**[2016] UKUT 0315 (TCC)**

**Appeal number: UT/2015/0010**

***VALUE ADDED TAX - whether single composite supply or multiple separate supplies - appeal dismissed***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**BETWEEN:**

**GENERAL HEALTHCARE GROUP LIMITED**

**Appellant**

**- and –**

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

**Respondents**

**Tribunal: The Hon Mr Justice Henderson**
**Judge Sinfield**

**Sitting in public in London on 6 and 7 April 2016**

**Sam Grodzinski QC, counsel, instructed by Deloitte LLP, for the Appellant**

**Owain Thomas QC and Matthew Donmall, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

1. This is another appeal on the subject of whether a transaction which comprises several different elements should be regarded as a single supply or several distinct and independent supplies. Although the principles are now well established and have been restated in a number of decisions, their application to particular facts continues to bring appeals before the tax tribunals and courts.

2. This case concerns the VAT treatment of supplies made by the Appellant ('GHG') to patients of medical or surgical appliances such as artificial hips and pacemakers, referred to below as 'prostheses', and other supplies directly attributable to the fitting or implanting of those prostheses. Supplies of such prostheses were zero-rated for VAT at the relevant time, whereas supplies of medical care in a hospital and, in connection with it, the supply of any goods, were (and remain) exempt. The significance of the classification of GHG's supplies is that it determines whether GHG is entitled to recover (in principle, and subject to quantification issues which are yet to be determined) input tax of £3,279,582 said to have been incurred between 1 April 1973 and 31 March 1987 in relation to the purchase and implanting of prostheses. GHG contends that it made separate zero rated supplies of prostheses so that the input tax is recoverable, whereas HMRC contend that GHG made exempt supplies of medical care of which the supply of prostheses was merely a component element so that the input tax is not recoverable.

3. GHG's claim was one of 215 materially identical claims made in reliance on the decision of the Court of Appeal in *C&E Commissioners v Wellington Private Hospital Ltd & Others* [1997] STC 445 ('*Wellington*'), which decided that the provision of prostheses to in-patients in private hospitals were zero-rated supplies for VAT, rather than a component element of a single exempt supply of hospital and medical care services. HMRC refused these claims on the basis that, in light of subsequent European and domestic jurisprudence, *Wellington* was wrongly decided. As all the appeals raised common issues of law, one of the appeals, an appeal by Nuffield Health, was designated as the lead case under rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the FTT Rules'). The other cases, including GHG's appeal, were stayed behind Nuffield Health's appeal. On 8 May 2013, the FTT issued a decision, *Nuffield Health v HMRC* [2013] UKFTT 291 (TC) ('*Nuffield'*), holding that Nuffield Health had made a single supply of medical care and dismissing the appeal.

4. Nuffield Health did not appeal against the FTT's decision. GHG applied under rule 18(4) of the FTT Rules not to be bound by the decision in the lead case. That application was refused and the FTT, exercising its power under rule 18(5), subsequently dismissed GHG's appeal on the basis that, in the absence of any distinguishing facts, the decision in *Nuffield* was binding as to the result of GHG's appeal. GHG now appeals to the Upper Tribunal. GHG's case is that the FTT in *Nuffield* erred in law in holding that the supply of prostheses formed part of a single exempt supply of medical care and the correct analysis is that the supply of a prosthesis by GHG was an independent zero rated supply. HMRC contend that the decision in *Nuffield* was correct for the reasons given by the FTT.

**Background**

5. In January 1997, the Court of Appeal in *Wellington* held by a majority: (i) that the supply of drugs and prostheses to hospital patients constituted a separate supply of goods from the other services provided by the hospital, such as accommodation and nursing care; and (ii) that the supply of such drugs and prostheses was zero rated. We discuss the reasons given by Millett LJ, with whom Hutchison LJ agreed, below.

6. Following *Wellington*, HMRC issued Business Brief 6/97 and invited claims to be made by private hospitals for "underclaimed input tax on past supplies of drugs and prostheses as well as on the installation of prostheses and any supporting services necessary for that installation". Claims made at this time were subject to a three year statutory limitation period.

7. In April 1997, Arthur Anderson and BDO Stoy Hayward made input tax claims in light of *Wellington* on behalf of General de Sante International Plc ('GSI') for periods back to September 1986. The Arthur Anderson claim covered input VAT that had been incurred on the purchase of prostheses, which had at the time been attributed to exempt supplies between 1 September 1986 and 31 December 1991 but which, following *Wellington*, should have been attributed to zero rated supplies. The BDO claim principally covered additional residual input tax that had wrongly been attributed to exempt supplies between 1 June 1987 and 31 May 1995. At the time these claims were submitted, GSI was the representative member of the VAT group that included GHG (formerly known as AMI Healthcare Ltd). In the following year, 1998, GHG became the representative member of that VAT group. The claims made by Arthur Anderson were accepted and paid by HMRC.

8. On 1 January 1998, legislation came into force to limit, prospectively, the impact of the decision in *Wellington*, by restricting the scope of zero-rating to drugs and prostheses which were self-administered by patients at home. This legislation left unaffected claims for unrecovered input tax concerning periods prior to 1 January 1998.

9. In January 2008, the House of Lords in *Fleming (t/a Bodycraft) v HMRC* [2008] STC 324 held that a three year cap such as that which applied in the present case was contrary to Community law and so had to be disapplied in relation to pre-implementation periods until an adequate prospective transitional period for making claims had been implemented in national law. Accordingly, in February 2008 HMRC published "Revenue and Customs Brief 2008" stating that, in light of the decision in *Fleming*, "claims may now be made for … input tax in respect of which the entitlement to deduct arose in accounting periods ending before 1 May 1997".

10. In March 2009, Deloitte, on behalf of GHG, as the representative member of its VAT group, submitted a voluntary disclosure claiming under-claimed input tax of £3,279,582 for periods from 1 April 1973 to 31 May 1987, plus interest pursuant to section 78 of the VAT Act 1994, in effect extending backwards the claims that had already been made by Arthur Anderson and BDO.

11. On 4 December 2009, HMRC rejected the claim, on the ground that subsequent case law, including decisions of the Court of Justice of the European Communities, later the Court of Justice of the European Union, (together 'the CJEU'), in Case C-349/96 *Card Protection Plan Limited v HM Customs and Excise* [1999] STC 270 ('*CPP'*) and Case C-41/04 *Levob Verzekeringen BV v Staatssecretaris van Financiën* [2006] STC

766 ('*Levob*'), and of the House of Lords in *Beynon and Partners v HMC&E* [2004] UKHL 53, [2005] STC 53 ('*Beynon*') showed that *Wellington* was wrongly decided and the hospital's supply to in-patients was a single exempt supply of healthcare. As a result, HMRC did not consider the evidence, methodology or entitlement of GHG to render a claim for the period.

12. GHG asked for a reconsideration by HMRC, and GHG's claim was formally rejected by HMRC on 17 August 2010. GHG appealed that decision to the FTT on 14 September 2010.

13. GHG's appeal was one of 215 appeals by other hospitals, healthcare trusts and authorities against similar decisions made by HMRC. Following a hearing in the FTT on 30 June 2011, Nuffield Health's appeal was designated as a lead case pursuant to rule 18(2)(a) of the FTT Rules and all the other appeals, including GHG's, were stayed under rule 18(2)(b) on the basis that they gave rise to common or related issues of law, namely:

> "1) whether or not the provision of pharmaceutical supplies and/or the supply and surgical fitting of prostheses, such as artificial hip joints or pacemakers, to patients were at the relevant times part of a single exempt supply or zero rated for the purposes of Value Added Tax Act 1994; and
>
> 2) accordingly, whether or not the Appellants can recover the attributable input tax on such expenditure incurred in the course of private 'in-patient' treatment prior to 1997."

14. Nuffield Health's appeal was heard on 18 and 19 March 2013 and the FTT (Judge John Brooks and Harvey Adams FCA) released their decision, [2013] UK FTT 291 (TC), on 8 May 2013. The FTT concluded that the provision of drugs and prostheses were part of a single supply of exempt healthcare and dismissed the appeal.

