[2014] UKUT 0446 (TCC)

Appeal number FTC/50/2013

VALUE ADDED TAX — local authorities — off-street parking — whether treatment as a non-taxable person would result in significant distortion of competition within Sixth VAT Directive art 4.5 — yes — no error of law in the findings of the FTT — appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

(1) ISLE OF WIGHT COUNCIL
(2) WEST BERKSHIRE COUNCIL
(3) MID-SUFFOLK DISTRICT COUNCIL
(4) SOUTH TYNESIDE METROPOLITAN BOROUGH COUNCIL **Appellants**

- and -

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

TRIBUNAL: MRS JUSTICE PROUDMAN DBE
JUDGE COLIN BISHOPP

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 10 and 11 April 2014

Julian Ghosh QC, Clive Sheldon QC, Jonathan Bremner and Edward Capewell, instructed by Rowel Genn, solicitors, for the Appellants
Alison Foster QC, Ben Rayment and Brendan McGurk, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. This case has a long history. The first of the decisions now relevant, of the then VAT and Duties Tribunal constituted of Mr Stephen Oliver QC and Mr Kenneth Goddard MBE, was given as long ago as 23 January 2006 ((2006) VAT Decision 19427), when the Tribunal allowed the appeals of the four appellant local authorities against HMRC's refusal to refund VAT for which they had previously accounted. HMRC appealed the decision to the Chancery Division and Rimer J (at [2007] EWHC 219 (Ch), [2008] STC 614) referred the matter to the European Court of Justice ("ECJ") to obtain answers to questions relating to the construction of article 4.5 of the Sixth Council Directive of 17 May 1977 (77/388/EEC) ("the Sixth Directive"). The Grand Chamber of the ECJ gave its answers in *Revenue and Customs Commissioners v Isle of Wight Council* (Case C-288/07) (reported at [2008] STC 2964) on 16 September 2008. The matter then reverted to the Chancery Division (Rimer LJ, as he was by then) which (at [2009] EWHC 592 (Ch), [2009] STC 1098) allowed HMRC's appeal and remitted the matter back to what had by then become the First-tier Tribunal ("the FTT"), "for the competition/Article 4.5.2 issues determined by the VAT Tribunal on 23 January 2006 to be reheard and determined in accordance with the judgment of the European Court of Justice in Case C-288/07".

2. There was then a directions hearing by the FTT, on this occasion Judges Sir Stephen Oliver QC and Nicholas Paines QC, resolving a dispute between the parties about what categories of evidence were admissible at the rehearing. They released their decision on 11 June 2011. In May 2012 the FTT, by a panel now consisting of Judges Oliver QC and Paines QC and Mr Philip Gillett FCA, re-heard the appeal and released its decision ([2012] UKFTT 648 (TC), reported at [2013] SFTD 442) on 12 October 2012. By that decision the FTT found in favour of HMRC. The FTT (Judges Oliver QC and Paines QC) refused permission to appeal to this Tribunal ("the UT") but permission was granted by Judge Bishopp in the UT in May 2013. That is the appeal now before us.

3. Claims had been made to HMRC by the appellants (and many other local authorities) in accordance with s 80 of the Value Added Tax Act 1994 for repayment of the VAT included in charges made by them to members of the public for off-street car parking. The claims related to the VAT for which the appellants had accounted since 1 January 1978. The issue before the FTT was whether they had been correct to charge and account for that VAT, an issue whose outcome depended upon whether each of the appellants was entitled to be treated as a non-taxable person in respect of its supplies of off-street parking. The answer to that question in turn depended upon whether non-taxation would lead to significant distortions of competition within the meaning of article 4.5, which was in these terms:

> "States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even

> when they collect dues, fees, contributions or payments in connection with these activities or transactions.
>
> However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of those activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.
>
> In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D … provided they are not carried out on such a small scale as to be negligible."

4. The article did not replace an earlier similar provision but introduced a new approach to supplies made by public bodies. Article 1 of the Sixth Directive provided that the new approach was to "enter into force" in the member states by no later than 1 January 1978. In fact, as is common ground, it has never been implemented by United Kingdom domestic legislation, but the judgments to which we have referred established, among other things, that it is to be treated as having effect in the UK as if it had been implemented. It is for that reason that the appellants' claims go back to 1 January 1978, but no further; and they accept that before then their supplies of off-street parking were taxable. The provisions of article 4.5 have been replaced, in substantially the same form, by article 13 of the Principal VAT Directive (2006/112/EC) but as the Sixth Directive was in force during the period with which we are concerned (1978 to 2001) we shall refer hereafter only to its terms.

5. It is, and we understand always has been, common ground that the appellants are bodies governed by public law, and that they are acting as public authorities in making supplies of off-street parking, since they make such supplies pursuant to a statutory duty to which we come below. It is undisputed, therefore, that the supplies with which we are concerned fall within the first paragraph of the article. It is the second paragraph (like others before us we shall refer to it as article 4.5.2) which is principally in issue.

