply - appeal from the FTT allowed*

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

COLAINGROVE LIMITED

Respondent

TRIBUNAL: MR JUSTICE HILDYARD

Sitting in public at The Royal Courts of Justice, The Rolls Building, Fetter Lane, London EC4A 1NL on 18 & 19 June 2014

Jeremy Hyam, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellant

Roderick Cordara QC, instructed by PWC Legal LLP, for the Respondents

DECISION

1. This appeal from a decision of the First Tier Tribunal, Tax Chamber ("the FTT") concerns a question which has recently been raised in various contexts in different cases: that is, whether section 29A and Group 1, Schedule 7A of the VAT Act 1994 ("the VAT Act"), on their true construction, provide for the application of reduced rates of VAT to particular elements of a single supply which would otherwise be taxed at the standard rate. The question has received different answers.

2. The supply in question in this case was made by Colaingrove Limited ("Colaingrove"), or by other companies within the Bourne Leisure Group Limited VAT group of which Colaingrove is part. Colaingrove or such other companies[1] provide serviced chalets and static caravans at holiday parks which they own or operate in the UK.

3. The particular question in this appeal is whether the provision of electricity as part of the supply by Colaingrove to certain promotional users of its serviced chalets and static caravans (see paragraphs [13] to [20] below) is to be taxed at a reduced rate of Value Added Tax ("VAT"), notwithstanding that (as is no longer disputed) the charge for electricity is an element of a single complex supply of serviced accommodation, and the supply of serviced accommodation falls to be taxed at the standard rate.

4. This appeal in fact relates to and consolidates three appeals to and from the FTT (Tribunal Judges John Walters QC and John Robinson). One appeal relates to the refusal by Her Majesty's Commissioners for Revenue and Customs ("HMRC") to repay VAT of £129,743 claimed pursuant to a voluntary disclosure by Colaingrove dated 23 December 2002. The second relates to an assessment in the sum of £941,650 in respect of output tax made on 4 January 2007 in respect of the periods 12/03 to 09/08. The third relates to the refusal by HMRC of a claim for repayment of VAT of £691,891.38 made by Colaingrove on 7 December 2010. All three appeals raise the same issues.

Brief summary of the rival contentions

5. HMRC have throughout contended that (a) Colaingrove provides and charges for electricity as part and parcel of its supply of fully serviced holiday accommodation to the relevant promotional users; (b) the whole should be treated as a composite or fused single supply; (c) there is no provision in the

[1] Colaingrove has been treated throughout as the representative member of that VAT Group; and in this decision (as in the decision of the FTT) a reference to "Colaingrove" should be read as a reference to the relevant supplier company in that VAT Group.

VAT Act for a reduced rate to apply to any part of that composite single supply; and (d) the supply must be standard-rated in its entirety.

6. Colaingrove appealed to the FTT against HMRC's assessment and refusal of repayment claims on two bases: (a) one basis was that its supplies of electricity were to be distinguished from its supplies of accommodation, and should be treated as separate supplies; and (b) its alternative basis was that, even if part of a single complex supply, the provision of and charge for electricity constituted a 'concrete and specific' element of a wider supply. Colaingrove submitted that in either case the charge for electricity should be subject to VAT at the reduced rate of 5% under the provisions of section 29A and Schedule 7A to the VAT Act.

7. In the FTT, Colaingrove failed on its first basis (a): it did not persuade the FTT that there were two separate supplies, one of holiday accommodation and one of electricity. There is no cross appeal on this point: in this Upper Tribunal, Colaingrove no longer seeks to contend that the supply of electricity and the supply of accommodation were separate supplies.

8. However, Colaingrove succeeded in the FTT on its alternative argument (b) that its supply of electricity should be treated as a 'concrete and specific' aspect of its transactions with, and supply to, Sun Holiday (as defined below) customers, and that the relevant domestic legislation on its true construction provided for a reduced rate of VAT to that aspect of the supplies. It is common ground that the supply of electricity for domestic purposes attracts VAT at the reduced rate.

9. That alternative argument was sufficient for the FTT to conclude the overall question as to the application of a reduced rate to the provision of electricity by Colaingrove as part of its supply of serviced accommodation. Accordingly, HMRC are the Appellants in this appeal; whereas Colaingrove is the Respondent.

10. HMRC do not for the purposes of this appeal seek to contest the finding that the provision of electricity is a concrete and specific element of the single complex supply. Thus, the only issue now is whether there is domestic legislative warrant for the application of different rates of VAT to a single supply where some element of the supply is 'concrete and specific'. It follows that this appeal to the Upper Tribunal turns on the true construction of the provisions in section 29A and Schedule 7A to the VAT Act.

11. However, those provisions must be construed in the context of Article 113 of Directive 2006/112 (formerly Article 28(2)(b) of the EC 6th VAT Directive,

which permitted Member States to apply a reduced rate to goods and services that were previously zero-rated (including electricity)). It is necessary also to consider a number of decisions of the European Court of Justice ("the ECJ") as to the permissible scope of that permission and the required approach, as well as recent authority in the FTT and Upper Tribunal.

The facts as found

12. The facts as found by the FTT (and not now capable of being disputed) are set out in paragraphs 6 to 13 of its Decision ("the FTT Decision"). They may be summarised for present purposes as follows.

13. Colaingrove has 37 holiday parks and resorts trading under the names 'British Holidays', 'Haven' and 'Butlins'. At these holiday parks and resorts, Colaingrove provides accommodation to customers in static caravans and chalets (as well as pitches for static and touring caravans which it does not own). Each pitch (including pitches where static caravans and chalets owned by Colaingrove are located) has its own electric meter and gas meter.

14. The relevant provision of electricity which is the subject of these proceedings was by Colaingrove to holidaymakers staying at Colaingrove's chalets and static caravans while taking holidays which had been advertised as promotional offers in *The Sun* newspaper.

15. Since the early 1990s, Colaingrove has had a contractual relationship with News International Limited, the owner of *The Sun*. Pursuant to that relationship, *The Sun* publishes, from time to time, promotional offers of holidays ("Sun Holidays") in static caravans and chalets at heavily discounted rates.

16. The contract between the entity acting for News International Limited (called GFM Services Limited) and Colaingrove provides for the promotional offers to be charged as 'holiday prices', and for any supplementary charges (such as for electricity) to be clearly indicated in the promotional offer.

17. The charge for accommodation on a Sun Holiday is collected by *The Sun*. It is held by *The Sun* until the holiday has taken place, and then remitted (less a commission) to Colaingrove.

18. However, the charge for electricity is a fixed charge, which is collected separately by Colaingrove from the customer at the time when the customer

makes the reservation. In 2008, the fixed charge was at a rate of £5.75 per day: by the time of the appeal to the FTT it was some £6.

19. Although electricity supplied to static caravans and chalets at Colaingrove's parks is metered, the FTT accepted and found that in the period in issue Colaingrove, to save the burden and expense of separate metered charges, simply charged Sun Holiday customers a fixed daily fee for electricity. The fixed fee bore no correlation to the actual consumption of electricity by that customer. Further, the charge for electricity is not optional. If it is not paid in advance, the booking is treated as cancelled.