15. In *Nuffield*, the FTT considered the CJEU authorities on single and multiple supply and also the domestic authorities. In relation to *Wellington*, the FTT concluded that the judgment could not be regarded as correct because Millett LJ only focussed on whether one element of the transaction was so dominated by another as to lose any separate identity and his analysis was limited to consideration of the relation between aspects of the transaction, rather than consideration of the transaction as a whole. At [74] to [75], having cited certain passages from the judgment in *Wellington*, the FTT stated as follows:

> "74. With respect to Millett LJ, in view of the subsequent decisions of the ECJ in *Levob, Aktiebolaget, Deutsche Bank, Field Fisher Waterhouse* and the House of Lords in *Beynon* and *College of Estate Management* we consider that his 'proper inquiry', namely 'whether one element of the transaction is so dominated by another element as to lose any separate identity as a supply for fiscal purposes, leaving the latter, the dominant element of the transaction, as the only supply' can no longer be regarded as correct.
>
> 75. We also agree with [counsel for HMRC] that Millett LJ was also incorrect to consider the issue to be only … a question of the relation between various aspects of the transaction, rather than by consideration of the transaction as a whole as required by *CPP* and *Levob* in which 'the essential features of the transaction must in the first place be ascertained in order to determine whether the taxable person is making to the customer, being a typical consumer, several distinct principal supplies or a single supply' (*Levob* at [20] see paragraph 50, above). In that way, a customer at a restaurant is not contracting for a multitude of discrete transactions, some goods,

> some services; and neither is a student at the *College of Estate Management*. As [counsel for HMRC] submits, the error in Millett LJ's approach is that it ends up assuming what it is seeking to establish, namely that there are multiple supplies, rather than considering the whole…."

16. At [76] to [79], the FTT rejected the argument advanced by Nuffield Health that the supply of drugs and prostheses was more closely linked to the medical care provided by the consultant than it was to the hospital care provided by Nuffield Health.

17. Having identified the relevant principles, , the FTT then applied those principles to the facts at [92] to [96]:

> "[92] Turning to the question of whether the provision of drugs and prostheses are a separate supply from the care provided by Nuffield, it is clear from the decisions of the ECJ and House of Lords:
>
> > (1) we must first have regard to all the circumstances in which that transaction takes place (*CPP*);
> >
> > (2) every transaction must normally be regarded as distinct and independent and, secondly, that a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must in the first place be ascertained in order to determine whether the taxable person is making to the customer, being a typical consumer, several distinct principal supplies or a single supply (*Levob*);
> >
> > (3) in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise in turn to taxation or exemption, must be considered to be a single transaction when they are not independent (*BGZ Leasing*); and
> >
> > (4) it is inappropriate to analyse the transaction in terms of what is 'principal' and 'ancillary', and it is unhelpful to strain the natural meaning of 'ancillary' in an attempt to do so. In that regard we note that food is not ancillary to restaurant services; it is of central and indispensable importance to them; nevertheless there is a single supply of services (*Faaborg*). Pharmaceuticals are not ancillary to medical care which requires the use of medication; again, they are of central and indispensable importance; nevertheless there is a single supply of services (*Beynon*), (*College of Estate Management*).
>
> [93] The essential features of transactions with which we are concerned are the provision of drugs and prostheses to Nuffield's private in-patients. It is common ground that these drugs and prostheses are provided by Nuffield, albeit on the prescription or instruction of the relevant consultants.
>
> [94] Having regard to all the circumstances we consider that for a patient, there is no meaningful separation of the supply of drugs and prostheses from elements of the care and treatment they receive in hospital and, as such, find that there was a single supply of exempt health care by Nuffield. All the elements of Nuffield's supply are not independent but closely linked and integral in the sense that they are part of a package of services with an overall therapeutic aim as part of a patient's clinical plan in the light of his condition and the treatment needed. Also, they are all supplied in a hospital setting answering a single description of hospital and medical care, a category of transaction specifically recognised in the VAT directives, as opposed to being supplies of a distinct nature such as leasing and cleaning services.
>
> [95] It is not the patient who determines the nature or quantity of the drugs he is provided with, even if this is separately itemised on an invoice. We find that in the absence of any significant element of choice in relation to the volume or nature of drugs provided, the economic reality is that that provision is not dissociable from all the other elements that Nuffield provides as part of a single supply of medical and hospital care. Similarly in the case of the prostheses, any element of patient choice

> is subject to the overall clinical judgment as to the identification of the patient's needs and the appropriate appliance.
>
> [96] In our view if the provision of drugs or prostheses were separate supplies of goods, it would follow that the provision of other goods used, such as needles, drips, tubes etc, as itemised on an invoice should also be treated as separate supplies which, in our judgment, would be [a] wholly artificial split … leading to a potential distortion of the functioning of the VAT system."

18. Nuffield Health decided not to appeal the FTT's decision. However, GHG considered that decision to be wrong in fact and law. The effect of rule 18(3)(b) of the FTT Rules was that GHG was bound by the result of that appeal. On 11 September 2013, GHG made an application under rule 18(4) to be unbound from *Nuffield*.

19. In a decision released on 15 April 2014, Judge Berner dismissed GHG's application to be unbound and gave directions, pursuant to rule 18(5) of the FTT Rules, for a hearing to determine and dispose of GHG's appeal.

20. That hearing took place on 1 December 2014, again before Judge Berner. Witness evidence was given by Mr Richard Evans, managing director of hospital operations for GHG, who was cross-examined by counsel for HMRC, Mr Owain Thomas QC who appeared, with Mr Matthew Donmall, both in *Nuffield* and in this case. On 9 December 2014, Judge Berner directed, in accordance with rule 18(5) of the FTT Rules, that GHG's appeal should be dismissed. The basis of that decision was that there was no material distinction between the facts of GHG's appeal and the facts found by the FTT in *Nuffield*. Judge Berner decided that, in the absence of any distinguishing facts, the decision in *Nuffield* was binding as to the result of GHG's appeal so that the only course open to him was to dismiss GHG's appeal.

21. On 2 February 2015, GHG applied for permission to appeal to the Upper Tribunal, on the basis that *Nuffield* was incorrectly decided. On 9 February 2015, Judge Berner gave permission to appeal.

**Facts**

22. In the second *GHG* decision, Judge Berner found the facts in *Nuffield* to be materially indistinguishable from those in GHG's case. Mr Thomas asked us to substitute 'GHG' for 'Nuffield' when reading the decision of the FTT in *Nuffield*. Mr Sam Grodzinski QC, for GHG, submitted that, while we could infer that GHG's facts are materially the same as those found by the FTT in *Nuffield*, it was open to us to refer to the statement of agreed facts in GHG's case and the supplemental facts found by Judge Berner in the second *GHG* decision in December 2014. Our view is that we must consider the particular facts of GHG's case and not simply confine ourselves to the facts found by the FTT in *Nuffield*, despite the facts in that case being materially indistinguishable from those in GHG's case. Although it may not make a material difference to the outcome of this particular appeal, it is appropriate to bear in mind that there are factual differences between the two appeals. For example, the appeal in *Nuffield* concerned the supply of pharmaceutical drugs as well as prostheses, whereas GHG's appeal is concerned only with the latter. The relevant facts of GHG's appeal are, accordingly, the facts found by the FTT in *Nuffield* at [20] to [37] subject to differences apparent from the statement of agreed facts in this case and the supplemental facts found by Judge Berner in the second GHG decision.

23. The relevant facts are as follows:

(1) GHG operates 63 hospitals and treatment centres across the UK at which a wide range of procedures are carried out, including but not limited to orthopaedic, general surgery and cardiac surgery. The hospitals have operating theatres, bedrooms, imaging suites, consulting rooms, and pharmacy and pathology services. The medical procedures at GHG hospitals are carried out by self-employed specialist consultants.

(2) Patients who require treatment are referred by their GP to a consultant. The consultant will carry out a thorough examination of the patient at a GHG hospital. If the consultant advises the patient that a surgical procedure, such as the fitting of a prosthesis (e.g. a hip replacement) is required and the patient agrees to it, the consultant will admit the patient to the GHG hospital. The consultant's secretary will book the theatre at the hospital for the procedure.

