[2018] UKUT 0292 (TCC)

Appeal number: UT/2014/0003

VALUE ADDED TAX – reduced rate – energy saving materials supplied as part of a single composite supply – whether the whole of the supply subject to the standard rate of VAT or whether a component of the supply subject to a reduced rate of VAT – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

AN CHECKER HEATING & SERVICE ENGINEERS

Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondent

Tribunal: Mrs Justice Rose
Judge Andrew Scott

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 25 and 26 June 2018

David Milne QC and Charles Bradley, Counsel, instructed by Harper Macleod LLP for the Appellant

Marika Lemos, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondent

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DECISION

Introduction

1. This is an appeal that turns on whether or not, as a matter of construction, Group 2 of Sch.7A to the Value Added Tax Act 1994 ("VATA 1994") applies a reduced VAT rate to a component of what is, for VAT purposes, otherwise regarded as a single supply.

2. An appeal was brought by AN Checker Heating & Service Engineers ("AN Checker") against VAT assessments issued by HMRC for the periods 03/06 to 09/08. At the material time AN Checker made supplies of installing boilers or central heating systems in residential accommodation. AN Checker asserted that a component of those supplies comprised the installation of energy-saving materials.

3. The appeal was designated as a lead case pursuant to rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273). The common or related issues of fact or law were:

> "Whether the supply of the installation of energy saving materials together with services of installation of boiler and other central heating products is a single supply subject to [a] single rate of VAT or is a single supply subject to two or more different rates of VAT or, in the alternative, are two or more separate supplies subject to different rates of VAT."

4. The First-tier Tribunal (Judge Nicholas Paines QC) dismissed the appeal by a decision given on 24 September 2013 ([2013] UKFTT 506 (TC)) determining at [48] the rule 18 issue as follows:

> "The supply of the installation of energy saving materials together with services of installation of a boiler or of a central heating system is a single supply subject to a single rate of VAT at the standard rate."

5. Later that year the FTT granted permission to appeal against its decision.

6. The parties then agreed that the appeal should be stayed behind an appeal to the Upper Tribunal in *Colaingrove v HMRC* ([2015] UKUT 80 (TCC)), a case that concerned Group 1 of Sch.7A to VATA 1994 and the extent to which a component of a single supply could benefit from a reduced rate of VAT. The stay was continued when the Upper Tribunal's decision was in turn appealed to the Court of Appeal ([2017] EWCA Civ 332) ("*Colaingrove (CA)*"). The Court of Appeal upheld HMRC's assessments.

Relevant VAT legislation

7. Article 12(3)(a) and Annex H(9) of Council Directive 77/388/EEC ("the Sixth Directive") conferred on member states a power to apply reduced VAT rates to the "supply, construction, renovation and alteration of housing provided as part of a social policy". The relevant provisions of the Sixth Directive were re-enacted as Article 98 and Annex III(10) of Council Directive 2006/112/EC ("the PVD").

8. In exercising the power to derogate from the ordinary VAT system, the UK Parliament conferred relief in July 1998 in respect of the installation and supply of

energy-saving materials. This was effected by way of amendment to what was then Sch. A1 to VATA 1994 (the operative effect of which was governed by what was then s.2(1A) of that Act). The expression "energy-saving materials" was defined as insulation for walls, floors, ceilings, roofs or lofts or for water tanks, pipes or other plumbing fittings; draught stripping for windows and doors; central heating system controls; and hot water system controls. The relief was confined to supplies made to "qualifying persons", defined as someone aged 60 or over or receiving certain social security benefits. It was also provided that the relief applied only to the extent that the consideration for it was met by a grant made under a particular type of public scheme.

9. The Finance Act 2000 made changes to the system of reduced rates (see s.135 of, and Sch.35 to, that Act, and it is worth noting that, on introduction of the Finance Bill 2000, s.135 was clause 131). The effect of those changes was that the relief in respect of energy-saving materials as defined above (re-labelled by the Act as "List A energy-saving materials") was extended to installations in residential accommodation, regardless of the person to whom they were supplied and the funding of the consideration. In addition, Parliament conferred relief on supplies of *other* types of energy-saving materials (referred to as "List B energy-saving materials") but only if they were made to qualifying persons funded by a grant.