The genesis and scope of the dispute

20. The genesis of the present dispute is Colaingrove's decision to account for output VAT on provision of electricity to Sun Holiday customers at the reduced rate.

21. This appeal concerns only the charge for electricity made by Colaingrove to Sun Holiday customers using fixed caravans or chalets provided and serviced by Colaingrove. It does not concern electricity provided to other customers of Colaingrove.

22. In particular, it does not concern supplies to touring caravans taking advantage of electricity 'hook-ups' at caravan sites operated by Colaingrove. For example, HMRC has not opposed Colaingrove's practice of applying the reduced rate to the output VAT due in respect of the supply of electricity to touring caravans using the 'hook-up'.

The grounds of the FTT's Decision under appeal

23. The FTT made the following findings:

(1) Sun Holiday customers realistically had no choice but to pay Colaingrove a fixed charge for electricity. That is inherent in the transaction taking place, that is, the purchase of electricity for use in a static caravan or chalet taken at one of Colaingrove's holiday parks for a few days at most.

(2) Although charges for electricity were invoiced separately by Colaingrove from the charges for accommodation, that was not

determinative of the issue whether the two charges could be split into separate elements for VAT purposes.

(3) What the typical Sun Holiday customer was buying from Colaingrove was the combination of holiday accommodation and electricity, comprising in each case a single complex supply of serviced holiday accommodation.

24. The FTT accepted that the line of cases flowing from the judgment of the ECJ in *Card Protection Plan Ltd v Customs and Excise Commissioners* (Case C-349/96) [1999] STC 270 ("the *CPP* case" or "the *CPP* line", as appropriate) mandates that, ordinarily, the starting point is to identify "the essential features of the transaction" and that, having done so, it is inappropriate artificially to split a supply which "from an economic point of view" comprises a single service into separate services or supplies.

25. In that context, the FTT also accepted that it would not be a correct application of the fiscal neutrality principle to split a single complex supply discerned on the application of the *CPP* line into separate supplies of accommodation and electricity: "it would undermine the efficacy of the *CPP* jurisprudence if single complex supplies were generally required to be disaggregated because the taxation consequences would have been different if the parties had chosen or been able to make their transactions on a different basis". In this regard, the FTT considered that it was following the decision of the ECJ in *Purple Parking Ltd v HMRC* (Case C-117/11) ("*Purple Parking*"), where a single charge was made for 'parking services' with no separate and distinct charge being made for transport to and from the airport terminal, and the ECJ emphasised that the essential features and true nature of the transaction must be discerned from the transaction actually entered into and not from equivalent transactions that might have been, but were not, entered into.

26. The FTT further accepted that if the *CPP* line does apply in this case, it would be artificial to split the supply by Colaingrove into separate elements of a supply of holiday accommodation and a supply of electricity (see paragraph 89 of the Decision). It concluded that, applying the *CPP* line, there are in this case single complex supplies of serviced holiday accommodation (see paragraph 90 of the Decision).

27. However, it considered that the *CPP* line did not provide exhaustive guidance, and was not applicable in "the very limited class of case where a reduced rate of VAT is in issue and the domestic legislation imposing it indicates an intention that the *CPP* jurisprudence should not apply" (see paragraph 68 of the Decision). In that class of cases, the analysis proceeded, the real question was not whether there were two separate supplies, or a single complex supply

with two or more elements, because on either basis a reduced rate specified by national law would apply to the relevant element of a single complex supply, just as it would to a self-standing supply. The FTT concluded that this case fell within that limited class.

28. The FTT rationalised its conclusion by reference to the ECJ jurisprudence as follows:

(1) Where there is an issue as to the application of a reduced rate, the ECJ has recognised in *Talacre Beach Caravan Sales Ltd v Customs and Excise Commissioners* (Case C-251/05) [1999] STC 1671 (*"Talacre Beach"*) that a single supply can be taxed at two separate rates.

(2) The test in a case such as this is whether within an overall supply a 'concrete and specific' element can be identified which is of a kind or nature which the (domestic) legislature intended should attract a reduced rate of VAT, as exemplified in *European Commission v France* (Case C-94/09), which concerned services by undertakers ("the *French Undertakers* case"). In the *French Undertakers* case, the ECJ confirmed that French legislation applying a reduced rate of VAT to the transportation of a body by vehicle, as a concrete and specific element of the supply of services by undertakers, fulfilled the conditions required by the relevant European legislation providing for the application of reduced rates to supplies of services including, *inter alia*, supplies of services by undertakers.

(3) In the context of this case, (a) the *French Undertakers* case was authority for the entitlement of a Member State to legislate that a reduced rate of VAT should apply to the provision of electricity even where, if the *CPP* line was applicable, that provision would, from an economic point of view, be characterised as merely an element in a larger single complex supply and receive the tax treatment appropriate to that larger single supply taken as a whole; and (b) the UK Parliament had so legislated in section 29A and Group 1, Schedule 7A of the VAT Act.

29. That conclusion is expressed in paragraphs 94 and 95 of the FTT Decision in rather broad terms, considerably confining the *CPP* line and implicitly asserting a broader application instead of the *French Undertakers* case, as follows:

> "94. Cases where a Member State has legislated that a reduced rate of VAT will apply to a supply of goods or services which would be merely an element in a larger single complex supply (if the *CPP* jurisprudence were to be

applied) are cases where the *CPP* jurisprudence is inappropriate to determine the scope and substance of the supplies made for VAT purposes and the rate(s) of VAT which they respectively attract.

95. Section 29A and Group 1, Schedule 7A, VATA constitute a case within the immediately preceding paragraph."

Grounds of appeal

30. Pursuant to Rule 39 of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009, HMRC applied for permission to appeal.

31. Permission to appeal to the Upper Tribunal was granted by Judge John Walters QC on 19 April 2013 for the following reasons:

> "…there appears to be a conflict between the approach of the First-tier Tribunal in this appeal and the approach to the same (or a very similar) issue of the First-tier Tribunal in *WM Morrison Supermarkets v HMRC* [2012] UKFTT 366 (TC) and it will be convenient and desirable for the UT to provide authoritative guidance."

32. HMRC's grounds of appeal (dated 16 May 2013, and which essentially repeat the arguments on which permission to appeal was granted) contend that the FTT's conclusions in paragraphs 94 and 95 of its Decision could not be maintained, and identified three errors of law in the FTT's approach and conclusions:

(1) First, HMRC contend that the FTT was wrong to conclude that this was a case to which the *CPP* line did not apply, and had misunderstood the *French Undertakers* case. More particularly, HMRC contend that the FTT failed to distinguish between (a) the court determining which elements within a *category* of supply (such as burial and cremation services) may properly be treated by Member States as attracting a reduced rate, thus giving an express differential rating to different elements of a category of taxable supply (the issue in the *French Undertakers* case) and (b) whether or not, on a case-by-case basis, an element of an economically indivisible transaction should be artificially split into constituent parts with different rates of VAT being applied to different parts (the approach prohibited by the *CPP* line).