(3) The consultant determines whether a patient requires a prosthesis after clinical assessment. The choice of any prosthesis is discussed between the consultant and the patient. The consultant prescribes the prosthetic device.

(4) Although GHG forecasts the medical devices likely to be required during the year, purchasing and managing logistics, storage and appropriate document trails, GHG has no involvement in the decision of the consultant to prescribe any prosthetic device. GHG's role is limited to making sure that the relevant prosthesis is available at the time of surgery. GHG has a wide range in stock to suit the needs and preferences of various consultants. For NHS patients, given cost considerations, a more limited range is available.

(5) For surgical procedures (including the fitting of a prosthesis), GHG provides the operating theatre and the ancillary personnel (such as nurses). The staff ensure that any required devices, surgical instruments and disposable materials are available in the right quantity and sequence.

(6) The consultant retains all decision-making authority in the operating theatre and he or she will choose which anaesthetist they wish to work with and may bring their own operating assistant with them. The consultant is personally liable for his or her actions within the operating theatre.

(7) Notwithstanding the consultant's primary role in relation to the provision of medical care, the following types of medical treatment are provided by GHG and not by the consultant:

> (a) The hospital's resident medical officer, a qualified doctor and the equivalent of a senior house officer, takes down details of the patient's medical history on admission.
>
> (b) Pre and post-operative care is provided by the hospital, by properly trained staff.
>
> (c) The hospital team working with the team post-operatively monitor, and brief the consultant about, the patient's development.
>
> (d) The hospital provides the backup team to the consultant in theatre, including the operating department assistant, the 'scrub' nurse and a 'runner' nurse, although the consultant may bring their own operating assistant with them.

(e) Diagnostic services (biochemistry, haematology, microbiology, histopathology, histology), e.g. full blood count, chest x-ray, liver function profile, bone profile.

(f) Cardiac catheterization.

(g) X-rays.

(h) Physiotherapy (where not provided by physiotherapists contracting directly with the patients).

(i) Various other medical treatments, such as 'suction of outer ear'.

(8) In addition to the prosthesis, GHG provides other medical consumables to patients e.g. syringes, needles, bed drapes, catheters, tubing drips etc.

(9) Patients (and/or their insurer if they had private medical insurance) usually received three invoices: from GHG for the hospital care (including the cost of the prosthesis); from the consultant; and from the self-employed anaesthetist. The invoices from GHG were itemised.

## Legal framework

*Community Legislation*

24. For most of the VAT periods at issue in this appeal, the relevant provisions of Community Law were set out in EC Council Directive 77/388 ('the Sixth Directive) which came into force with effect from 1 January 1978. Prior to the coming into force of the Sixth Directive, the position was governed by Article 10 of the Second Council Directive 67/228/EEC ('the Second Directive'), which stated that each Member State "may… determine the other exemptions which it considers necessary".

25. Exemption from VAT was dealt with in Title X of the Sixth Directive. Article 13A provided, so far as material:

> "Article 13
>
> A. Exemptions for certain activities in the public interest
>
> 1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:
>
> …
>
> (b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable to those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;
>
> (c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned …"

26. Zero-rating was dealt with in the transitional provisions in Title XVI. Article 28, as amended, preserved the right of Member States to continue provisions for "exemptions with refund" (i.e. zero-rating) which were in force at the time the Sixth Directive was enacted. This provision was by way of a further extension of a transitional period introduced by Article 17 of the Second Directive. The effect is that

any supplies which were zero-rated in the United Kingdom at the beginning of the transitional period could continue to enjoy this status for the time being.

*Domestic Legislation*

27. During the beginning of the period relevant to this appeal, the relevant domestic legislative provisions were first contained in the Finance Act 1972 and then in the Value Added Tax Act 1983 ('VATA 1983'), which repealed and replaced the 1972 Act with effect from 26 July 1983. As the Tribunal noted in *Nuffield* at [9], there is no material difference in the relevant provisions of VATA 1983 and the 1972 Act in respect of the exemption from VAT for the provision of medical care.

28. Those provisions were contained in section 17 of, and Schedule 6 to, VATA 1983. Section 17 provided, so far as material:

> "17 Exemptions
>
> A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 6 to this Act …"

29. Schedule 6 provided:

> "Schedule 6 Exemptions
>
> Group 7 – Health and Welfare
>
> Item No. …
>
> 4. The provision of care or medical or surgical treatment and, in connection with it, the supply of any goods, in any hospital or other institution approved, licensed, registered or exempted from registration by any Minister …"

30. Zero-rating was dealt with in section 16 of, and Schedule 5 to, VATA 1983. Section 16 provided:

> "Zero-rating
>
> 16.—(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not tax would be chargeable on the supply apart from this section, -
>
> (a) no tax shall be charged on the supply; but
>
> (b) it shall in all other respects be treated as a taxable supply;
>
> and accordingly the rate at which tax is charged on the supply shall be nil.
>
> (2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 5 to this Act or the supply is of a description for the time being so specified."

31. Schedule 5 to VATA 1983, so far as material, provided:

> "Schedule 5 Zero-rating
>
> Group 14 – Drugs, Medicines, Aids for the Handicapped, etc
>
> Item No.
>
> 1. The supply of any goods dispensed, by a person registered in the register of pharmaceutical chemists kept under the Pharmacy Act 1954 … on the prescription of a person registered in the register of medical practitioners …
>
> 2. The supply to a handicapped person for domestic or his personal use, or to a charity for making available to handicapped persons by sale or otherwise, for domestic or their personal use, of

> (a) medical or surgical appliances designed solely for the relief of a severe abnormality or severe injury
>
> …
>
> (g) equipment and appliances not included in paragraphs (a) to (f) above designed solely for use by a handicapped person …"

32. Note 3 to Group 14 in Schedule 5 provided that "handicapped" meant "chronically sick or disabled."

*Case law on whether a transaction is a single supply or multiple supplies*

33. In *Beynon*, Lord Hoffmann, giving the only reasoned opinion, said at [19]:

> "In the course of argument your Lordships were also referred, as were the courts below, to a number of cases, both in this country and in the Court of Justice, which were decided before the *Card Protection* case. Submissions were made as to whether the principles upon which those cases were decided had application to this case. Their Lordships think that there is no advantage in referring to such earlier cases and their citation in future should be discouraged. The *Card Protection* case was a restatement of principle and it should not be necessary to go back any further."

34. We respectfully agree, and tentatively suggest that it might now no longer be necessary to refer to cases that were decided before *Levob* which itself restates and explains the principle in *CPP*. That is not to say that all cases decided before *CPP* or *Levob* are flawed, only that it is necessary to look at previous case law in the light of *Levob*. For that reason, although both parties made extensive submissions on *Wellington*, which predated *Beynon* and was cited in argument in that case although not referred to in the decision of the House of Lords, it is appropriate to start by considering the later jurisprudence of the CJEU before returning to *Wellington*.

35. We start with *CPP*. The facts of *CPP*, which concerned the supply of insurance against loss of credit cards together with other non-insurance assistance services and some small goods of low value, are not relevant to this case. Although neither party contended that GHG made the type of single supply discussed in that case, the approach to determining whether there is a single composite supply or several distinct supplies is relevant to the present case. In *CPP*, the CJEU stated:

> "28. ... where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place.
>
> 29. In this respect, taking into account, first, that it follows from Article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.
>
> 30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (Joined Cases C-308/96 and C-94/97 *Commissioners of Customs and Excise v Madgett and Baldwin* [1998] ECR I-6229, paragraph 24).

31. In those circumstances, the fact that a single price is charged is not decisive ..."

36. It must be pointed out that, although the Court in *CPP* referred only to services, it is clear from subsequent cases such as *Levob* and Case C-111/05 *Aktiebolaget NN v Skatteverket* [2008] STC 3203 (‘*Aktiebolaget*’) that the comments apply equally to supplies of goods or goods and services such as in this case. It is clear from *CPP* that the usual or default position is that every supply of goods or services must be regarded as distinct and independent, but where there is a single supply from an economic point of view, it should not be artificially split because to do so would distort the functioning of the VAT system. In deciding whether a taxable person is making several distinct and independent supplies or a single supply of different elements, it is necessary to ascertain the essential features of the transaction from the point of view of a typical customer. There is a single supply in particular where there is a principal supply to which other goods or services are ancillary. HMRC did not argue that the prosthesis must be regarded as ancillary to the supply of hospital and medical care by GHG. The prosthesis was not a means for the typical patient of better enjoying the care provided by GHG: nor was it argued that the hospital care was a means of better enjoying the prosthesis.