6. The first matter to be considered is the interpretation to be placed on it. That was the subject of the three questions posed by Rimer J for answer by the ECJ, which were as follows (see [12] of the ECJ judgment):

> "1. Is the expression 'distortions of competition' to be ascertained on a public body by public body basis such that, in the context of the present case, it should be determined by reference to the area or areas where the particular body in question provides off-street parking or by reference to the totality of the national territory of the Member State?
>
> 2. What is meant by the expression 'would lead to'? In particular, what degree of probability or level of certainty is required for that condition to be satisfied?
>
> 3. What is meant by the word 'significant'? In particular, does 'significant' mean an effect on competition that is more than trivial or *de minimis*, a 'material' effect or an 'exceptional' effect?"

7. The ECJ answered the questions in the following way (see the end of its judgment):

> "1. … the significant distortions of competition … must be evaluated by reference to the activity in question, as such, without such evaluation relating to any local market in particular.
>
> 2. The expression 'would lead to' is, for the purposes of the second paragraph of art 4(5) of the Sixth Directive, to be interpreted as encompassing not only actual competition, but also potential competition, provided that the possibility of a private operator entering the relevant market is real, and not purely hypothetical.
>
> 3. The word 'significant' is … to be understood as meaning that the actual or potential distortions of competition must be more than negligible."

8. The appellants add the gloss that the risk of a significant distortion of competition must be realistic, relying for that proposition on observations of Advocate General Kokott in *Hutchison 3G UK Ltd v Customs and Excise Commissioners* (Case C-369/04) [2008] STC 218 at para 130. We do not think there can be any doubt that this argument is correct, but we do not detect a reason to think that the FTT based any of its conclusions on theoretical or fanciful, rather than real, possibilities.

9. We should mention that HMRC contended before Rimer LJ, when the matter returned to him, that the effect of article 4.5, read in the light of what the ECJ had said in answer to the referred questions, amounted to a statement that there was a presumption of law that differential tax treatment of supplies of off-street parking made by local authorities and commercial operators would lead to more than negligible distortions of competition. Rimer LJ rejected that proposition. The same argument was, nevertheless, advanced before the FTT, upon the basis that the later judgment of the ECJ in *Revenue and Customs Commissioners v Rank Group plc* (Joined Cases C-259/10 and C-260/10) [2012] STC 23), when read with what the court had said in the *Isle of Wight* judgment, showed that there was indeed such a presumption. Although the FTT accepted, at [31], that it was "likely that the court did take it for granted that differential tax treatment would distort competition in the off-street car parking market", it rejected again, and consistently with what Rimer LJ said when remitting the case for rehearing, the argument that what the court said gave rise to a presumption of law. Rather, it considered that any presumption there might be would be a presumption of fact; and it is a clear inference that the FTT took the view that if there should be such a presumption, it was rebuttable. Indeed, there would have been no purpose to its examination of the extensive evidence before it had it thought otherwise. HMRC have not renewed their earlier argument before us, and we are content to proceed from the assumption that the FTT's analysis is correct.

The FTT's decision

10. After disposing of that argument, and of some other preliminary points of no immediate relevance, the FTT proceeded to discuss the approach it should adopt in deciding the issue of fact before it, and in our view did so with great care. At [36] it set out a passage from the skeleton argument the appellants produced for that hearing:

> "the question is not how local authorities might respond to a 'change' in the VAT treatment. Thus the Tribunal is not asked to assess the reaction of local authorities to a situation where in year 1 local authorities are treated as taxable persons in relation to supplies of off-street car parking for VAT purposes but in year 2 it is decided that they should not be so treated. Rather, the comparison is between a world where local authorities are treated as taxable persons in relation to supplies of off-street car parking for VAT purposes (on the one hand) and a world where they are not (on the other)."

11. At [37] the FTT said it agreed with that approach. It went on to add that although HMRC did not quarrel with the proposition in principle, they had suggested that the likely reaction to the removal of taxation from local authority charges could be taken as a helpful guide to what would have been the position had those charges never been subject to tax. The FTT said it also agreed with that suggestion, though it took care not to allow its perception of the probable reaction to a change in tax treatment to deflect it from answering the real question before it, namely whether a situation of (as distinct from change to) non-taxation of local authority supplies of off-street car parking would lead to distortion of competition. If the appellants are right there should, of course, have been such a change in 1978 when art 4.5.2 came into effect, but at [38] the FTT set out the reasons why it had concluded that by the time of the hearing before it the effects of the change would have long since disappeared. We agree with that conclusion, which was in any event not challenged.

12. At [42] the FTT summarised its perception of the task before it in this way:

> "… we consider that the question that art 4(5)(2) requires us to answer is whether, in the event that local authority off-street car parking were not taxable, there would be in the United Kingdom as a whole a degree of distortion of competition that could not be dismissed as negligible. In doing so we are simply to compare a situation in which the activity is non-taxable with the situation in which it is taxable. The question is in our view a question of fact; it is, however, a question of secondary or inferential fact to be judged on the basis of conclusions of primary fact."

13. Neither party disagrees with that formulation of the question, with the FTT's statement of the proper approach, or with its description of the question as one of fact.

14. The FTT recognised too that it was not required to consider only actual or potential price competition between local authorities and commercial providers of off-street parking, but also to have regard to the other consequences which differential tax treatment might have, in (for example) making it less likely that commercial providers would be attracted to the market, or in otherwise affecting the manner in which off-street car parking is made available to motorists.