10. The Finance Act 2001 recast the reduced rates for VAT more generally, repealing s.2(1A) and Sch.A1 and enacting instead s.29A and Sch.7A. In essence, the relief for List A energy-saving materials became Group 2 of Sch.7A to VATA 1994; and the relief for List B energy-saving materials became Group 3 of that Schedule.

11. The provisions of Group 2 of Sch.7A included, at the times of the VAT assessments subject to this appeal, relief for the installation of materials in buildings used for charitable purposes. The charitable purposes limb was repealed by s.193 of the Finance Act 2013. The existence of that limb is not material to the issue falling to be decided in this appeal.

12. The European Commission brought infraction proceedings against the United Kingdom in relation to Group 2 of Sch.7A. It was in response to the Commission's concerns that the UK Parliament removed the relief for supplies of materials in buildings used for charitable purposes. However, that was not enough to stop the infraction. The infraction proceedings succeeded before the CJEU in 2015: see *Commission v United Kingdom* (Case C-161/14) [2015] STC 1767. The CJEU held that the reduced rate of VAT provided by Group 2 of Sch.7A was not permissible as a matter of EU law. It appeared to be common ground between the parties in the present appeal that the ruling in those infraction proceedings should not affect our interpretation of the relevant statutory provisions when deciding whether AN Checker was entitled to rely on reduced VAT rates conferred by domestic legislation. Neither of the conflicting interpretations put forward by the parties could be preferred on the basis that it would amount to a compliant interpretation from the EU standpoint.

13. So far as relevant to the issues in this appeal, s.29A of VATA 1994 provides:

> "(1) VAT charged on—
>
> (a) any supply that is of a description for the time being specified in Schedule 7A, or
>
> [...]

shall be charged at the rate of 5 per cent.

(2) [...].

(3) The Treasury may by order vary Schedule 7A by adding to or deleting from it any description of supply or by varying any description of supply for the time being specified in it.

(4) The power to vary Schedule 7A conferred by subsection (3) above may be exercised so as to describe a supply of goods or services by reference to matters unrelated to the characteristics of the goods or services themselves.

In the case of a supply of goods, those matters include, in particular, the use that has been made of the goods."

14. So far as relevant to the issues in this appeal, Group 2 of Sch.7A to VATA 1994 currently provides as follows:

"Group 2 Installation of energy-saving materials

Item no.

1. Supplies of services of installing energy-saving materials in—

(a) residential accommodation, …

2. Supplies of energy-saving materials by a person who installs those materials in—

(a) residential accommodation, …

Notes

Meaning of "energy-saving materials"

1. For the purposes of this Group "energy-saving materials" means any of the following—

(a) insulation for walls, floors, ceilings, roofs or lofts or for water tanks, pipes or other plumbing fittings;

(b) draught stripping for windows and doors;

(c) central heating system controls (including thermostatic radiator valves);

(d) hot water system controls;

(e) solar panels;

(f) wind turbines;

(g) water turbines;

(h) ground source heat pumps;

(i) air source heat pumps;

(j) micro combined heat and power units;

(k) boilers designed to be fuelled solely by wood, straw or similar vegetal matter."

Relevant EU case law etc

15. The issue raised in this appeal involves a consideration of two principles of EU law, namely, the principle that different components of what is, from the economic point of

view of the typical consumer, a single supply of goods or services should be treated as a single supply subject to a single rate of VAT (the applicable rate being the one that applies to the dominant element), and the principle that where a member state takes advantage of a power to apply a lower VAT rate to a defined class of goods or services, that derogation can be exercised in relation to a subset of that defined class.

16. The CJEU's decision in *Card Protection Plan* (Case C-349/96) [1999] STC 270 ("*CPP*") established that, in certain cases, a transaction which comprises several elements is to be regarded as a single supply (which we refer to as a "CPP supply"). The Court was considering a card protection plan which comprised a package of services some of which could be described as the making of arrangements for the provision of insurance which were exempt from VAT. The House of Lords sought a preliminary ruling as to the appropriate criteria for deciding whether a transaction which comprised several elements was to be treated as a single supply or as two or more distinct supplies to be assessed separately. The CJEU held at [29] that, although every supply of a service must normally be regarded as distinct and independent, "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". It was the task of the national court therefore to ascertain "the essential features of the transaction … in order to determine whether the taxable person is supplying the customer, being a typical customer, with several distinct principal services or with a single service". The House of Lords subsequently held that the transaction performed by CPP was to be regarded as a principal exempt insurance supply. The other supplies involved were ancillary and were also to be treated as exempt for VAT purposes: [2001] UKHL 4, [2001] 2 WLR 329.