37. In *Beynon*, the House of Lords considered whether supplies of medication, such as vaccines, provided and administered by NHS doctors in geographical areas where there was an insufficient number of pharmacies, under regulation 20 of the National Health Service (Pharmaceutical Services) Regulations 1992, should be treated in the same way for VAT purposes as supplies made by doctors to non-regulation 20 patients, which were exempt, or as separate supplies by pharmacists which were zero rated. The answer turned on whether the supplies of drugs should be regarded as part of the supply of medical care when the patient visits the doctor for treatment, or as one of several smaller units. Lord Hoffmann considered the test in *CPP*, and explained at [20]:

> “20 The Court of Justice observed, in paras 27-29, that the diversity of commercial operations made it impossible to give exhaustive guidance as to how to approach the problem correctly in all cases. Regard should always be had to the circumstances in which the transaction took place. Every supply of ‘a service’ is by definition distinct and independent but a supply which ‘from an economic point of view’ comprises a single service should not be artificially split into separate ‘services’. What matters is ‘the essential features of the transaction’.”

38. Lord Hoffmann went on to hold, at [31] to[32], that “the level of generality which corresponds with social and economic reality”, together with the practical need to “have a rule which applies to all transactions of a certain kind,” required that the supplies of medication by doctors should be the same for regulation 20 and non-regulation 20 patients, so that the supplies should be regarded as part of the single transaction comprising the patient’s visit to the doctor and thus exempt. On that view, there was a single supply of services.

39. Mr Grodzinski submitted that *Beynon* was distinguishable from this case in that, in *Beynon*, the primary medical care was provided by the doctor who was also the person who supplied the medicine itself whereas, in GHG’s case, the primary medical care was supplied by the self-employed consultant and the prosthesis was supplied by GHG. He further submitted that *Beynon* was plainly not authority for the proposition that, wherever a person supplies both pharmaceuticals and medical care, they are part of a single supply.

40. Mr Thomas acknowledged that in *Beynon* there was only one medical supplier whereas in this case there were (at least) two. He submitted that the starting point should be the social and economic reality of the supply. He contended that GHG's preferred analysis that the medical care provided by the hospital should be split into smaller units of exempt medical care and the zero rated supply of a prosthesis did not correspond with the social and economic reality of the patient admitted to a GHG hospital to have a hip replaced.

41. We agree that the facts in *Beynon* and the question that arose for consideration in that case were very different from the facts and issue in this case. Accordingly, we do not gain much assistance from the decision of the House of Lords in *Beynon* beyond the useful observations of Lord Hoffmann at [31] and [32], mainly derived from *CPP*, that one should avoid artificial dissection of a transaction and consider the social and economic reality of the supply and the need to have a rule that can apply to all transactions of a certain kind. We take the latter point, which is not found in *CPP*, to mean that the classification of a transaction as either a single, composite supply or as several distinct and independent supplies should not depend on variations in the importance to individual customers of some elements over others where, from the viewpoint of social and economic reality, the transactions are in substance the same. The contrary analysis would lead to essentially similar transactions being taxed differently, in breach of the principle of fiscal neutrality, while the practical difficulties of administering the tax on such a basis also help to show that it cannot be right.

42. In *College of Estate Management v C&E Commissioners* [2005] UKHL 62, [2005] 1 WLR 3351 ('*College of Estate Management'*), the College provided distance-learning courses in the fields of property management and construction. HMRC contended that the College made a single supply of exempt educational services to its students, whereas the College argued that it made a zero rated supply of goods (i.e. the written course materials) that was separate from the exempt supply of the rest of the educational services. The House of Lords agreed with the tribunal's findings that the printed materials were not an end in themselves, and even though the means of educating the students relied, principally, on the provision of written materials, the College was providing overall a supply of education (see the opinion of Lord Walker of Gestingthorpe at [23] and [31] ). This was despite the fact that the supply of the written materials was not 'ancillary' to the supply of education in the *CPP* sense. The House of Lords decided that the fact that a particular supply was not 'ancillary' to a principal supply did not, of itself, make it a separate supply for VAT purposes. Thus, Lord Walker stated at [30]:

> "In the course of this appeal there has been much discussion of para 30 of the judgment of the Court of Justice [in *CPP*]. In my opinion it is clear that this paragraph (which uses the introductory words 'in particular') is dealing with a particular case exemplified by the *Madgett and Baldwin* case. It is not asserting that every distinct element of a supply must be a separate supply for VAT purposes unless it is 'ancillary'. 'Ancillary' means (as Ward LJ [2004] STC 1471, 1482, para 39 rightly observed) subservient, subordinate and ministering to something else. It was an entirely apposite term in the discussion in the *British Telecommunications* case (where the delivery of the car was subordinate to its sale) and in the *Card Protection Plan* case itself (where some peripheral parts of a package of services, and some goods of trivial value such as labels, key tabs and a medical card, were subordinate to the main package of insurance services). But there are other cases (including the *Faaborg-Gelting* case (Case C-231/94) [1996] ECR I-2395, *Beynon's* case [2005] 1 WLR 86 and the present case) in which it is inappropriate to analyse

> the transaction in terms of what is 'principal' and 'ancillary', and it is unhelpful to strain the natural meaning of 'ancillary' in an attempt to do so. Food is not ancillary to restaurant services; it is of central and indispensable importance to them; nevertheless there is a single supply of services (the *Faaborg-Gelting* case). Pharmaceuticals are not ancillary to medical care which requires the use of medication; again, they are of central and indispensable importance; nevertheless there is a single supply of services (*Beynon's case*)."

43. The House of Lords decided that the College had made a single supply of education services, of which the supply of books was a part. In holding that there could be a single supply in situations other than where some elements are ancillary to one or more principal elements, Lord Walker in *College of Estate Management* anticipated the CJEU's decision in *Levob*, which was delivered a week later on 27 October 2005.

44. In *Levob*, the CJEU held that a software house, which supplied standard software, which had been previously developed and marketed, to a customer and subsequently customised the software to the customer's specific requirements, which was of decisive importance in enabling the customer to use the software, made a single supply of customisation services. This was so despite the fact that separate prices were paid for the elements of the supply. It is worth examining the CJEU's approach in *Levob* in some detail. The CJEU set out the principles to be applied in paras 19 to 25 of the judgment, as follows:

> "19. According to the Court's case law, where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine, firstly, if there were two or more distinct supplies or one single supply and, secondly, whether, in the latter case, that single supply is to be regarded as a supply of services (see, to that effect, *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94) [1996] STC 774, [1996] ECR I-2395, paras 12 to 14, and *Card Protection Plan* [1999] STC 270, [1999] 2 AC 601, paras 28 and 29).
>
> 20. Taking into account, firstly, that it follows from art 2(1) of the Sixth Directive that every transaction must normally be regarded as distinct and independent and, secondly, that a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must in the first place be ascertained in order to determine whether the taxable person is making to the customer, being a typical consumer, several distinct principal supplies or a single supply (see, by analogy, *Card Protection Plan* [1999] STC 270, [1999] 2 AC 601, para 29).
>
> 21. In that regard, the Court has held that there is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal supply, whilst one or more elements are to be regarded, by contrast, as ancillary supplies which share the tax treatment of the principal supply (*Card Protection Plan* [1999] STC 270, [1999] 2 AC 601, para 30, and *Customs and Excise v Primback Ltd* (Case C-34/99) [2001] STC 803, [2001] 1 WLR 1693, para 45).
>
> 22. The same is true where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.
>
> …
>
> 25. The fact, highlighted in the question, that separate prices were contractually stipulated for the supply of the basic software, on the one hand, and for its customisation, on the other, is not of itself decisive. Such a fact cannot affect the objective close link which has just been shown with regard to that supply and that

> customisation nor the fact that they form part of a single economic transaction (see, to that effect, *Card Protection Plan* [1999] STC 270, [1999] 2 AC 601, para 31)."