(2) Secondly, HMRC contend that the FTT erred in construing the UK's national legislation in question as enabling the application of a reduced rate to goods or services regardless of whether such goods were provided separately or as part of a single complex supply. HMRC submit that there is no provision of UK national legislation which could sensibly be interpreted as having that effect.

(3) Thirdly, HMRC contend that the FTT erred in concluding that the principle of fiscal neutrality would still be observed by 'carving out' a reduced rate for elements of a single complex supply, and failed in the process to take into account that if the *French Undertakers* case 'trumped' the *CPP* line, then in every case where some element of a single complex supply could conceivably attract the reduced rate, it would be argued that that element should be taxed at a different rate, and the *CPP* line (which is founded on the principle of fiscal neutrality) would seldom if ever fall to be applied at all. HMRC also submit that if the FTT was right, cases such as the decision of the House of Lords in *College of Estate Management v HMRC* [2005] UKHL 62 applying the *CPP* line would have to be considered to have been wrongly decided, given that in that case the supply of written materials and education was held to be a single supply of education services and the supply of books (which as a separate supply would be zero-rated) as an element of that single complex supply was not regarded as benefiting from the zero rate.

The Decision of the UT in the WM Morrison case

33. Not long after HMRC had submitted its grounds of appeal, the decision of the Upper Tribunal in *WM Morrison Supermarkets v HMRC* (*supra*, "the *WM Morrison* case") was promulgated by Vos J (as he then was) on 23 May 2013. He considered both the *CPP* line and the analysis in the *French Undertakers* case, and in doing so also referred expressly to the FTT's decision in this case.

34. At paragraphs 66 to 68 of his Decision in the *WM Morrison* case Vos J said this:

> "66. In Colaingrove, the FTT asked itself whether UK legislation had in fact provided for the reduced rate to apply to the 'concrete and specific' element of the supply of domestic fuel. But it never actually answered that question. Had it done so, it would have concluded that UK legislation had not done so, because there was no specific legislative provision providing that the domestic fuel element of caravan rentals should be charged at a reduced rate. There was only the general provision for domestic fuel to be at a reduced rate. Since the decision is

under appeal, I shall not comment on whether the argument that VATA 1994 contained "*indications that Parliament intended the reduced rate of VAT to apply to the 'concrete and specific'*" fuel element in the supply was sufficient to support the decision. But I can say that I do not accept the correctness of the wholly general statement at paragraph 94 to the effect that "*[c]ases where a Member State has legislated that a reduced rate of VAT will apply to a supply of goods or services which would be merely an element in a larger single complex supply (if the CPP jurisprudence were to be applied) are cases where the CPP jurisprudence is inappropriate to determine the scope and substance of the supplies made for VAT purposes and the rate(s) of VAT which they respectively attract"*.

67. In my judgment, the CPP analysis will always be applicable to ascertain whether there is a single or multiple supply, but as Lord Mance pointed out in Mauritius Revenue Authority: "*[t]he power to exempt or attach a lower VAT rate to what would otherwise fall to be treated as a single service [under the CPP test] can … attach to a "concrete and specific aspect" of such a service"*.

68. With that introduction, I return to the basic question, which is when the French Undertakers' analysis is properly to be employed. In my judgment, it is only when the domestic legislation seeks to restrict the application of a reduced rate of VAT. It is then appropriate to ask whether the restriction in question is in respect of a "concrete and specific aspect" of the supply. If it is, it will not matter that the whole supply would have been regarded as a single supply by the application of a CPP analysis. The French Undertakers test has not 'trumped' the CPP test in any meaningful sense. All that has happened is that a different question has been asked and answered. In the very specific situation where the Member State has legislated within the limits permitted by Annex III, or Articles 102 or 110 to restrict the application of a reduced rate in some way, the French Undertakers' test is applied to see whether such a restriction is permissible. *[RH note ie to only part of a category of supply within Annex III]* If it is, then the reduced rate will apply as the legislation envisages. If not, it will not.

69. I think there is something to be said for Mr Chapman's complex flowchart analysis set out above, but I am not sure that it caters for all the possibilities or that it is, as one might say, watertight. It is not necessary to approve it for the purposes of this appeal, which has raised only one very simple question.

70. In my judgment, the FTT was right when it said: "*CPP is concerned with defining the nature of transactions for VAT purposes*", and French Republic is "*concerned with whether Member States can identify specific aspects of what would otherwise be a single supply and treat them as falling inside or outside an exemption or reduced rate*". The FTT reached the correct conclusion because "*[i]n the present circumstances the UK domestic legislation does not seek to carve out the charcoal element of the supply so as to subject it to a reduced rate*". Moreover it was insightful to say that "*[i]t is not open to a taxpayer to carve out an element of what would otherwise be treated as a single supply in order to apply a reduced rate to that element of the supply*", and that HMRC "*are simply seeking to apply Schedule 7A which on its terms has no application to the supply of a disposable barbecue*".

71. Whilst it is true that Talacre held that the scope of the reduced rate could not be extended by the use of a CPP analysis (as suggested by Mr Scorey's 6th point), it does not follow that a reduced rate that a Member State has made applicable to one type of supply must be respected, even if it has been decided upon for socio-economic reasons, whether or not that supply is to be properly regarded as only a constituent part of a single supply for VAT purposes on a CPP analysis. The reasoning confuses the obvious importance of Member States being able to decide for socio-economic reasons, and within the limits of the Principal VAT Directive and EU law which supplies should be at a reduced rate, and the technical rules that decide whether those rules are effective. The French Undertakers test is simply there to decide if a limitation imposed by the Member State is effective; it will only be so, as a matter of EU law, if it carves out a "*concrete and specific aspect*" of the supply. The CPP test will always, subject to the provisos in that case itself, be used to decide the character of a supply – whether it is properly to be regarded under EU law as a single or multiple supply."

35. Vos J's observations and conclusions in his Decision in the *WM Morrison* case, rejecting paragraphs 94 and 95 of the FTT's Decision in this case, appeared to validate HMRC's position and grounds of appeal. The rationale of Vos J's Decision, to the effect that the *CPP* line is overriding, and the *French Undertakers* case can only have any application where the national legislation makes specific provision for a reduced rate to apply to a concrete and specific element of a specified category of a complex supply, obviously runs against the decision below in this case.

36. There has been no appeal from Vos J's Decision, which, though not technically binding upon me, is obviously highly persuasive. The decision has since been followed in a number of FTT decisions (including *AN Checker Heating & Service Engineers v HMRC* [2013] UKFTT 506 (TC) ("*AN Checker*") and *Envoygate (Installations) Limited and Richvale Limited v HMRC* [2014] UKFTT 221 (TC)).

37. Indeed, in the light of the UT's Decision in the *WM Morrison* case, Colaingrove made an application for leap-frog to the Court of Appeal on the basis that Vos J's views were "indicative of the approach likely to be taken by the UT in any further consideration of the test arising from the [*French Undertakers* case]". However, in the context of doubts as to the jurisdiction to grant a leap-frog, that application was withdrawn on 29 July 2013.