15. After dealing with those points the FTT embarked, at [48], on an examination of the legal framework relating to the provision by local authorities of off-street parking. As the decision explains, there is extensive legislation regulating local authorities' activities in this respect. The principal enabling power is to be found in s 32(1) of the Road Traffic Regulation Act 1984 ("the RTRA") (replacing earlier provisions in similar terms):

"Where for the purpose of relieving or preventing congestion of traffic it appears to a local authority to be necessary to provide within their area suitable parking places for vehicles, the local authority … —

(a) may provide off-street parking places (whether above or below ground and whether or not consisting of or including buildings) together with means of entrance to and egress from them…."

16. Section 122 of the RTRA converts what s 32(1) permits into a duty in certain circumstances:

"(1) It shall be the duty of every local authority upon whom functions are conferred by or under this Act, so to exercise the functions conferred on them by this Act as (so far as practicable having regard to the matters specified in subsection (2) below) to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off the highway or, in Scotland, the road.

(2) The matters referred to in subsection (1) above as being specified in this subsection are—

(a) the desirability of securing and maintaining reasonable access to premises;

(b) the effect on the amenities of any locality affected …;

(c) the importance of facilitating the passage of public service vehicles and of securing the safety and convenience of persons using or desiring to use such vehicles; and

(d) any other matters appearing to the local authority to be relevant."

17. It is apparent from that wording that local authorities are not required to provide off-street parking themselves; they may instead rely for the discharge of their duty upon the existence of sufficient and appropriate commercial provision. However, the FTT found—and it seems it was not a matter of controversy—that local authorities do make extensive provision of off-street parking places, so much so that, taking the country as a whole, well over half of all such parking spaces are provided by local authorities. It was also uncontroversial that in the more rural areas, all or almost all of the available off-street parking spaces are provided by local authorities, largely because there is insufficient profit to be made from commercial provision while local authorities have a statutory obligation to make it available. By contrast, in towns and cities there is much greater provision by commercial operators. Some local authority spaces, particularly in rural areas, are free of charge to the motorist, as are some commercially provided spaces. The example given by the FTT was of rural and suburban railway stations, where spaces are provided free of charge as an element of a policy of encouraging motorists to use public transport to travel into the larger towns and cities.

18. Section 35 of the RTRA permits a local authority to make orders providing for charges to be levied for the use of their off-street parking spaces, and both that section and other provisions of the RTRA (some inserted after first enactment) allow for the variation from time to time of the charges so imposed. In fact, as the FTT recorded, charges may be imposed without a formal order, although penalty

charges may not be imposed if there is no order. It does not seem that there is any distinction to be drawn, for the purposes of this appeal, between charges imposed with or without an order; what are critical are the legislative constraints and the policy considerations which drive the setting by local authorities of the charges they impose. We shall deal with these factors in detail when we come to the appellants' arguments. Before moving on, however, we should mention that the FTT did not describe, and we were not referred to, any legislation regulating the provision of off-street parking by commercial operators which is relevant to the issues in this appeal. We assume therefore, as it seems did the FTT, and leaving to one side special considerations such as the railway station car parks we have mentioned, that a commercial provider has a free hand in determining its charges.

19. The FTT engaged in an exploration of the incidence of outsourcing—that is, when a local authority arranges for a commercial organisation to manage its off-street car park while itself retaining the income stream, or instead receiving a fixed amount—of joint ventures between local authorities and commercial providers, and of transfers of car parks by a local authority to a commercial operator, or vice versa, but it does not seem to us (and the parties did not suggest) that the detail of arrangements of this kind is of importance. The FTT did, however, consider how the non-taxation of local authority supplies would affect the scale of such arrangements, and dealt with the point in its conclusions. We shall, again, return to this aspect of the matter in the course of dealing with the appellants' submissions.

20. The hearing before the FTT lasted, in all, for seven days. Oral evidence was given by nine witnesses, all with experience and expertise in the field of off-street car parking. The decision sets out, in considerable detail, the evidence the FTT heard about the practices in several local authority areas, some urban and some rural, and it also describes the practices and perceptions of two major commercial off-street car parking providers, NCP and Britannia. Much of that evidence related to the factors which dictate, or at least are relevant to, the setting of charges by suppliers of off-street parking. Those factors include not only the cost of provision, but the location of the car park in question (city centre car parks generally commanding a premium over those further away), over- or under-supply in any particular locality, consumer dislike of parking charges and, in some cases, a policy of encouraging motorists to park in one place rather than another, for example for reasons of traffic management.

21. The appellants' case is not that these are irrelevant considerations, or that the FTT misunderstood or misjudged their impact. Indeed, the appellants did not argue before us that the FTT had erred at all in its evaluation of those factors. What they contend is that the FTT incorrectly accepted that the incidence of taxation was a further, and important, factor whereas, say the appellants, in the case of a local authority the tax treatment of such supplies is an irrelevance; its pricing policies are wholly driven by other considerations.