45. There can be no doubt after *Levob* that there can be a single composite supply where two or more elements supplied by the taxable person to the typical consumer are not in a principal/ancillary relationship but are so closely linked that they form, objectively, a single, indivisible economic supply which it would be artificial to split.

46. In numerous cases following *Levob* a single supply has been found to exist in the absence of a principal/ancillary relationship, for example *Aktiebolaget,* which concerned the supply and laying of an undersea cable, and Case C-461/08 *Don Bosco Onroerend Goed BV v Staatssecretaris van Financien* [2010] STC 476, which concerned the supply of land and the demolition of the buildings on it. Another example is Case C-44/11 *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* [2012] STC 1951, where the issue was whether portfolio management services consisting of a number of elements, including deciding what to buy and sell as well as implementing those decisions by buying and selling securities, should be regarded as a single supply. The CJEU said at paras 23 to 28 :

> "23. Having regard, in accordance with the case-law referred to in paragraph 18 of this judgment, to all the circumstances in which that portfolio management service takes place, it is apparent that the service basically consists of a combination of a service of analysing and monitoring the assets of client investors, on the one hand, and of a service of actually purchasing and selling securities on the other.
>
> 24. It is true that those two elements of the portfolio management service may be provided separately. A client investor may wish only for an advisory service and prefer to decide on and make the investments himself. Conversely, a client investor who prefers to take the decisions on investments in securities and, more generally, to structure and monitor his assets himself, without making purchases or sales, may call on an intermediary for the latter type of transaction.
>
> 25. However, the average client investor, in the context of a portfolio management service such as that performed by Deutsche Bank in the main proceedings, seeks precisely a combination of those two elements.
>
> 26. As the Advocate General stated at point 30 of her Opinion, to decide on the best approach to the purchase, sale or retention of securities would be pointless for investors within the context of a portfolio management service if no effect were given to that approach. Likewise, to make – or not, as the case may be – sales and purchases without expertise and without a prior analysis of the market would also be pointless.
>
> 27. In the context of the portfolio management service at issue in the main proceedings, those two elements are therefore not only inseparable, but must also be placed on the same footing. They are both indispensable in carrying out the service as a whole, with the result that it is not possible to take the view that one must be regarded as the principal service and the other as the ancillary service.
>
> 28. Consequently, those elements must be considered to be so closely linked that they form, objectively, a single economic supply, which it would be artificial to split."

47. In our view, the CJEU in *Deutsche Bank* is saying that, in order for different elements that are of equal importance to the typical consumer so that none is ancillary to the other to form a single economic supply which it would be artificial to split, they must, from the point of view of the typical consumer, be both inseparable and indispensable.

48. The most recent guidance from the Court of Justice on the single/multiple supply issue is found in its judgment in Case C-224/11 *BGZ Leasing sp z oo v Dyrektor Izby Skarbowej w Warszawie* [2013] STC 2162. The Court re-stated the principles at paras 29 to 32 as follows:

> "29. It must be recalled that, for VAT purposes every supply must normally be regarded as distinct and independent, as follows from the second subparagraph of art 1(2) of the VAT Directive (*Field Fisher Waterhouse LLP v Revenue and Customs Comrs* (Case C-392/11) [2013] STC 136, para 14 and the case law cited).
>
> 30. Nevertheless, it is clear from the case law of the court that, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise in turn to taxation or exemption, must be considered to be a single transaction when they are not independent (see *Ministero dell'Economia e delle Finanze v Part Service Srl* (Case C-425/06) [2008] STC 3132, [2008] ECR I-897, para 51, *Everything Everywhere Ltd (formerly T-Mobile (UK) Ltd) v Revenue and Customs Comrs* (Case C-276/09) [2011] STC 316, [2010] ECR I-12359, para 23). There is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (*Levob Verzekeringen BV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766, [2005] ECR I-9433, para 22, and *Aktiebolaget NN v Skatteverket* (Case C-111/05) [2008] STC 3203, [2007] ECR I-2697, para 23). Such is the case where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service (*Card Protection Plan Ltd v Customs and Excise Comrs* (Case C-349/96) [1999] STC 270, [1999] ECR I-973, para 30, and *Part Service*, para 52).
>
> 31. Thus, the court has held not only that every supply of a service must normally be regarded as distinct and independent, but that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system (see, to that effect, *Card Protection Plan*, para 29, and *Swiss Re Germany Holding GmbH v Finanzamt München für Körperschaften* (Case C-242/08) [2010] STC 189, [2009] ECR I-10099, para 51).
>
> 32. In order to determine whether the services supplied constitute independent services or a single service, it is necessary to examine the characteristic elements of the transaction concerned (see, to that effect, *Card Protection Plan*, para 29, *Levob Verzekeringen and OV Bank*, para 20, and *Field Fisher Waterhouse*, para 18). However, it must be recalled that there is no absolute rule for determining the extent of a service for VAT purposes, … and, therefore, in order to determine the extent, all the circumstances in which the transaction concerned takes place must be taken into account (see, to that effect, *Card Protection Plan*, paras 27 and 28)."

49. Both parties referred to and were content to accept the summary of the principles to be derived from the relevant case law on single and multiple supplies in *HMRC v The Honourable Society of Middle Temple* [2013] UKUT 250 (TCC), [2013] STC 1998 at [60]:

> "The key principles for determining whether a particular transaction should be regarded as a single composite supply or as several independent supplies may be summarised as follows:
>
> (1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.
>
> (2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.

(3) There is no absolute rule and all the circumstances must be considered in every transaction.

(4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.

(5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.

(6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.

(7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.

(8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.

(9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.

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

(11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.

(12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality."

**Is Wellington still good law?**

50. We now turn to consider the decision of the Court of Appeal in *Wellington*. The FTT, at [74] and [75], held that the approach of the majority in *Wellington* could no longer be considered to be correct. Mr Grodzinski took issue with the FTT on this point but, although GHG's second ground of appeal is that the FTT erred in law when it held that *Wellington* is no longer good law, he did not say that GHG's case stands or falls on *Wellington*. Mr Grodzinski submitted that the Court of Appeal came to a particular view and we should not simply put that to one side as irrelevant.

51. In *Wellington*, the Court of Appeal considered whether the supplies of drugs and prostheses made by various healthcare providers should be regarded as separate zero rated supplies or as part of a single composite supply of exempt medical care. The facts, which are materially indistinguishable from the present case, were set out by Millett LJ, who gave the leading judgment, at 450:

"Each hospital provides its patients with food and accommodation, together with nursing and medical services. It also provides operating theatres and ancillary facilities for the use of consultants, surgeons, anaesthetists, radiologists, physiotherapists, pathologists and other specialists who attend there. These are not employed by the hospital, but contract directly with the patients in their care. In addition to the invoice rendered by the hospital, therefore, a patient will also receive an invoice from each of the specialists who has attended him. All drugs, prostheses and other items used by them in the course of treatment are provided by the hospital and are charged to the patient by the hospital. The hospital's daily charge covers food, accommodation, and nursing as well as heat, lighting, electricity and so on; items such as drugs or prostheses are charged for individually."

52. HM Customs and Excise, now part of HMRC, ruled that, among other things, the supply and surgical fitting of prostheses was inseparable from the provision of medical care by the hospitals and formed an integral part of the patient's treatment so that it ceased to be a separate supply of goods and became a component element of a single composite supply of hospital and medical services which was exempt and did not qualify for zero-rating. The appellants challenged the rulings and they were successful before three separate VAT Tribunals but failed on appeal before Jowitt J in the High Court.

53. In the Court of Appeal, Millett LJ, with whom Hutchison LJ agreed while Kennedy LJ dissented, did not find the issue straightforward. Indeed, at 450 he said :

> "I have found the question a difficult one on which my mind has wavered not only during the course of argument but even while writing this judgment."