Confined scope of appeal

38. In this appeal, Colaingrove seeks to embrace and build upon Vos J's acceptance of the existence of a Member State's discretion to provide for a reduced rate to apply to the supply of electricity as a 'concrete and specific' element in a larger and otherwise standard-rated transaction. Colaingrove no longer contends for the broad position sustained in the FTT to the effect that the *CPP* line is 'trumped' by the *French Undertakers* case. It confines itself on this appeal to the contention that UK domestic legislation, on its true construction, does indeed provide for a reduced rate to apply to the supply of electricity where that supply forms a concrete and separate part of a wider supply.

39. Thus, in paragraph 1 of its Summary of Argument on appeal, Mr Cordara QC, Counsel for Colaingrove, summarised the ambit of the appeal and Colaingrove's revised position on it as follows:

> "This case turns on the true construction of a provision of a UK statute, namely Sched 7A, Grp 1 of the VAT Act 1994. That is the only statutory source of rights on which Colaingrove can rely, and equally the only battleground on which the Crown

could hope to win. The ultimate question for decision is whether Parliament has exercised its undoubted discretion to tax supplies of electricity at a reduced rate, where they form a concrete and specific part of a wider supply (be that a dominant supply (in the *CPP* sense) or a fused single supply (in the *Levob* sense[2]). If it has done so, on the proper construction of Sched. 7A, Grp 1, then the appeal will fail."

40. Accordingly, both sides are at one that the determination of this appeal depends upon the true construction of the domestic legislation, set (of course) in the context of the European legislation permitting Member States, by way of derogation from the general principle that a standard rate should apply across the EU, to apply reduced rates to goods and services that were previously zero-rated, and having regard to the principle of fiscal neutrality and the concern not to endanger the functioning of the pan-European VAT system.

Relevant legislation

41. It is thus of prime importance in the determination of the real issue in this case to focus closely on the terms of the relevant legislative provisions, and especially section 29A and Group 1, Schedule 7A to the VAT Act.

42. However, before doing so, I think it is important to bring out certain important features of the Community/EC legislation, and the extent of the derogation permissible from the general principle established by EC Council Directive 1977/388 ("the Sixth Directive") and now EC Council Directive 2006/112 ("the Principal VAT Directive") that in all Member States VAT is to be levied on all goods or services supplied for consideration by a taxable person.

43. First, the provisions of the Sixth Directive in article 28(2) and now article 113 of the Principal VAT Directive, authorising Member States, subject to certain conditions, to adopt particular exemptions or derogations from the general principle, are to be interpreted strictly (see the *Talacre Beach* case cited at para 23(2) above and *EC Commission v France* (Case C-384/01) [2003] ECR 1-4395).

44. Secondly, and as an aspect of the requirement of strict interpretation, and of consistency with the principle of fiscal neutrality inherent in the common system of VAT, any exception or exemption must be limited to a category of supply in respect of which derogation is permitted by the Directives (whether

[2] *Levob Verzekeringen & OV Bank NV v Staatssecretaris van Finacien* [2005] EUECJ C-41/04

in Annex III or Articles 102, 110 or 113), or a separately identifiable, 'concrete and specific' aspect of such supply: and see *EC Commission v France* (*supra,* at para 28) and also *The French Undertakers case* (at para 30).

45. Thirdly, and following in turn from that limitation, it is always necessary to identify what is the permissible category of supply in issue, and in that context to determine whether, for tax purposes, the taxable person is supplying the customer with (a) a single supply or (b) two or more distinct supplies.

46. Fourthly, for the purpose of that determination, a supply comprised of two or more elements is to be treated as a single supply where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal (or dominant) supply (see para 30 of the *CPP* case). There will also be a single supply where there are two or more elements supplied by the taxable person but they are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (see para 22 of *Levob Verzekeringen BV and Ovo Bank NV v Staatssecretaris van Financien* [2005] EUECJ C-41/04).

47. Fifthly, and whether the single supply with multiple elements is of a *CPP* ('dominant supply') type or a *Levob* ('fusion') type, it is necessary to determine whether there is some 'concrete and specific' element of that single supply (being a supply in a category which may be liable to exemption or exception) which, with sufficient specificity, has been identified by the relevant national legislation as attracting a lower rate of VAT, notwithstanding that under that legislation the supply as a whole attracts the standard or normal rate.

48. What therefore is in issue is the true meaning of the exemptions or exceptions as enacted in the UK's national legislation and (according to the nature of the exemption or exception) whether it falls within the ambit of the derogation permitted by the Community/EU law.

49. The Community law authorising the relevant exceptions (as at 1999) was contained in article 12.3(b) of the Sixth VAT Directive, as follows:

> "Member States may apply a reduced rate to supplies of natural gas, electricity and district heating provided that no risk of distortion of competition arises. A Member State intending to apply such a rate must inform the Commission before doing so. The Commission shall give a decision on the existence of a risk of distortion of competition. If the Commission has not taken the decision within three months of the receipt of the

information a risk of distortion of competition is deemed not to exist."

50. With effect from 15 January 2010, the applicable EU law provision has been either article 102 or article 113 of the Principal VAT Directive (it being, as I understood it, common ground that either provision could apply in this particular case). Article 102 provides as follows:

> "Article 102: After consultation of the VAT Committee, each Member State may apply a reduced rate to the supply of natural gas, electricity or district…"

51. Article 113 provides:

> "Member States which, at 1 January 1991, in accordance with Community law, 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, in respect of goods and services other than those specified in Annex III, may apply the reduced rate, or one of the two reduced rates, provided for in Article 98…"

52. Turning to the UK's national legislation, with effect from 1 November 2001, section 29A of the VAT Act has relevantly provided as follows:

> "(1) VAT charged on–
>
> (a) any supply that is of a description for the time being specified in Schedule 7A
>
> …
>
> shall be charged at the rate of 5 per cent.
>
> …
>
> (3) The Treasury may by order vary Schedule 7A by adding to or deleting from it any description of supply or by varying any description of supply for the time being specified in it.
>
> (4) The power to vary Schedule 7A conferred by subsection (3) above may be exercised so as to describe a supply of goods or services by reference to matters unrelated to the characteristics of the goods or services themselves. In the case of a supply of goods [and by

paragraph 3 of Schedule 4, VATA, the supply of any form of power, heat, refrigeration or ventilation is a supply of goods], those matters include, in particular, the use that has been made of the goods."

53. Also with effect from 1 November 2001, Schedule 7A of the VAT Act has relevantly provided as follows:

"**Group 1: Supplies of domestic fuel or power**

Item 1

Supplies for qualifying use of–

(a) Coal, coke or other solid substances held out for sale solely as fuel;

(b) Coal gas, water gas, producer gases or similar gases;

(c) Petroleum gases, or other gaseous hydrocarbons, whether in a gaseous or liquid state;

(d) Fuel oil, gas oil or kerosene; or

(e) Electricity, heat or air-conditioning.

…

Note 3: Meaning of 'qualifying use'

In this Group "qualifying use" means–

(a) Domestic use; or

(b) Use by a charity otherwise than in the course of furtherance of a business.