22. It is quite clear that the FTT did consider that the incidence of taxation (or, perhaps more accurately, the incidence of non-taxation) was an important factor. So much is apparent from its critical finding, set out at [203]:

> "Our conclusion is that non-taxation of local authorities would distort competition in the off-street car parking market in the areas, principally, of pricing and outsourcing. We do not consider that it would directly affect, to a more than negligible extent, local authorities' decisions on opening new car parks, but we find that local authority charges would find a lower level in circumstances of non-taxation than of taxation. This would in turn affect the pattern of provision of off-street car parking in two respects. First, fewer commercial car parks would open or remain open. Secondly, and in consequence, more local authority car parks would open or remain open in pursuance of the local authorities' duty to seek to ensure adequate off-street car parking pursuant to s 122 of the 1984 Act. In addition, decisions on forms of 'outsourcing' would tend to be distorted in favour of forms that left the local authority as the provider of off-street car parking, with the commercial sector providing at most the management."

23. The FTT went on to explain its reasons for reaching those conclusions, in the process rejecting the arguments about the considerations which influence the pricing and outsourcing of local authority off-street car parking which the appellants renew before us.

Appeal on question of law only

24. The appellants, represented before us by Mr Julian Ghosh QC, Mr Clive Sheldon QC, Mr Jonathan Bremner and Mr Edward Capewell, recognised that, by virtue of s 11 of the Tribunals Courts and Enforcement Act 2007, an appeal lies to the UT on a point of law only, and they do not argue that the FTT's conclusion at [203] was not a finding of fact. However, they say, in the seminal authority on this topic, *Edwards v Bairstow* [1956] AC 14, the House of Lords explained that while, as a general rule, the conclusions of a fact-finding tribunal must be respected, there was an exception from that rule when a finding of fact was based on a misunderstanding of the law. In this case, the appellants say, the FTT was guilty of a significant error of law, in that it misunderstood the legal framework which governs the setting of local authority car parking charges. That error had a material bearing on its determination of fact, thus making the determination one which this tribunal should correct. Henderson J, sitting in this tribunal, succinctly described the manner in which the exception was to be applied in *Revenue and Customs Commissioners v Brunel Motor Co Ltd* [2013] UKUT 6 (TCC), [2013] STC 1426 in which he said, at [20]:

> "One type of case in which an appellate court or tribunal may legitimately interfere with a conclusion of fact as being erroneous in point of law is where, although the primary facts and inferences properly drawn from them could in principle warrant a decision either way, the fact-finding tribunal show by statements made in their decision that they have misunderstood the law in a way that has a material bearing on their determination of the facts."

25. Miss Alison Foster QC, leading Mr Ben Rayment and Mr Brendan McGurk, for HMRC told us that her primary position was that there was no error of law by the FTT, and certainly none which vitiated what was said at [203]. That was a pure finding of fact, and it is not possible to characterise it as a finding based on an error of law. The House of Lords made it very clear in *Edwards v Bairstow* that the circumstances in which a challenge to a finding of fact could properly be made

in this way were limited; and we should in addition keep in mind the warning note sounded by Evans LJ in *Georgiou v Customs & Excise Commissioners* [1996] STC 453 where he said, at 476,

> "…it is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure … to be abused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but was there evidence before the tribunal which was sufficient to support the finding which it made?"

26. We shall return to this area of disagreement at a later stage.

The appellants' arguments

27. The appellants' starting point is the legislative and policy framework which governs the manner in which local authorities conduct their activities and which, more particularly, regulates the manner in which revenues generated from those activities may be spent. In the case of on-street parking, s 55 of the RTRA provides that a local authority must keep a "ring-fenced" account of income and expenditure, and that any surplus of income over expenditure may be applied only to specified purposes. Those purposes, identified by sub-s (4), include the supply of off-street parking spaces, whether by the local authority itself or by others and, if the authority is satisfied that there is a sufficient supply of off-street parking, other specified public transport and traffic management purposes. Surplus monies may be paid to the authority's general fund only in order to refund money paid from the general fund to the ring-fenced fund in order to make up a deficit in an earlier year.

28. There is no corresponding provision relating to the income generated by off-street parking, and the expenditure incurred on it. Any surplus of income over expenditure falls into the local authority's general fund, whose use is not circumscribed in a similar fashion: it is the fund from which most of a local authority's activities are financed.

29. The FTT correctly found, at [61] to [63], that local authorities provide off-street parking "as part of the government of their areas and not as a business", and that they may determine as a matter of policy the scale and distribution of the parking provision in their areas and the charges levied as a means of, for example, discouraging the use of cars in certain areas or supporting town centre shops. It was explained elsewhere in the decision that differential pricing structures also determine whether a car park is used for long-term or short-term parking. These are all policy considerations, to which the incidence of taxation has no relevance.

30. The FTT's reasoning, however, was that the charges levied by local authorities for off-street parking were influenced by a combination of upward and downward pressures, that non-taxation would reduce the upward pressures while the downward pressures were unaffected, and that charges would therefore find a

lower level. Taken in isolation, that reasoning was logical. But the FTT made other statements which revealed its misunderstanding of the effect the law peculiar to local authorities has on their practices. It was, in particular, wrong (say the appellants) to reject the proposition that the legislative framework would prevent local authorities from allowing their charges to reduce gradually over time if those charges were not taxable. That misunderstanding infected the FTT's whole approach to the question it had to decide.