54. Millett LJ set out the approach of Jowitt J in the court below at 461 to462:

> "Jowitt J held that there was a single, composite supply of services. He recognised that the question was one of impression, and said ([1995] STC 628 at 642):
>
> > 'One would not say a patient went into hospital simply to be supplied with medication or to purchase, for example, an artificial hip joint. The emphasis is on care or medical or surgical treatment and the supply of goods is obviously an integral part of this to enable the care or treatment to be effective. There is, it seems to me, just such a single supply by the hospital as was envisaged by Nolan LJ in the passage from his judgment in the *Bophutatswana* case already quoted. What the hospital does is to provide the wherewithal, including accommodation, care, investigative and theatre and other treatment facilities and the requisite drugs which together enable the consultants' services to achieve their desired effect. All the elements of provision by the hospital are integral and interrelated parts of one whole supply of services.'
>
> I would not quarrel with that analysis; the question, in my view, is whether the conclusion stated in the last sentence of the passage quoted follows from what precedes it."

55. Millett LJ then held that Jowitt J had asked himself the wrong question and thus reached the wrong conclusion. He concluded, at 464, that:

> "… the reality is that care and treatment in hospital involves multiple supplies by different suppliers; and that it is difficult to see why the supply by the hospital of medication prescribed by a consultant should be regarded as 'ancillary' to the accommodation or nursing services supplied by the hospital rather than to the services supplied by the consultant (in which it cannot be subsumed)."

56. The core of the reasoning that led Millett LJ to that conclusion is at 462- to 464,where he said:

> "I am not convinced that there is necessarily a single approach which is appropriate in all circumstances. The risk in canonising one particular method is that it disguises the true nature of the inquiry, which is essentially one of statutory construction. But I accept the appellants' submission that Jowitt J asked himself the wrong question. The issue is not whether one element of a complex commercial transaction is ancillary or incidental to, or even a necessary or integral part of, the whole, but whether one element of the transaction is merely ancillary or incidental to, or a necessary or integral part of, any other element of the transaction. The reason why the former is the wrong question is that it leaves the real issue unresolved; whether there is a single or a multiple supply. The proper inquiry is whether one element of the transaction is so dominated by another element as to lose any separate identity as

a supply for fiscal purposes, leaving the latter, the dominant element of the transaction, as the only supply. If the elements of the transaction are not in this relationship with each other, each remains as a supply in its own right with its own separate fiscal consequences.

In determining whether what would otherwise be two supplies should be regarded as a single supply the court has to ask itself whether one element is an 'integral part' of the other, or is 'ancillary' or 'incidental' to the other; or (in the decisions of the Court of Justice) whether the two elements are 'physically and economically dissociable.' This, however, merely replaces one question with another. In order to answer this further question, the court must consider 'what is the true and substantial nature of the consideration given for the payment' (see the *Bophuthatswana* case (at 708) per Nolan LJ). There are, however, limits to this process. Where supplies are made by different suppliers, they cannot be fused together to make a single supply; and it is probably only in relatively simple transactions that the reduction of multiple to single supplies is appropriate.

…

The administration of drugs which the consultant has prescribed and the supply of (say) an artificial hip joint are not optional extras nor are they merely one of several possible ways of providing the treatment contracted for. They are of the essence. Jowitt J was plainly right in saying ([1995] STC 628 at 642):

> 'One would not say a patient went into hospital simply to be supplied with medication or to purchase, for example, an artificial hip joint. The emphasis is on care or medical or surgical treatment and the supply of goods is obviously an integral part of this to enable the care or treatment to be effective.'

But this does not take the inquiry far enough. The fact that the supply of drugs or prostheses is an integral part of the treatment in the sense that it is essential to its success leaves the question 'does the treatment involve a single or multiple supply' unresolved. Indeed, Jowitt J's use of the word 'simply' exposes the fallacy in his reasoning. The question is not whether the supply of drugs is the only, or even the main, consideration for the payment; but whether it is in reality any part of the consideration at all: and it plainly is.

As Jowitt J said (at 642):

> 'What the hospital does is to provide the wherewithal, including accommodation, care, investigative and theatre and other treatment facilities and the requisite drugs which together enable the consultants' services to achieve their desired effect.'

Jowitt J deduced from this (at 642): 'All the elements of provision by the hospital are integral and interrelated parts of one whole supply of services'. With respect, this conclusion does not follow. Jowitt J's characterisation of hospital treatment as a single supply of services is merely an assumption. It would be equally consistent with his analysis to characterise it as consisting of multiple supplies of goods and services, all of which are necessary to success, all of which form part of the consideration for the payment, and none of which is to be disregarded as subservient to and subsumed in any other.

If one asks what is the real and substantial consideration provided to the patient for his money, there can in my view be little doubt about the answer. Just as the air passenger pays for transportation, so the hospital patient pays for care and treatment. But while the air passenger would regard the provision of in-flight catering, in-flight entertainment, and toilet facilities as merely incidental to his transportation by air from his point of departure to his destination, the hospital patient would not regard the provision of drugs and prostheses in the same light. They are an essential part of the care and treatment, perhaps a most important part without which the treatment would not succeed, and certainly an important part of what he has contracted for. As counsel for the appellants observed, the man who takes his car to his local garage

> for servicing contracts for labour and materials, which is to say for goods and services; it is no different when he takes his body to hospital for treatment.
>
> In my opinion, it is only if one begins by assuming that 'hospital treatment' is a single supply that it is possible to conclude that the supply of drugs or prostheses is an integral part of that supply. But the reality is that care and treatment in hospital involves multiple supplies by different suppliers; and that it is difficult to see why the supply by the hospital of medication prescribed by a consultant should be regarded as 'ancillary' to the accommodation or nursing services supplied by the hospital rather than to the services supplied by the consultant (in which it cannot be subsumed). … Accordingly, I would hold that … the supply of drugs and prostheses to hospital in-patients constitutes a separate supply of goods for the purposes of VAT."

57. Mr Grodzinski submitted that the FTT in *Nuffield* had been wrong to accept the case advanced by HMRC that *Levob* showed that the approach adopted by Millett LJ in *Wellington* was wrong. Mr Grodzinski contended that Millett LJ's reasoning was consistent with the need to consider all the circumstances of the transactions and, rather than being limited to an analysis of whether one supply was dominant or ancillary to another, it also included considering whether the different elements of the transaction were "physically and economically dissociable" which foreshadowed *Levob* and later CJEU case law. Mr Grodzinski submitted that the FTT, in [74], misunderstood Millett LJ's reasoning and assumed that he had simply asked whether one element of the transaction was so dominated by another element as to lose its separate identity. Mr Grodzinski contended that Millett LJ had also considered whether one element of a complex commercial transaction was "a necessary or integral part of, any other element of the transaction" which was consistent with the CJEU case law. Mr Grodzinski also argued that the FTT had erred in [75] when they found that Millett LJ's approach of considering the relationship between the various elements of the transaction, was inconsistent with *Levob* and later case law which required consideration of the essential features of the transaction. Mr Grodzinski submitted that Millett LJ's reasoning was entirely consistent with looking at the whole transaction and taking into account its various essential features and then, correctly, looking at their relationship to each other.

58. Mr Thomas submitted that, in *Wellington*, Millett LJ wrongly approached the question of whether there was a single/multiple supply on the basis that there must be a principal/ancillary relationship between the elements of the transaction for there to be a single supply.

59. We agree with Mr Thomas that, in the light of *Levob* in particular, it is clear that Millett LJ focussed on the wrong question when he said, at 462, that the proper inquiry is whether one element of a transaction is so dominated by another element as to lose any separate identity as a supply for VAT purposes, leaving the dominant element as the only supply. This led Millett LJ to conclude that, where the elements of a transaction are not in a principal/ancillary relationship with each other, then each must be a separate supply in its own right. That view cannot be regarded as correct following the CJEU's decision in *Levob* and the cases that followed it where different elements of a transaction were found to be equally important and essential, i.e. were principal elements, but were nevertheless components of a single supply. We do not accept that when Millett LJ in *Wellington* asked whether two elements are physically and economically dissociable he was foreshadowing the *Levob* test. It is clear from the context in which it occurs, and his rejection of Jowitt J's analysis of the elements being integral and interrelated parts of one whole supply of services, that Millett LJ regarded 'physically and economically dissociable' as another way of saying that one is ancillary

to another. The CJEU in *Levob* has clearly shown, as correctly anticipated by the House of Lords in *College of Estate Management*, that the principal/ancillary test is merely one example ("in particular") of a transaction where the elements are so closely linked that they form, objectively, a single, indivisible economic supply which it would be artificial to split.