17. The effect of the ruling in *CPP* on the application of transitional derogations from the standard rate of VAT was considered by the CJEU in *Talacre Beach Caravan Sales Ltd v CEC* (Case C-251/05) [2006] STC 1671 ("*Talacre Beach*"). That case concerned the zero-rating of supplies of fitted caravans. The relevant provisions of VATA provided, in s.30(2) of VATA 1994, that:

> "(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 8 or the supply is of a description for the time being so specified."

18. Group 9 of Sch.8 to VATA 1994 included, at the material time, the following:

> "1. Caravans exceeding the limits of size for the time being permitted for use on roads of a trailer drawn by a motor vehicle having an unladen weight of less than 2,030 kilogrammes.
>
> […].
>
> *Note:* This Group does not include—
>
> (a) removable contents other than goods of a kind mentioned in [item 4] of Group 5;"

19. Talacre argued that the supply of the caravan and its contents was a single indivisible supply which should be subject to a single rate of VAT. That rate was the rate appropriate to the principal element which was the caravan itself. Since the caravan was zero-rated, the whole supply should be zero-rated.

20. The CJEU held that, although there was a single CPP supply of a caravan to which the supply of contents was ancillary, the single supply was nonetheless to be taxed at two different rates, with the standard rate applying to so much of the consideration as was attributable to the contents. The Court noted that the zero-rating of caravans was enacted by the UK in reliance on the power in art 28(2)(a) of the Sixth Directive to continue in force lower tax rates that had applied as at 1 January 1991 provided certain conditions were satisfied. The Court acknowledged at [19] that the exemption for caravans did meet those conditions and so was legitimate. However, the UK had specifically excluded the caravan contents from zero-rating because the conditions for derogation were not satisfied with regard to the contents referred to in the Note. To treat those contents nonetheless as benefiting from the same zero-rate as the principal element in the supply would, the Court recognised, "mean that items specifically excluded from exemption by the national legislation would be exempted nevertheless pursuant to art 28(2)(a) of the Sixth Directive". The Court held that such an interpretation of art 28(2)(a) of the Sixth Directive would run counter to that provision's wording and purpose, according to which the scope of the derogation laid down by the provision is restricted to what was expressly covered by the national legislation on 1 January 1991. The CJEU then addressed how this result could be consistent with what the Court had held in *CPP*: (emphasis added)

> "24. The fact that the supply of the caravan and of its contents may be characterised as a single supply does not affect that conclusion. The case law on the taxation of single supplies, relied on by Talacre …, does not relate to the exemptions with refund of the tax paid with which art 28 of the Sixth Directive is concerned. **While it follows, admittedly, from that case law that a single supply is, as a rule, subject to a single rate of VAT, the case law does not preclude some elements of that supply from being taxed separately where only such taxation complies with the conditions imposed by art 28(2)(a) of the Sixth Directive on the application of exemptions with refund of the tax paid.**
>
> 25. In this connection, as the Advocate General rightly pointed out in paras 38 to 40 of her opinion, referring to para 27 of *CPP* there is no set rule for determining the scope of a supply from the VAT point of view and therefore all the circumstances, including the specific legal framework, must be taken into account. In the light of the wording and objective of art 28(2)(a) of the Sixth Directive, recalled above, a national exemption authorised under that article can be applied only if it was in force on 1 January 1991 and was necessary, in the opinion of the member state concerned, for social reasons and for the benefit of the final consumer. In the present case, the United Kingdom of Great Britain and Northern Ireland has determined that only the supply of the caravans themselves should be subject to the zero-rate. It did not consider that it was justified to apply that rate also to the supply of the contents of those caravans."