31. Where the FTT went wrong, say the appellants, was in concluding at [58] that, in the absence of any statutory restriction such as that found in s 55(4) of the RTRA, local authorities were not precluded from "setting off-street car parking charges with a view to raising income for other traffic management purposes at least where they are also local traffic authorities". That error revealed a failure to pay proper heed to what was said by McCullough J in *R v Camden LBC ex p Cran* [1995] RTR 346 ("*Cran*") as it was explained by the Divisional Court in *Djanogly v Westminster CC* [2010] EWHC 1825 (Admin), [2011] RTR 9 ("*Djanogly*"), and of what was said by Lang J in *R (Attfield) v Barnet London Borough Council* [2013] EWHC 2089 (Admin), [2013] PTSR 1559 ("*Attfield*"). Those cases deal with the proper interpretation and application of ss 55(4) of the 1984 Act but, say the appellants, guidance on the interpretation of the RTRA as a whole is to be derived from them.

32. At p 360 of his judgment in *Cran* McCullough J said that

> "… the Act of 1984 is not a fiscal measure. It contains no provision which suggests that Parliament intended to authorise a council to raise income by using its powers to designate parking places on the highway and charge for their use."

33. At p 365 he added that

> "… it was the intention of Parliament that local authorities, in determining charges to be made in pursuance of the designation of parking places, should not have regard to the manner in which section 55(4) of the Act of 1984 would permit any resulting surplus to be spent."

34. Although his observations were made in the context of a case about on-street parking, what McCullough J said about its not being a revenue-raising measure related to the RTRA as a whole, and not only to those parts of it which governed on-street parking. Moreover, the provisions of the Act which permit charging for, respectively, on-street and off-street parking are in materially the same terms.

35. In *Djanogly* the Divisional Court went further. Pitchford LJ said at [13] that

> "What the authority may not do is introduce charging and charging levels for the purpose, primary or secondary, of raising section 55(4) revenue."

36. Thus it is not open to a local authority to raise money—that is, charge more than sufficient to cover the cost of provision—from car parking even if its purpose in doing so is to provide the funds necessary for the performance of related, that is traffic management, activities including the provision of off-street parking. If there should remain any residual doubt about that proposition it was disposed of

by what Lang J said in *Attfield*, a case about charges for residents' parking permits. At [59] she observed:

> "As the surplus funds in the [ring-fenced account] may only be used in accordance with section 55, there can be no wider use of the funds under section 122. The purpose of section 122 is to impose a duty on local authorities to exercise their functions under the Act in accordance with the objects set out therein. It is necessarily couched in general terms because it applies to a remarkably broad range of functions in the RTRA 1984, e.g. traffic schemes, pedestrian crossings, school crossings, street playgrounds, speed limits, bollards, traffic wardens, removal and immobilisation of vehicles, as well as different types of parking facilities. I do not consider that section 122 was intended to authorise a local authority to raise a levy on parking permit holders, pursuant to section 45(2)(b), to fund any project which met the objects set out in section 122. Such an intention is not expressly stated, nor can it properly be implied. The RTRA 1984 is not a revenue-raising or taxing statute."

37. At [64] she added:

> "I accept the Claimant's submission that the 1984 Act is not a fiscal measure and does not authorise the authority to use its powers to charge local residents for parking in order to raise surplus revenue for other transport purposes funded by the General Fund. I have already concluded that the Defendant's purpose in increasing the charges for resident parking permits and visitor vouchers on 14th February 2011 was to generate additional income to meet projected expenditure for road maintenance and improvement, concessionary fares and other road transport costs. The intention was to transfer the surplus on the Special Parking Account to the General Fund at year end, to defray other road transport expenditure and reduce the need to raise income from other sources, such as fines, charges and council tax. This purpose was not authorised under the RTRA 1984 and therefore the decision was unlawful."

38. The essence of the appellants' case, in the light of those authorities, is that the FTT was wrong to find, at [58], that a local authority could set off-street parking charges at a level which would raise income for use in other traffic management purposes, at least if they were also local traffic authorities, and to conclude by the same token that they were at liberty to allow their charges to "find a lower level" because of the absence of taxation. It is, rather, the duty of a local authority, as *Cran*, *Djanogly* and *Attfield* make clear, to observe the policy considerations spelt out by s 122 of the RTRA. In public law terms, therefore, it is an irrelevant consideration that the charges are, or are not, subject to VAT. It is apparent from the statutory framework that any increase in the surplus generated from off-street parking charges consequent upon non-taxation cannot be specifically designated for re-investment in off-street car parking, and it would not be lawful for any local authority to allocate even part of the revenue for that purpose. Thus the result of non-taxation would be an augmentation of the general fund, which the local authority is required to apply in accordance with its wider spending priorities.

39. That result leads to the simple proposition, and the essential foundation of the appellants' grounds of appeal, namely that there is no causal connection

between increased revenue through non-taxation and lower off-street car parking prices. The effect on the general fund would in any event be only at the margins and would have no, or only a negligible, effect on decision-making.

40. The same reasoning applied also to the second of the possible areas of distortion identified by the FTT, that of outsourcing. All outsourcing must be financed from the general fund (since there is no other possible source), and it follows that decisions in respect of outsourcing are governed by the same principles as affect other uses of the general fund. The increase in the amount available in the general fund as a result of non-taxation could not affect those principles; and, as McCullough J said in *Cran*, a local authority could not take into account the possible use of the money when setting its parking charges.