…

Note 4: Supplies only partly for qualifying use

For the purposes of this Group, where there is a supply of goods partly for qualifying use and partly not–

(a) if at least 60 per cent. of the goods are supplied for a qualifying use, the whole supply shall be treated as a supply for a qualifying use; and

(b) in any other case, an appointment shall be made, to determine the extent to which the supply is a supply for a qualifying use.

Note 5: Supplies deemed to be for domestic use

For the purposes of this Group the following supplies are always for domestic use–

…

(c) a supply to a person at any premises of piped gas (that is, gas within item 1(b), or petroleum gas in a gaseous state, provided through pipes) where the gas (together with any other piped gas provided to him at the premises by the same supplier) was not provided at a rate exceeding 150 therms a month or, if the supplier charges for the gas by reference to the number of kilowatt hours supplied, 4397 kilowatt hours per month;

…

(g) a supply of electricity to a person at any premises where the electricity (together with any other electricity provided to him at the premises by the same supplier) was not provided at a rate exceeding 1000 kilowatt hours a month.

Note 6: Other supplies that are for domestic use

For the purposes of this Group supplies not within paragraph 5 are for domestic use if and only if the goods supplied are for use in–

(a) a building, or part of a building, that consists of a dwelling or number of dwellings;

(b) a building, or part of a building, used for a relevant residential purpose [item 7 contains a definition of 'use for a relevant residential purpose' which is not directly relevant to the appeal];

(c) self-catering holiday accommodation;

(d) a caravan; or

(e) a houseboat."

The issue more closely defined

54. The essential issue can for present purposes be summarised as being whether on its true interpretation the UK statutory provision in question, Schedule 7A, Group 1 of the VAT Act, demonstrates Parliament's intention to tax the supply of power at a reduced rate of VAT, even if from an objective economic point of view it is part of a larger supply transaction (the provision of serviced holiday accommodation) which is otherwise to be taxed at the standard rate.

55. As emphasised by Mr Jeremy Hyam, Counsel for HMRC, and as is clear from the *WM Morrison* case, it is important to distinguish between, on the one hand, (a) whether there is express statutory provision for differential rating of different elements of a category of taxable supply, and if so, whether that is a permissible provision (essentially the question in the *French Undertakers* case) and, on the other hand, (b) what factors must be taken into account in determining whether or not a supply with different elements is to be treated as a single complex supply (addressed in the *CPP* case and the *Levob* case). The focus in this case is on (a).

56. The distinction between the questions, as highlighted in the *WM Morrison* case, is supported by the decision of the ECJ in *Purple Parking*. The ECJ stated as follows at paragraph 40 of that decision:

> "Furthermore, as regards the importance of the judgment in Case C-94/09 [the *French Undertakers* case]…it follows from paragraphs 25 to 29 and 31 to 34 of that judgment that it concerns the possibility for a Member State to apply, in a selective manner, on the basis of general and objective criteria, a reduced rate of VAT to certain aspects of a category of supplies that is listed in the Sixth Directive and, accordingly, concerns a different question from that raised by the first and second questions referred for a preliminary ruling[3]. Indeed, the sole purpose of the latter is whether two services constitute, in the light of the specific circumstances of their supply at issue in the main proceedings, a single supply."

57. The distinction is, of course, also that stressed by Vos J in the *WM Morrison* case, and which he suggested had not been recognised by the FTT in this case, leading to its failure (as he saw it) to answer the real question (question (a)).

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[3] The questions were: *"(1) What particular factors does the referring court have to take into account when deciding whether, in circumstances such as the present case, a taxable person is providing a single taxable supply of parking services or two separate supplies, one of parking and one of transport of passengers"* and *"(2) When the referring court is considering whether or not there is a single indivisible economic supply…what account should it take of the principle of fiscal neutrality?"*

58. It is instructive to consider how the FTT did approach the matter, both in order to determine whether it did address the relevant question and in assessing the consistency of its answer with the scope of the permissible derogation.

59. Having first been persuaded, by reference to the *French Undertakers* case, that the 'concrete and specific element' of a single supply could permissibly be subject to a different VAT rate than that applicable to that single supply (see paragraphs 61 and 64), in paragraph 65 of its decision the FTT posed the question as follows:

> "…the issue for our decision on this aspect of the case is whether the United Kingdom legislation has in fact provided for the reduced rate of VAT to apply to the 'concrete and specific' element (which consists of domestic fuel or power within Group 1 of Schedule 7A VATA) of a larger supply which falls to be characterised as something else – in this case, serviced holiday accommodation."

60. Then, having persuaded itself that the *CPP* line did not give "exhaustive guidance on the question of the extent of a transaction" (see paragraph 67) and that the *CPP* line would not apply if the domestic legislation "indicated an intention that the *CPP* jurisdiction should not apply" (see paragraph 68), it accepted (see paragraphs 70 to 71) the submission of Mr Cordara QC (for Colaingrove) that the relevant provisions of the UK's national law (in the VAT Act)

> "all contain indications that Parliament intended the reduced rate of VAT to apply to the 'concrete and specific' element (consisting of domestic fuel or power within Group 1 of Schedule 7A VATA) of a larger supply which (if the *CPP* jurisdiction were applicable to it) would fall to be characterised as something else."

61. In paragraph 73 of its Decision, the FTT then added that they also agreed with Mr Cordara that

> "the supply of power [in] relation to which a reduced rate is authorised by Group 1 of Schedule 7A VATA is, if it is an element of transaction which would be analysed as a larger single complex supply not being a supply of power (were the *CPP* jurisdiction to be applicable to it) capable of being a concrete and specific aspect of a larger single of the larger single complex supply and is, on the facts of this case, a concrete and specific aspect of the transactions entered into by Colaingrove with Sun Holiday customers."

62. Lastly, the FTT agreed with Mr Cordara (see paragraph 74), on the basis that all supplies of electricity in whatever package should be treated similarly, that

> "…on the evidence before us, the principle of fiscal neutrality is observed if the reduced rate is applied to the supplies of power in issue and that no distortion of competition results."

63. To my mind, these extracts demonstrate that the FTT in this case did confront the question, but from a rather different perspective than Vos J's.

64. The FTT's perspective was that the provisions of national law demonstrated Parliament's intention (a) to apply reduced rates to power for domestic consumption in whatever package the supplies might be wrapped, provided only that the supply was capable of being a concrete and specific element within the package and (b) if that proviso was fulfilled, not to apply the *CPP* line (which determines the nature of all elements within a single complex supply according to the nature of that single complex supply) but instead to treat the relevant element of the overall supply as, in effect, having its own self-standing identity.

65. Vos J's perspective, on the other hand, is that the *CPP* line always applies to determine the nature of a supply made up of different elements, and that the starting point is the determination of what constitutes the overall supply. Once the nature of that overall supply has been identified, what has to be found is express statutory warrant for attributing a reduced rate to a particular element, notwithstanding that the single complex or fused supply of which it forms a subsidiary element attracts the normal rate. For Vos J, the question is whether the statute has identified the supply of electricity to be separately rated as such, even if the supply is part of a particular single complex supply attracting the normal rate.