60. We therefore consider that the FTT in *Nuffield* were right to conclude that Millett LJ's approach in *Wellington*, based as it was on the incorrect premise that the different elements must be in a principal/ancillary relationship to form a single supply, could no longer be regarded as correct after *Levob*.

61. Mr Grodzinski also referred to *Telewest Communications Plc v HMC&E [2005] EWCA Civ 102*, [2005] STC 481 ("Telewest"). In that case, the issue was whether supplies of a monthly printed cable TV magazine, which would normally be zero rated, and standard rated television services by separate companies could be regarded as a single supply by one or both of them for VAT purposes. The Court of Appeal held that supplies by two separate suppliers, not being members of a VAT group, could not be treated as a single supply. At [80], Arden LJ referred to the fact that Millett LJ had expressed the view, obiter, in *Wellington* that supplies by two separate suppliers could not be treated as principal and ancillary supplies. Arden LJ then rejected HMRC's submissions that the law on single/multiple supply, as decided in *Wellington*, had been superseded by subsequent decisions of the CJEU. Mr Grodzinski criticised the FTT for not referring to *Telewest* , which had been referred to in the skeleton arguments. HMRC contended that it was factually different from GHG's case, as there had been three parties and two separate suppliers. Mr Grodzinski submitted that this too was at least a two supplier case, with the fitting of the prosthesis being supplied by the consultant who is a separate supplier from GHG which supplies the prosthesis. However, it did not follow from the fact that the consultant could not be regarded as supplying the prosthesis that GHG must be regarded as supplying the prosthesis as part of a package.

62. Mr Grodzinski's primary submission was that the supply of a prosthesis was very closely related to the supply by the consultant in advising the patient on what prosthesis was required and then carrying out surgery to fit it. From the point of view of a patient, the supply of a prosthesis is part of and much more closely associated with the medical services supplied by the consultant. He contended that the fact that, as *Telewest* shows, the consultant cannot be regarded as making a single supply of the prosthesis and medical services does not mean that the typical patient's view is irrelevant. In our view, however, *Telewest*, which was concerned with very different facts, does not provide the answer to the question that arises in this case.

63. Mr Grodzinski next contended that the fact that a typical patient considered the supply of the prosthesis to be more closely associated with the services supplied by the consultant meant that it could not be said that the supply of the prosthesis was, at the same time, indissociable from the other supplies made by GHG.

64. At the hearing, GHG's case was that the FTT in *Nuffield* erred in law in finding that the supply of prostheses formed part of a single exempt supply of healthcare and that, applying the relevant principles of law, the correct conclusion was that the supply of prostheses was an independent zero rated supply. Mr Grodzinski submitted that if the patient views the provision of the prosthesis as indissociable from the supply made

by the consultant, it is logically impossible for the patient also to view it as indissociable from the supply made by GHG. In support of this submission, he relied on the following facts:

> (1) the consultant is responsible for recommending whether a prosthesis is needed, and which kind of prosthesis to have, while GHG has no input at all into these decisions;
>
> (2) the consultant has primary responsibility for carrying out and supervising the surgery to fit the prosthesis, albeit with the assistance of a self-employed anaesthetist, perhaps another self-employed junior doctor and junior doctors/nurses provided by GHG who supply a separate group of services;
>
> (3) GHG provides the patient with hospital and medical care, but it is still the responsibility of the consultant to provide overall supervision of the care; and
>
> (4) the consultant charges separately for his or her services and GHG's invoice shows the charge for the prosthesis as a separate item.

65. Mr Grodzinski also relied on Case C-366/12 *Finanzamt Dortmund-West v Klinikum Dortmund gGmbH* [2014] STC 2197 ('*Klinikum Dortmund*'). Klinikum Dortmund was a non-profit company that managed a hospital which provided both outpatient and in-patient chemotherapy treatment for cancer. The drugs (cytostatics) administered were produced in the hospital pharmacy, on the basis of a doctor's prescription issued for each individual patient. Where the cytostatics were used for in-patient hospital and medical care on the hospital premises, it was agreed that their supply was exempt from VAT. Cytostatics produced by Klinikum Dortmund were also used for out-patient medical care provided at the hospital by doctors acting in an independent capacity. Klinikum Dortmund treated the supplies of those drugs as exempt. The German tax authorities disagreed. The arguments before the CJEU centred on Article 13A(1)(c) of the Sixth Directive which exempted the provision of medical care in the exercise of the medical and paramedical professions. At paras 46 and 47 of her opinion, Advocate General Sharpston stated:

> "46. On the basis of that description it is clear that there is a therapeutic continuum, which encompasses both 'the provision of medical care in the exercise of the medical and paramedical professions' and a supply of drugs. It is also clear that, without the supply of the drugs, the medical care itself would serve no purpose; that supply is, therefore, 'strictly necessary at the time when the care is provided'.
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> 47. However, I find it difficult to consider, at the same time, either that the supply of drugs is not 'physically and economically dissociable from the provision of the [medical care]' or that it is 'so closely linked [to the medical care] that they form, objectively, a single, indivisible economic supply, which it would be artificial to split'."

66. The CJEU held that the supply of the drugs by doctors working in an independent capacity in a hospital may not be exempt unless that supply is physically and economically indissociable from the principal supply of medical care by the doctor and healthcare staff, which was for the referring court to determine. The CJEU did not express any view on whether the supply of drugs in that case was physically and economically indissociable from the supply of medical care or so closely linked to it as to form a single, indivisible economic supply which it would be artificial to split. At paras 36 and 37 of its judgment, the Court observed that:

> "36. … despite that therapeutic continuum, the interested parties confirmed during the hearing that the treatment at issue in the case in the main proceedings comprises a series of activities and steps, which, although interrelated, are individually distinct. As the Advocate General noted at points 48 and 49 of her opinion , the patient appears to receive more than one supply, namely, first, the medical care from the doctor and healthcare staff, and second, drugs from the hospital pharmacy managed by KD, which prevents their being considered indissociable, physically and economically.
>
> 37. However, it is not clear from the information provided to the Court whether, in the case in the main proceedings, the dispensing of drugs may be considered to be physically and economically indissociable from the provision of care in the context of that treatment. Such a finding would require a detailed assessment of the therapeutic continuum at issue. From that point of view, it is for the referring court, which alone is competent to assess the facts, to make the necessary determinations in that regard."

67. Mr Grodzinski accepted that the primary question being considered in *Klinikum Dortmund* was the scope of the exemption under Art 13A(1)(c) and not whether there was a single supply or several supplies. Nevertheless, he submitted that certain observations of the Advocate General and CJEU showed that, despite being part of a therapeutic continuum, the supply of drugs (and by extension prostheses) cannot be viewed as a single supply of medical care. In our view, it is clear from the CJEU's decision in *Klinikum Dortmund* that the fact that a prosthesis is supplied in a therapeutic continuum does not, of itself, mean that it is necessarily physically and economically indissociable from the supply of healthcare. But that does not answer the question raised by this case. As the CJEU makes clear in para 37 of the judgment, it is necessary to undertake a detailed assessment of the therapeutic continuum, i.e. all the circumstances of the case, at issue before that question can be determined. The view expressed by the Advocate General indicates that, applying the *Levob* test, she might have held that the supply of drugs in that case should be regarded as a separate, independent supply from the supply of medical care, but the CJEU was more cautious. We consider that the CJEU's approach to the different test of dissociability, shows that it is necessary for the national court to approach each case on the basis of its own specific facts to which the appropriate principles must be applied.