41. The second of the appellants' grounds is that the inference the FTT drew, that local authority off-street parking charges would find a lower level in the absence of taxation, was irrational. That conclusion was not only inconsistent with the proposition that non-taxation could not have any such effect, because of the legislative constraints already mentioned; it was also contrary to the clear and consistent evidence before the FTT that non-taxation would not do so because of the manner in which local authorities operated in practice.

42. The appellants do not dispute the FTT's finding, at [171], that non-taxation with (implicitly) no change in parking charges would lead to greater revenue. It was the inference it drew from that finding, that local authorities would react by charging less for parking rather than by absorbing the additional revenue into their general funds, for spending in accordance with their policy priorities, which was not supported by the evidence. In fact, all of the local authority witnesses said that it was most unlikely that non-taxation would have any effect on prices. Some said that any additional funds would be spent on activities such as social care or child protection, and that both additional spending on car-parking or a reduction in charges would be very low priorities; and others that parking charges were set, not so much by reference to the cost of provision, but as a means of affecting driver behaviour, for example by encouraging the use of one car park rather than another. That evidence, the appellants said, was strongly challenged in cross-examination, but the challenge failed; all the witnesses made it clear that reducing the cost of car parking would not be a course any local authority would consider when resources were limited and there were more important priorities. Very occasionally a decision might be made to reduce charges at a particular car park in an area where shopkeepers were struggling, but such a decision would be made on policy grounds alone; the principal consideration would be the level at which such charges should be set in order to achieve the policy objective and in that context the fact that the charges were or were not subject to VAT would be an irrelevance.

43. It was important to bear in mind that HMRC led no evidence to counter what the local authority witnesses had said. On the contrary, the witnesses whom HMRC called candidly accepted that they could not say whether local authorities would or would not pass on the benefit of non-taxation to the motorists using their car parks, nor could they comment about the decision-making process which a typical local authority might adopt. Thus the FTT had before it evidence all of which pointed to the conclusion that local authorities did not take any account of

the incidence of taxation when setting parking charges, and that their decisions were driven by other motives entirely. HMRC's argument (to which we come below) that this evidence was not relevant to the FTT's conclusions was simply wrong. The conclusion that the absence of taxation would lead to lower prices was, therefore, perverse.

44. Mr Ghosh referred us to the observations of Lord Carnwath JSC in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] AC 48 at [41] to [47] to the effect that the Upper Tribunal, as a specialist tribunal itself, should feel less constrained than other appellate bodies about addressing errors of fact made by the First-tier Tribunal, when intervention would be conducive to consistency of approach. The appellants argued, on the strength of those observations, that we should re-make the decision ourselves, and that the only decision we could reasonably make was that non-taxation of local authority charges for off-street parking would not lead to distortion of competition. If we did so conclude it would follow that the exemption for which article 4.5 provided should be applied to the charges the appellants had levied since 1 January 1978.

HMRC's arguments

45. It is important to remember, said Miss Foster, that the third of the three questions referred by the High Court to the ECJ related to the meaning to be attributed to the word "significant". The answer given was that it meant only "more than negligible". The threshold is, therefore, quite low. HMRC accept that there has to be a real, rather than a theoretical, possibility—whether actual or potential—of distortion of competition between local authority and private off-street car-parking providers, but it is not necessary to show that the market would be, or would have been, greatly different if local authorities' supplies were not taxable.

46. The FTT concluded at [31], from the totality of the evidence before it, that HMRC had shown that such a real possibility existed. Indeed, it expressly stated that it had been driven to the conclusion, which it correctly described as one of fact, that differential tax treatment would distort competition "despite the particular features of the market urged upon us by Mr Ghosh". The exercise the FTT conducted, of weighing in the balance the upward and downward pressures it described, as well as the evidence it heard of the market, of pricing, and of other factors including the statutory requirements placed on local authorities, in relation to their duty to provide off-street parking as well as in relation to their finances, and the actual experiences of local authorities and major car park operators, could not be faulted.

47. There was, Miss Foster said, no substance to the argument that the FTT was unmindful of the fact that local authorities are subject to duties and obligations which do not affect commercial providers of off-street parking. At [207] it said:

> "… We find that there is a combination of upward and downward pressures on local authority off-street car park charging. The upward pressures are the desire to discourage certain forms of motoring and parking behaviour through pricing and the consideration that off-street car parking should make a contribution to the costs of traffic management or at least break even, so

> that non-motorists do not subsidise motoring. The downwards pressures are the wish of local authorities to contribute to the economic vitality of their areas through charging that does not deter, for example, shoppers and the recognised unpopularity of car parking charges, coupled with the fact that ultimate responsibility for their setting rests with locally elected councillors."