66. To some extent, I suspect this is an issue as to how specific the language of the statute has to be; and it is plain that Vos J had, at least, reservations in this regard, though he stepped back from actually so pronouncing in this case (not being the case before him and being subject to this appeal).

67. However that may be, the question posed in paragraph [54], whether or not answered before, falls now to be answered. Does the language of the relevant statutory provisions have to be, and if so is it permissibly, such as to spell out that the relevant supply of power is to attract the reduced rate even if it is provided as part of a wider supply, in this case of serviced holiday accommodation (in a caravan) which attracts VAT at the normal rate?

Competing contentions on appeal on the issue of construction

68. Mr Hyam submitted that only language spelling out that the reduced rate of VAT applicable to stand-alone supplies of electricity for domestic purposes is also to be applied where the provision of and charge for electricity are part of another overarching supply which is not a supply of domestic fuel, would suffice; and that the statutory language simply does not spell that out.

69. His elaboration of this can, I hope accurately, be summarised as follows:

(1) The starting point is to determine the nature of the 'supply'. This requires determination, first, whether the supply is a stand-alone supply or part of a complex supply.

(2) If the supply is a stand-alone supply, it will be taxed at the rate applicable to supplies in that category. In the case of a supply which forms an ancillary element of a wider supply (as in the *CPP* case itself), or where two or more elements of a supply are so closely linked in form as objectively to constitute a single indivisible economic supply (as in the *Levob* case), it is the nature of that wider supply or single economically indivisible supply which determines the character of the entire supply as a whole.

(3) Subject to (4) below, the *CPP* line (as extended in *Levob*) inexorably requires that all elements should be treated as a single supply and that the nature and tax treatment of that complex single supply must be determined according to an overall view of the essential purpose (objectively assessed) of the transaction without "over-zealous dissection of its components" (see *Card Protection Plan* itself on its return to the House of Lords, [2002] 1 AC 202). The rationale is simple and of fundamental importance: splitting transactions artificially or excessively could endanger the functioning of the VAT system.

(4) National derogations from the general principle are permitted, but limited. It must be shown both that (a) within the complex single supply there can be identified a 'concrete and specific' element, and that (b) national law permissibly provides for that element to be taxed at a rate different to that applicable to the complex single or 'wider' supply of which it forms part. Any such provision of national law must be clear and specific, and will be restrictively construed, again because that is necessary lest derogations undermine the VAT system.

(5) In this case, there is no provision of the UK's national legislation which specifically provides that the reduced rate of VAT applicable to stand-alone supplies of domestic electricity is applicable also if the provision of and charge for electricity are part of a wider supply. Unlike the French legislation relating to supplies by undertakers, for example, the VAT Act does not expressly identify a single composite supply and constituent elements within it which are to attract a reduced (or zero) rate of VAT (*cf* the *French Undertakers* case). Only such specificity will suffice.

(6) On that footing, a further question whether such a provision of national law is permissible if the wider supply is not one to which the Directive would allow the reduced rate to apply as a whole does not arise.

70. Mr Cordara dismissed the conclusion pressed by HMRC as "close to being absurd". He argued that "no social, political or economic purpose can possibly be served by an outcome in line with the Crown's contentions". He urged a purposive approach and conjured up an image of two caravans, both with their lights on, but the one with the *Sun* Holiday customer being treated by supposed reference to the *CPP* line as "not in fact receiving a supply of electricity at all (for 'fiscal' purposes)."

71. He put forward an analysis with a number of steps, all premised upon it being both legitimate and necessary to interpret the national legislation by reference to its true purpose. He criticised the illogical consequences of HMRC's approach, and submitted that they had made "no attempt, either to explain its case purposively or with reference to the differing treatment of final consumers to which it would lead".

72. Again, I hope accurately, I can summarise Mr Cordara's elaboration of these contentions as follows:

(1) Taxing statutes are to be construed purposively (he cited *IRC v McGuckian* [1997] 1 WLR 991 at 999H-1000B): this requires the identification of the likely purpose(s) of the legislation in question with a view to construing it to achieve the purpose identified.

(2) There is a difference between a strict construction (such that if the court is in doubt whether a fair interpretation of the words of an exemption covers the supplies in question, it should reject that claim for exemption) and a restricted construction (requiring the provision to be given the narrowest semantically available ambit to the words); and at all times "the task of the court is to give the words a meaning which they can fairly properly bear in the context in which they are used" (see *Expert*

Witness Institute v Customs and Excise Commissioners [2001] EWCA Civ 1882, [2002] STC 42 at [16 to [19]). Further, if applicable at all, the requirement of strict construction is attenuated in a reduced rate case as distinct from a zero-rate case (which involves exemption).

(3) The *Talacre* case is of central importance. Prior to it (and, for example, in cases such as *College of Estate Management v HMRC* [2005] UKHL 62), it was assumed that a complex single supply could not attract two different rates of VAT. There can be no doubt after the decision of the ECJ in the *Talacre* case that a national legislature may, by way of derogation from the general principle of a uniform normal rate of VAT, exempt or attach a lower VAT rate to a 'concrete and specific' aspect of what would otherwise fall to be treated by application of the *CPP* line as a single service: and see *Director General, Mauritius Revenue Authority v Central Water Authority* [2013] UKPC 4, [2013] STC 1538, especially *per* Lord Mance at [26].

(4) The intention of Parliament and the purpose of Schedule 7A of the VAT Act so far as it applies to the provision of electricity were to ensure that all charges for electricity for domestic use should attract VAT at a reduced rate, without differentiation as to the package of the supply, and (in particular) without regard to whether the charge for electricity was part of or ancillary to another supply.

(5) The word 'supply' is not a term of art and has no autonomous meaning for the purposes of the relevant EU legislation: it is an ordinary English word which has no special meaning. It does not connote a stand-alone supply nor does it exclude a compound supply; it does not exclude a supply which is one element of a wider supply. It captures the making available of electricity for domestic use.

(6) In any event, the emphasis in Schedule 7A is not on the supplier or the supply, but on the use made of the supply and the characteristics of the use (the reduced rate being restricted to 'domestic use'). Factual use is to be determined according to whether 'the lights are on'; factual use connotes supply; and whether the factual use is for 'domestic use' depends upon the supply to a qualifying place as listed in paragraphs 5 and/or 6 of Group 1 of Schedule 7A.

(7) As those lists demonstrate, domestic use is not confined to the home: it extends expressly to supply for use in, for example, self-catering holiday accommodation or a caravan (see paragraph 6(c) and (d) of Group 1 of Schedule 7A).

(8) Furthermore, in the case of self-catering accommodation (including in a caravan), it is unlikely that Parliament can have expected the user to set up (or even be able to set up) arrangements for a self-standing supply with an electricity supplier for such temporary use; almost inevitably the supply will be part of a package of arrangements with the supplier of the accommodation.

(9) Any suggestion that to qualify as a supply for domestic use the supply must be optional and metered is misplaced. In that context, HMRC's practice of accepting that metered supplies to a caravan qualify for the reduced rate, even where both caravan and electricity come from the same source, is welcome, but illogical. All that is required for the purpose of establishing a separately identifiable or 'concrete and specific' element of supply within a wider complex supply is an identifiably separate charge, however calibrated.