68. Mr Grodzinski also submitted that choice is an important factor in determining whether an element in a transaction should be regarded as part of a single supply or as a separate, independent supply. He contended that it was significant that the choice of prosthesis was made by the consultant who also fitted or implanted it rather than by GHG. He relied on a passage from *American Express Services Europe Ltd v HMRC* [2010] EWHC 120 (Ch), [2010] STC 1023. The question in that case was whether management services relating to properties in Europe supplied by American Express Services Europe Limited to its parent company in the US were separate property related services, in which case they were subject to VAT in the country where the property was located, or part of a single supply of a variety of management services which were not subject to VAT. Proudman J in the High Court, applying the *Levob* test, held that there was a single indivisible economic supply which it would be artificial to split. Mr Grodzinski relied on paragraph [55] of the judgment:

> "55. It seems to me that the crucial issue is the question of what the typical customer was paying the consideration for. If a house owner engages the services of a builder, is he taken to have paid the builder to do whatever is required (including subcontracting where necessary) to complete the building to his specifications, to be an overall 'Mr Fixit'? Or is he taken to have paid the builder to provide a package

> of distinct building, roofing, plastering, decorating, electrical and plumbing services? It seems to me that discretion is important in finding the answer to this question. If the supplier is given discretion to supply whatever it takes to provide and allocate expertise in the provision of an efficient service it is difficult to say that the customer is, objectively speaking, buying a package of discrete services. This discretion is a separate issue from independence."

69. Mr Grodzinski contended that GHG had no discretion as to the prosthesis that was to be used or how it was implanted. He argued that GHG was not an overall 'Mr. Fixit', and application of Proudman J's approach indicated that GHG was making a separate supply of the prosthesis.

70. Mr Thomas submitted that Proudman J was only referring to the discretion on the part of the supplier as being important as the obverse of any choice on the part of the customer. It was clear from the first sentence of [55] ("the crucial issue is the question of what the typical customer was paying the consideration for") and the context that the key question was whether the customer had any choice.

71. We agree with Mr Thomas on this point. It is clear from the CJEU cases from *CPP* onwards that when determining whether a transaction should be regarded as several distinct supplies or a single supply, the court must have regard to the essential features of the transaction from the viewpoint of a typical consumer. The cases also show that the ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive. None of the CJEU authorities refers to the viewpoint of the supplier being relevant to this issue, and it would be surprising if that were so as it could lead to different suppliers being taxed differently on identical supplies. We also consider that, if the ability of a supplier to choose which goods or services to supply and how to supply them is relevant to determining whether there is a single supply or several independent supplies, then it is surprising that the CJEU has not referred to it as a factor in any of the cases on the subject.

72. As we have already indicated, Mr Grodzinski's primary submission was that the typical patient would regard the prosthesis as more closely associated with the services of the consultant than the services supplied by GHG. He contended that the fact that the patient associated the prosthesis more closely with the consultant meant it could not be said that the supply of the prostheses was, at the same time, indissociable from the supplies by GHG. We see the force of that argument, but we consider that the issue of whether GHG makes a single supply or several independent supplies is to be determined by reference to the principles identified by the CJEU in the cases referred to above. In our view, GHG's submission seeks to substitute a different test for the one in *Levob*. The test, as set out by the CJEU in *Levob*, is not whether the element is closely linked to a supply by another, second, supplier, i.e. the consultant, but whether there is a single indivisible economic supply of the different elements by the first supplier, i.e. GHG. Bearing Mr Grodzinski's submissions in mind, we now consider the application of those principles to the facts of this case as out at [23] above.

73. We approach the question of whether GHG made a single supply or several independent supplies on the basis that every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split. The transaction between GHG and a typical patient should, it seems to us, be regarded as a single transaction

from an economic point of view because the evidence showed that, whether payment was by the patient or an insurer, GHG charged for all of its supplies in relation to the supply of the prostheses and associated hospital care together in one invoice or series of invoices. The consultants (and the self-employed anaesthetists) made separate charges and issued separate bills. Separate invoicing and pricing can support the view that different elements of a transaction are independent supplies but it is not decisive. In this case, we do not regard the fact that GHG's invoices to the patients itemised the cost of the prosthesis, as well as other items, as significant.

74. Neither party contended that the supply of prostheses was ancillary to the supply of medical care by GHG. The supply of the prostheses was not "a means of better enjoying the principal service supplied". Accordingly, it is necessary to ask whether the supply of the prosthesis and other services and goods supplied by GHG to the typical patient are "so closely linked that they form, objectively, a single, indivisible economic supply which it would be artificial split." In our view the answer is clearly yes.

75. The supply by GHG must be regarded as a single indivisible economic supply which it would be artificial to split if, from the point of view of a typical patient, the supply of the prosthesis and the medical care services are equally inseparable and indispensable. Mr Grodzinski submitted that the supply by GHG of a prosthesis would not be regarded by the typical consumer as inseparable from the accommodation, nursing and/or other auxiliary medical services supplied by GHG, rather than being more closely connected to the surgical and other medical services provided by the self-employed consultant, who:

> (1) medically examines the patient and prescribes the prosthesis, with no input from GHG;
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> (2) fits the prosthesis, in a surgical procedure that is under the overall supervision of the consultant;
>
> (3) has overall clinical responsibility for the care of the patient before, during and after the operation; and
>
> (4) being self-employed, charges the patient separately for his services.

76. We accept that, if the consultant supplied the prosthesis, then there would be a single supply by the consultant of the prosthesis and medical care. Mr Grodzinski's submissions show that to be the case. That does not mean, however, that, when they are supplied together, the prosthesis and medical care supplied by GHG cannot also be regarded as indivisible. We consider that the supply of the medical care and the prosthesis by GHG are inseparable and indispensable because each is necessary for the other and meaningless without the other. The fact that the prosthesis and the medical care could be supplied by separate suppliers and would, in that case, be separate supplies is irrelevant. The prosthesis and the medical care must be considered to be a single transaction if they are not independent. It is not necessary to talk about a 'therapeutic continuum' to understand that all the elements of GHG's supply are part of a package of services designed and intended to provide the patient with the treatment he or she needs. The typical patient who requires an artificial hip does not merely wish to purchase a prosthesis but wants a new hip. The ability of the patient to choose whether or not to be supplied with an element of a transaction is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive. In the case of a prosthesis, we consider that the ability of the patient to

choose was limited by the circumstances. In reality, the patient could not choose to be supplied with medical care but not his or her prosthesis or vice versa. The prosthesis was chosen by the consultant and the patient's choice was limited to deciding whether or not to have it implanted and possibly the hospital in which to have the necessary surgery. Once that choice had been made, the patient could not choose to have the prosthesis without the hospital and medical care, nor could the patient choose to receive the care without having the prosthesis.

77. In conclusion, we consider that, applying the *Levob* test, and from the point of view of the typical patient who requires a prosthesis, GHG makes a single supply of hospital and medical care which includes providing the prosthesis to be fitted by the consultant.

78. For completeness, we record that GHG also sought to argue in its grounds of appeal that the FTT in *Nuffield* had erred in rejecting Millett LJ's construction of item 4 of Group 7 of Schedule 6 to VATA 1983 in *Wellington*. Having held that the supplies of drugs and prostheses were not part of a single exempt supply of healthcare by the hospital, Millett LJ observed that the same result could also be reached by construction of the domestic legislation. He noted that if the provision of drugs and prostheses were not separate supplies then the words "and, in connection with it, the supply of any goods" in item 4 would be empty of content. Before us, Mr Grodzinski did not seek to argue that if we considered that GHG made a single supply then we should nevertheless find that GHG should be regarded as making a separate supply of the prosthesis on the basis of the construction of item 4. In our view, that must be right as, if we conclude that EU law requires us to regard GHG as making a single supply, then we would also be required to construe item 4 in order to give effect to the Sixth Directive in so far as possible.

79. Towards the end of his reply, Mr Grodzinski submitted that the position was not acte clair and that we should make a reference to the CJEU. Mr Thomas opposed a reference on the ground that the existing case law is clear and this case does not merit a reference. We consider that the relevant principles are well established and are as we have set them out above. We do not believe that there is any scope for reasonable doubt as to the manner in which those principles are to be applied. The real issue in this case, as in many others, is how should those principles be applied to the facts. We do not consider that a reference is necessary or desirable in a fact-based case such as this. We consider that it is inevitable that the CJEU would state that it is for the national court to apply the principles to the facts. For those reasons, we decline to make any reference to the CJEU.

**Disposition**

80. GHG's appeal against the Decision is dismissed.

**Costs**

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

**The Hon Mr Justice Henderson**

**Upper Tribunal Judge Greg Sinfield**

**Release date: 19 July 2016**