48. The argument that the FTT had misunderstood the legislative framework within which a local authority must operate, and that its misunderstanding infected its conclusions, was without foundation. It had not relied on *Cran* as authority for the proposition that local authorities are permitted to set their off-street car-parking charges with a view to raising income for other traffic management purposes at all. On the contrary, the FTT recorded at [56] Mr Ghosh's submission that charges could be set at levels higher than the break-even point in order to discourage certain types of motoring behaviour, and at [58] and [59] concluded, from the local authorities' own evidence, that in practice free or loss-making car parks were subsidised by surpluses from car parks at which higher charges were levied, for deterrent or similar reasons, and that local authorities did use the overall surpluses generated from off-street parking charges for other traffic management purposes. Moreover, there was ample evidence before the FTT that the annual income derived from local authority off-street car-parking ordinarily exceeded expenditure; indeed, at [186] it referred to the evidence it had received that some local authorities, whether lawfully or not, set out to achieve a surplus as they viewed the charges as a valuable source of income. However, the FTT did not say that all local authorities set out to generate surpluses, and there is no inconsistency between the FTT's observations and the judgments in *Cran*, *Djanogly* or *Attfield*. But even if the FTT did reach a conclusion on this point which was wrong as a matter of law, it was irrelevant because of what it had said at [60]:

> "It seems to us likely that they [*ie* local authorities] are permitted to set charges with a view to their contributing to other costs of traffic management; many of them do so, as will be seen later in this decision. We do not need to reach a concluded view on this for the purposes of our decision: if it were the case that local authorities could not lawfully make any surplus on off-street car parking save to the extent that the surplus derived from charges set at a deterrent level … it would follow even more strongly that non-taxation would lead to charges lower than would prevail in circumstances of taxation; that would be so because the law would require local authorities to set all of their non-deterrent charges at a level that avoided their contributing to a surplus and the non-incidence of VAT would make that level a lower one than if the charges were taxable."

49. That passage, said Miss Foster, simply reflected common sense. A similar, common-sense, conclusion was reached at [222]:

> "We do not accept Mr Ghosh's submission … to the effect that the legislative framework would prevent this [a falling of local authority off-street parking charges over time] happening. He accepted that local authorities could have regard to the relationship between their charges and their expenditure; we find his suggestion that they could only look, in that connection, at the costs of providing a service and not at whether charges bore VAT to be artificial. Even accepting, for the sake of argument, that

> VAT is not a cost of providing charged-for off-street car parking, local authorities must in our judgment be permitted, when having regard to the relationship between expenditure and charges, to notice whether the level of revenue from charges is or is not reduced by the need to account for output VAT on the charges. If they are to be blind to this, one might ask rhetorically, are they to proceed as though all their charges are subject to VAT or that none are? They could not sensibly attempt to balance their books if they did not look at the actual position."

50. In addition, said Miss Foster, the appellants' focus on what would be done with a surplus in the general fund addressed the wrong question. The argument proceeds from the assumption that non-taxation would automatically lead to an increased surplus. But no such assumption can be made. As the FTT rightly observed, in a world of non-taxation of local authority charges the force of the upward pressures on price would be weakened since the absence of VAT would enable the local authority to absorb upward pressures to a greater degree than it could if its supplies were subject to VAT. It does not follow that this would lead to an increased surplus; the absence of VAT might simply mean that there would be less pressure on a local authority to generate income from other sources. The FTT dealt with that point at [205]:

> "Comparing the propositions (a) that in circumstances where the charges were not taxable but all other things were equal, off-street car parking would have generated a contribution to or drain upon local authority resources similar to that which it has in fact generated and (b) that in those circumstances off-street car parking would have generated a contribution or drain that was higher or lower than it has historically been by an amount equal to the VAT fraction, we think it reasonable to regard proposition (a) as the more probable. It is implicit in proposition (a) that local authority charges would have been correspondingly lower and/or expenditure on off-street car parking higher. Of those two possibilities, we find it is principally the case that the charges would have been lower."

51. It also added, at [219], that "non-taxation would reduce the need to introduce, for budgetary reasons, an unpopular increase, possibly damaging to the local economy, in car parking tariffs." That reduction of need would be particularly significant in the case of an increase in the rate of VAT. A commercial provider would have to raise its charges if it could not absorb the increase; a local authority would not be subject to any such pressure. It is, said Miss Foster, bizarre to argue that the incidence of VAT is irrelevant to the setting of local authority charges; the absence of the need to respond to an increase in VAT rates, alone, shows that the argument is wrong. In addition, much of the evidence of the local authorities' witnesses related to the possible reaction of local authorities to the removal of VAT from their parking charges, rather than to the position which would have been reached after a prolonged period of non-taxation, and it could not be taken as a reliable guide to the question the FTT had to decide.

52. The appellants' contention that decisions about outsourcing are similarly determined by the local authority's overall policy considerations is also flawed, and for substantially the same reasons. As the FTT found, a local authority's decision whether or not to outsource a supply, whether of off-street parking or anything else, is based upon its perception of whether it would be more cost-

effective to provide it in-house or to outsource it. As the FTT also found, a local authority must have regard to whether the supply is chargeable to VAT or not, because the incidence of VAT has a material impact on that question, as the FTT explained by way of an example at [132] and [133]. Its conclusion, again a conclusion of fact, was that the absence of VAT on their off-street parking charges would tend to lead local authorities to make such supplies in-house. That was plainly a conclusion supported by the evidence.