(10) More generally, the plain intention of Parliament was to provide, as it was permitted to provide, for the application of a reduced rate to all electricity provided to and used for domestic purposes (as defined); electricity, in modern life, is like 'the air we breathe' and a reduced rate of VAT on its supply for domestic use is in furtherance of a clear and understandable social purpose. It cannot sensibly have been Parliament's intention to expose to the higher ordinary rate supplies of electricity capable of being separately identified simply because they were unmetered and unmeasured.

My analysis

73. These competing contentions were concisely and powerfully made: and I have not found the case an easy one, notwithstanding Vos J's observations in *WM Morrison.* I turn to my own assessment and determination of the issue, starting with a more detailed consideration of *WM Morrison* and the cases in the FTT I have mentioned which were decided after the FTT's decision in this case.

74. I first return to *WM Morrison*, which at one stage HMRC depicted as indistinguishable from this case. I do not entirely agree with that depiction; but plainly Vos J's analysis, especially of the ambit of the three CJEU cases at the heart of that case and this, namely, *CPP*, the *French Undertakers* case and the *Talacre* case, is of particular importance.

75. As may already be apparent from the parts of Vos J's decision that I have already quoted (see paragraph [34] above), his central conclusions were that:

(1) The *CPP* analysis will always be applicable to determine whether there is a single or multiple supply (see paragraph 71).

(2) The *French Undertakers* case applies only "where the domestic legislation seeks to restrict the application of a reduced rate of VAT" (see paragraph 68): it is only there to decide if a limitation on a reduced or zero rate is effective, and is thus of narrow application (see paragraph 710).

(3) There is no tension or inconsistency between those two cases, still less has *French Undertakers* 'trumped' the *CPP* line in any meaningful way (see paragraph 68).

(4) The *Talacre* case was simplicity itself (see paragraph 62) and took the issue no further. It simply gave effect to a specific provision of UK domestic legislation stipulating that caravans, but not the fittings within them, were zero-rated. To that end, it clarified that the *CPP* line could not be used to gain an advantage for the taxpayer to extend the restricted exception for caravans to include their contents on the basis that the dominant supply was of caravans: it thereby simply observed and gave effect to the express limitation in the UK statute (see paragraph 62), just as in the *French Undertakers* case the ECJ clarified that the *CPP* line could not be used to override a legitimate restriction on zero-rating expressly imposed by French legislation.

(5) As to the actual issue for determination in the *WM Morrison* case, applying the *CPP* line, the charcoal sold with disposable barbecues was an ancillary element in a single supply; in the absence (as Vos J found there to be) of any express provision in the domestic statute expressly identifying "charcoal as part of disposable barbecues" as being worthy of a reduced rate, they did not attract one. That result, Vos J, stated, "is neither surprising nor undesirable, since disposable barbecues are leisure items, and are not likely to be used as a regular means of using solid fuel for domestic cooking, at which the exemption in Item 1(a) of Schedule 7A is obviously aimed" (see paragraph 73).

76. This fuller adumbration of Vos J's decision reveals, as it seems to me, rather more features distinguishing that case from this than the shorter extract previously quoted (and relied on by HMRC). In particular:

(1) It seems clear that Vos J's primary ground for concluding that the *French Undertakers* case had no application was that it was confined to the context of national legislation which restricted the application of a

reduced rate permitted under Annex III (see also paragraph 64 of his decision): I did not understand HMRC to adopt such a restrictive application in this case.

(2) It seems to me that the effort to treat charcoal as a concrete and specific element of a single package of a disposable barbecue sold together with charcoal is in economic and objective terms very strained. There is little reason to suppose that Parliament would have envisaged anything other than a separate supply of charcoal as attracting a reduced rate, and even less reason to suppose that, had it envisaged such a complex supply, Parliament would have intended the division up of the single economic package and the treatment of the charcoal as a concrete and specific element for VAT purposes.

(3) By contrast, the separate provision of electricity to a self-catering holiday accommodation or caravan, 'rented' quite possibly for a very limited time, is more problematic: unlike the separate sale of charcoal, the provision of electricity to serviced accommodation otherwise than as a package is much less easy, and yet Parliament expressly envisaged that the provision of electricity in such a context could attract the reduced rate

(4) As Vos J stated, the use of charcoal in a disposable barbecue is suggestive of a leisure activity (and disposable barbecues are nowhere mentioned as a qualifying use); whereas the uses of electricity in self-catering accommodation or in a caravan are expressly identified domestic uses.

(5) It may be putting the same point in a different way: but the use of charcoal in disposable barbecues is not like 'the air we breathe', unlike electricity in self-catering accommodation or (nowadays at least) a caravan.

77. I should also confess that I am not presently entirely persuaded by Vos J's confinement of the *French Undertakers* case and the decisions in and following *Talacre,* including *Finanzamt Oschatz v Zweckerbande zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien* (Case C-442/05) [2009] STC 1 and *Purple Parking*, as applicable only where the domestic legislation seeks to restrict the application of a reduced rate of VAT. I accept that, as Judge Nicholas Paines QC put it, sitting in the FTT in *AN Checker*, "all the CJEU cases were ones in which, at first sight at least, the wider supplies that were likely to be made were supplies that could, compatibly with the Directive, have been taxed entirely at the reduced rate" (see paragraph 32 of his decision). Like Judge Nicholas Paines QC, I do not

think it is clear or *acte clair* that a Member State may only apply a reduced rate to an element of a wider supply if the Directive would allow the reduced rate to apply to the whole.

78. However, that issue would only arise if on its true construction the VAT Act in relevant part does apply or purport to apply a reduced rate to an element of a wider supply, which wider supply would not itself attract a reduced rate.

79. Taking that to be the real question raised in this case, where is the mandate in the UK's national legislation for the application of a reduced rate of VAT to an element (the provision of electricity) of a composite or complex single supply (holiday accommodation in a caravan)?

80. In answering that question, I have found Judge Paines QC's decision in *AN Checker*, reached after, and thus with the benefit of, Vos J's decision in *WM Morrison* of more general assistance. In the *AN Checker* case, the issue was whether the supply of energy-saving materials, which, had it been self-standing, would have attracted the reduced rate, also attracted the reduced rate even when provided as part of a wider supply of installation of a boiler or a central heating system. The FTT decided it did not.