Discussion

53. As it is accepted—and in our judgment rightly—that the FTT identified the correct test and the correct approach to that test, and it was not argued before us that it failed to apply the test or that it deviated from the correct approach, it is clear that the appellants' case stands or falls by their ability to demonstrate to us that the FTT, despite its analysis of the relevant authorities, failed to understand the manner in which local authority decision-making is undertaken. In essence, the appellants complain that the FTT's finding, which is accepted to be one of fact, that the absence of taxation would reduce the upward pressure on prices is fatally wrong because it fails to take account, or adequate account, of the provisions, particularly of s 122, of the RTRA.

54. We are bound to say that we have encountered some difficulty with that argument. The appellants' case, as we have set it out above, is that the RTRA as a whole is not a revenue-raising measure. We accept that although *Cran*, *Djanogly* and *Attfield* relate to on-street parking, what was said in those cases is consistent with the appellants' argument on that point. We can also accept, as did the FTT, that it is legitimate for a local authority to structure its car parking prices so as to discourage parking in some places, and to encourage it in others, and that it is likewise legitimate to use surplus revenue generated from some car parks to make up for a shortfall in revenue from car parks which, whether for policy reasons or otherwise, are run at a loss, or where parking is free of charge. Thus there is no requirement that income and expenditure be balanced on a car park by car park basis, as the FTT found at [59]. However, it must follow, if the RTRA is not a fiscal measure, that overall, and perhaps taking one year with another, the cost to the local authority of meeting its statutory obligation of providing sufficient off-street parking and the revenue generated from the activity must be broadly equal. The FTT dealt with the points the appellants made in respect of *Cran* at [55] (it seems it was not referred to *Djanogly* and *Attfield* was decided after the FTT's decision was released, but neither adds materially to *Cran*) and at [57] it set out the statement made in Cross on *Local Government Law* that "The deliberate making of a profit would take the activity into the realm of trading". In short, we are not persuaded that the FTT misunderstood the nature of the legislative framework which governs local authorities in this area.

55. The appellants' case is, necessarily, that what the legislation apparently demands is not what happens in practice, in that local authorities instead divert surplus funds to other purposes. Some of the evidence described by the FTT supported that view: for example, at [182] it referred to the evidence of one local authority witness that off-street car parking charges might be increased in order to help balance a council's overall budget, and at [186], as we have mentioned, to

the policy of some local authorities of aiming for a surplus consistently from one year to the next. The FTT accepted too (see [200]) that local authorities did not always lower their car parking prices to reflect reductions in the rate of VAT, in part because of the impracticality of changing ticket-issuing machines which accepted coins, but in part for policy reasons, and that they would take account of other duties imposed on them which might be regarded as more important than the level of car parking charges (see [218]).

56. We recognise that *Cran*, *Djanogly* and *Attfield* were judicial review cases which related to the legitimacy of the defendant local authorities' policies, and that was not the issue before the FTT—in other words, it was not required to determine the appeal by reference to what local authorities ought to do, but by reference to what they do as a matter of fact. We do not, however, detect any reason to think that the FTT did misunderstand the policy considerations which affect local authority decisions in practice. It dealt with the evidence at various points in its decision, particularly at [58] to [64], and touched several times on the view expressed by the local authority witnesses that local authorities did not feel themselves under an obligation to set off-street car parking charges at a level which would not lead to a surplus. We likewise detect no reason to think that it disregarded that evidence in reaching its conclusions; on the contrary, what it said at [222], set out at para 49 above, is in our judgment a clear indication that it was very conscious of that framework and was addressing precisely the argument the appellants were making.

57. One of the arguments that Miss Foster advanced was that if local authority-supplied off-street parking were not taxed, local authorities would not need to consider raising their charges in the event of an increase in the rate of VAT whereas commercial providers would be compelled to do so. We agree. A local authority might, of course, take the opportunity to increase its prices in order to generate a greater surplus, but the absence of any compulsion to do so amply supports the FTT's finding that in the absence of taxation the upward pressures on local authority charges would be reduced. That, as the appellants accept, is a finding of fact. We can find no error in the FTT's analysis of the evidence which led to that conclusion, nor in its understanding of the relevant law and the practice of local authorities.

58. We agree too with Miss Foster that the FTT was right to find that the non-taxation of local authority-provided off-street car parking would distort the provision of outsourcing. The FTT explained why at [256] to [258]: while there would be little economic difference, if there were parity of tax treatment, between outsourcing a car park so that the supplies to motorists were made by a commercial provider on the one hand, and merely outsourcing the management so that the supply to the motorist remained with the local authority on the other, there would be a significant difference of approach to outsourcing if commercial provision was taxed but local authority provision was not. In our judgment the FTT's analysis of this issue cannot be faulted. It found, as a matter of fact, that local authorities did not (as the appellants argued) disregard the incidence of taxation when deciding whether and how to outsource a car park or its management, in the process accepting at [257] the evidence on the topic of a witness able to speak of commercial providers' practices. In our judgment this

was a finding of fact, supported by the evidence before the FTT, and it too is not based upon a misunderstanding of the relevant law.

59. It follows that the appeal is dismissed.

MRS JUSTICE PROUDMAN DBE

JUDGE COLIN BISHOPP

RELEASE DATE: 15 October 2014