81. Judge Paines expressed "considerable sympathy" for Mr David Milne QC's arguments on behalf of the taxpayer that it seemed an odd choice for the Treasury and Parliament to continue to apply a reduced rate to fuel, but to circumscribe the reduced rate for environmentally beneficial energy-saving materials by restricting its operation to the minority of cases where they were supplied as a stand-alone supply, rather than in conjunction with a boiler or as components of a newly installed central heating system. However, he felt unable to accede to the taxpayer's submission for the following reasons (set out in paragraph 43 of the decision):

> "43. I have nevertheless found myself unable to accede to Mr Milne's submission, for the following reasons. The first is that it requires a departure from the clear literal meaning of the legislation. Both the former s 2(1A) and the current s 29A of the VAT Act refer to a reduced rate for a 'supply', and s 29A reinforces that with a requirement that the supply must be 'of a description' contained in Schedule 7A. To read the provisions as applying the reduced rate applied to elements within a supply would be to depart from the unambiguous meaning of the words used. I would need to be 'abundantly sure' that that was the result that was intended and that 'by inadvertence the draftsman and Parliament failed to give effect to that purpose': see *Inco Europe Ltd. v First Choice*

> *Distribution* [2000] 1 WLR 586 at 592. Mr Milne's thesis is that Parliament expected its legislation to achieve the results he contends for by virtue of the energy-saving materials being analysed as a separate supply. I am far from being abundantly sure that Parliament was misled by the state of the case-law on complex supplies into believing that the words used would achieve that result in that way.
>
> …
>
> 48. I am therefore compelled to reach the conclusion that when AN Checker installs energy-saving materials along with a replacement boiler or as part of the installation of a central heating system, it is making a standard-rated supply of which the energy-saving materials are elements. That conclusion must in my view follow whether AN Checker is itself installing an individual item, such as a thermostat, which falls within the definition of energy-saving materials or installing a larger item, such as a boiler, into which energy-saving materials such as insulation have been incorporated by its manufacturer. Even if I had concluded that the reference to 'installation of energy-saving materials' included such installation as part of a wider supply, I would not have concluded that the words were apt to cover installation of, say, a boiler in which energy-saving materials had been included by its manufacturer. Accordingly I decide the issue identified in the Tribunal's earlier Order as follows:
>
> > 'The supply of the installation of energy saving materials together with services of installation of a boiler or of a central hearing system is a single supply subject to a single rate of VAT at the standard rate.'"

82. This analysis conforms, of course, with Vos J's actual decision in *WM Morrison,* who upheld the FTT's decision rejecting an argument that the reduced rate fell to be applied to the charcoal in a disposable barbecue, saying it was:

> "…precisely because the domestic statute did not identify 'charcoal as part of disposable barbecues' as being worthy of a reduced rate that they do not attract one."

83. For reasons I have sought previously to adumbrate, *WM Morrison* appears to me an easier case on the facts than this. What makes this case difficult is that (a) there are indeed 'indications', as Mr Cordara submitted, that Parliament

might have had in mind a single complex supply of both accommodation (the dominant supply) and electricity (the ancillary but nevertheless 'concrete and specific' supply) and (b) the initial appeal of Mr Cordara's broader argument that it would be odd if Parliament really intended that a metered or measured supply to a caravan for domestic use should be treated as a 'supply' attracting a reduced rate, even though only an 'element' in the wider supply, but that the inclusion of electricity, without metering or measurement, as a separate element of an overall supply of holiday accommodation should not.

84. Put shortly, whereas in *WM Morrison* Vos J understandably concluded that the result was neither surprising nor undesirable, it is not easy to be so comforted in this case.

85. Indeed, and like the FTT in *AN Checker*, I should acknowledge that I have felt some sympathy for the taxpayer's position, and Mr Cordara's vivid submissions on Colaingrove's behalf as to the oddness in some ways of the result. To return to the scene he conjured up of two caravans, one occupied by a non-*Sun* holidaymaker with a meter, the other next door, occupied by a *Sun* holiday maker with no meter (having paid in advance), both with their lights blazing he posed a number of questions. Why should there be a difference? What purpose could Parliament be taken to have had in mind in giving a tax break only to consumers who got their supplies of electricity by means of a single supply, rather than by means of a mixed supply? On what logical basis might Parliament have considered that those who (as here) make an express arrangement to receive such electricity, for a separate price, payable in advance from the provider of the caravan, should not get the tax break, but those who do so from, say, an associated company of the caravan company, should do so? Why should the metering of supply make such a difference though the use was expressly deemed to be domestic?

86. These are telling questions in the particular context; and in the particular context, some of the answers might seem strained. However, it seems to me that, looked at objectively, it is not unsurprising that Parliament may have wanted to draw a distinction between provision of electricity for domestic use in a verifiable amount and a fixed charge irrespective of use or its amount. Parliament may have been wary of legislating for a reduced rate on an uncertainly quantified element.

87. Furthermore, and in any event, the construction of section 29A and Schedule 7A must be uniform, and consistent with the EU cases. In particular, a consistent approach and meaning to what constitutes a '*supply*' for the purposes of section 29A is required.

88. Despite the lucidity of Mr Cordara's arguments, and their initial appeal in general terms, I have eventually concluded that (as identified in *AN Checker)* the stumbling block is the combined effect of the *CPP* line and the provision (both in the former section 2(1A) and the current section 29A of the VAT Act) that a reduced rate of VAT may only be charged on a "supply that is of a description for the time being specified in Schedule 7A".

89. As to the *CPP* line, I have been persuaded by Vos J's exegesis of the cases in *WM Morrison* that neither the *French Undertakers* case nor the other CJEU cases he addressed (*French Republic*, *Talacre*, *Zweckverband* and *Purple Parking)* 'trump' or oust the *CPP* analysis. I agree that the two lines of cases concern different questions: the *CPP* line being concerned with "defining the nature of transactions for VAT purposes" consistently with the general principle of a uniform rate and the requirement of fiscal neutrality, the *French Undertakers* line being concerned whether and within what confines Member States can "identify specific aspects of what would otherwise be a single supply and treat them as falling inside or outside an exemption or reduced rate". I must therefore construe the provisions of the VAT Act consistently with the *CPP* line.

90. As to section 29A of the VAT Act, notwithstanding the attraction of Mr Cordara's submission that 'supply' has no special or autonomous meaning, and that the emphasis in item 5 of Schedule 7A on the domestic use of the electricity as being the qualifying characteristic attracting a reduced rate, it is still necessary to determine whether an element of what the *CPP* line requires to be treated as a single complex supply is itself a 'supply' within the meaning of the section.

91. I have been persuaded by the analysis in *AN Checker* that there is at least doubt that this was Parliament's intention, that the doubt is increased by the fact that Parliament should be taken as being aware of the distinction by then drawn in the cases between a supply and its component or ancillary elements, and that the benefit of such doubt as there may be must fall in favour of a strict interpretation.

92. Applying together the logic of the *CPP* line and the actual wording of section 29A of the VAT Act, the 'supply' (being, in line with the *CPP* case, the single complex supply of serviced accommodation) is not a supply specified in Schedule 7A, even though a supply of electricity to such accommodation is.

Conclusion

93. In short, I have concluded that section 29A of the VAT Act falls to be construed as applicable only to the single complex supply identified by application of the *CPP* line, and not to elements within that supply.

94. That is consistent with *WM Morrison*; and I note that the same view, following *AN Checker*, was adopted by the FTT in *Envoygate (Installations) Limited and another v HMRC* [2014] UKFTT 221 (TC).

95. On that basis, it follows that this appeal must be allowed.

96. I will deal with any consequential matters in the usual way.

MR JUSTICE HILDYARD

TRIBUNAL JUDGE

RELEASE DATE: 10 March 2015