21. The CJEU returned to this issue in *Commission v France* (C-94/09) [2012] STC 573 ("*French Undertakers*"). That case concerned the application by France of the reduced rate of VAT to supplies of transportation of bodies by undertakers. The power to derogate by applying a reduced VAT rate to funeral services was conferred on member states by Annex III to the PVD and could be exercised in respect of the "supply of services by undertakers". France had chosen to legislate to exercise the derogation only in respect of the transportation of the body, not in respect of funeral services more generally. The Commission brought infraction proceedings against France arguing that that since all

supplies by undertakers constituted single CPP supplies, they had to be subject to a single rate of tax. The Commission argued that it was contrary to EU law to single out only part of the supply as benefiting from the reduced rate.

22. The CJEU dismissed the action. The Court held at [28] to [30] and [33] that there was nothing in the PVD that required the reduced rate to be charged only if it applied to all aspects of a category of supply described in the Directive. It was open to member states to limit the application of the reduced rate of VAT to a subset of the services to which it could legitimately be applied under the derogation power conferred. However, this was subject to a two-fold condition. First the derogation enacted must isolate "only concrete and specific aspects of the category of supply at issue". The second condition was that the member state must comply with the principle of fiscal neutrality. The Court addressed the Commission's reliance on the CPP supply principle saying that although the criteria laid down in *CPP* for determining when there was a single transaction were important to prevent an artificial splitting of a transaction, "they cannot be regarded as decisive for the purpose of the exercise by the member states of the discretion left to them" when deciding how far to implement a permitted derogation: [33]. The Court went on:

> "34. Accordingly, in order to rule on the merits of this action, it is not necessary to examine whether, as the Commission maintains, the supply of services by undertakers must be regarded as a single transaction from the point of view of the expectations of a typical consumer. On the other hand, it is necessary to ascertain whether the transportation of a body by vehicle, in respect of which the French legislation provides for the application of a reduced rate of VAT, constitutes a concrete and specific aspect of that category of supply, as set out in Annex III, point 16, to Directive 2006/112, and, if so, to examine whether or not the application of that rate undermines the principle of fiscal neutrality."

23. The Court held that the transportation of the body by vehicle was a concrete and specific element and that the limited derogation did not infringe the principle of fiscal neutrality.

24. Quite what the *French Undertakers* case had decided was considered by the Upper Tribunal in *Wm Morrison Supermarkets plc v HMRC* [2013] UKUT 247 (TCC), [2013] STC 2176 ("*Wm Morrison*"). The exemption at issue in that case was the reduced rate for the sale of solid fuel which was item (a) of Group 1 of Sch.7A to VATA 1994. In that case the supermarket argued that, in the case of a supply of a disposable barbeque, the charcoal and lighting paper elements were, viewed by themselves, supplies for domestic use of a solid substance held out for sale solely as fuel. As such, the taxpayer argued, a reduced rate of VAT should apply to those elements even though they formed part of the single CPP supply of the overall disposable barbeque.

25. In rejecting the supermarket's argument, the Upper Tribunal (Vos J) held that the analysis of the European case law should not pre-empt a consideration of what he regarded as the real question in the case which was *when* the *French Undertakers* test is to be applied. He held that on close analysis, there is nothing in the authorities which make it of general application wherever reduced rates of VAT are invoked. The test is applicable only where the member state seeks to limit or restrict the application of a reduced rate of VAT: [59]. He went on:

> "68. … It is then appropriate to ask whether the restriction in question is in respect of a 'concrete and specific aspect' of the supply. If it is, it will not matter that the whole supply would have been regarded as a single supply by the application of a CPP analysis. The *French Undertakers* test has not 'trumped' the CPP test in any meaningful sense. All that has happened is that a different question has been asked and answered. …"

26. Vos J therefore upheld the FTT's decision that the scope of an exemption or reduced rate by way of derogation is defined by the terms of the domestic legislation provided that it is consistent with the PVD:

> "71 Whilst it is true that *Talacre* held that the scope of the reduced rate could not be extended by the use of a *CPP* analysis, … it does not follow that a reduced rate that a member state has made applicable to one type of supply must be respected, even if it has been decided upon for socio-economic reasons, whether or not that supply is to be properly regarded as only a constituent part of a single supply for VAT purposes on a *CPP* analysis. The reasoning confuses the obvious importance of member states being able to decide for socio-economic reasons, and within the limits of the Principal VAT Directive and EU law which supplies should be at a reduced rate, and the technical rules that decide whether those rules are effective. The *French Undertakers* test is simply there to decide if a limitation imposed by the member state is effective; it will only be so, as a matter of EU law, if it carves out a 'concrete and specific aspect' of the supply …
>
> 73. … It is precisely because the domestic statute did not expressly identify 'charcoal as part of disposable barbecues' as being worthy of a reduced rate that they do not attract one. The disposable barbecue is acknowledged to be a single supply. The result is neither surprising nor undesirable since disposable barbecues are leisure items, and are not likely to be used as a regular means of using solid fuel for domestic cooking, at which the exemption in item 1(a) of Sch 7A is obviously aimed."

The FTT's decision in *AN Checker* subject to this appeal

27. The FTT (rightly in our view) considered that, even though AN Checker was a lead case taken to determine an issue of law, it was not possible to determine the issue in the abstract in the absence of facts. At [7] to [10] the FTT recorded a summary of the evidence. AN Checker's business includes the installation, improvement and repair of domestic central heating installations. Mr Checker uses a computer to prepare quotations. In order to enable the computer to calculate the VAT element of the quotation Mr Checker attributes values to those elements of the job that he considers to be taxable at the reduced rate. These are the elements comprising thermostatic radiator valves, central heating timers, room thermostats, other central heating system controls such as motorised valves controlled by a thermostat, and insulation.

28. In recent years AN Checker has used a piece of computer software known as the 'VAT optimiser'. This appears to apportion costs of materials between components of an installation regarded as falling or not falling within the definition of energy-saving materials on the basis of the installer's purchase cost and to apportion labour costs between the two categories of component on the basis of the installer's labour rates and industry standard labour times. The 'VAT optimiser' makes an apportionment even as

regards the internal components of items that the installer purchases as a single unit, such as insulation material within a boiler.

29. AN Checker's appeal relied on *French Undertakers* as establishing that the reduced rate provided for by s. 29A of, and Group 2 of Sch. 7A to, VATA 1994 applies to those elements of its supplies that were energy-saving materials, regardless of whether they were elements of a single wider supply on CPP principles. In dismissing the appeal, the FTT noted at [28] that it was accepted by the appellant that the supply was a single CPP supply. That was not, however, enough in itself to determine the appeal in HMRC's favour. The FTT went on to consider whether, as a matter of construction, Parliament had intended the reduced rate for energy-saving materials to apply when those materials are provided as part of a wider CPP supply. The FTT held that Parliament did not so intend. The FTT considered that, by the time that Parliament established the reduced rate in the case of energy-saving materials, it was clear that, as a matter of EU law, different elements could amount to a single supply. At [43] and [47] the FTT held that, on a literal reading, the legislation was unambiguous in securing that elements of a CPP supply could not benefit from a reduced rate. The contrary position could not be sustained on the basis of a rectifying construction of the legislation in reliance on *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586.

EU and domestic case law developments since FTT's decision in *AN Checker*

30. Since the FTT's decision in *AN Checker*, there have been case law developments at both the EU and domestic level that are relevant to the issue to be determined in this case. In *Stadion Amsterdam CV v Staatssecretaris van Financiën* (Case C-463/16) [2018] STC 530 ("*Stadion Amsterdam*") the CJEU considered, among other things, the application of the *French Undertakers* test. Domestically, we have had the benefit of *Colaingrove (CA)* on Group 1 of Sch.7A to VATA 1994 and two Upper Tribunal decisions concerning Group 2 of Sch.7A to that Act, namely *HMRC v Pinevale* [2014] UKUT 202 (TCC) ("*Pinevale*") and *HMRC v Wetheralds Construction* Ltd [2018] UKUT 173 (TCC) ("*Wetheralds*").

31. The case of *Stadion Amsterdam* concerned the application of the Dutch reduced rate of VAT to so much of a supply of a tour of AFC Ajax facilities (notably, the football stadium) as consisted in a visit to the Ajax museum. At the relevant time it was possible to visit the museum only if participating in a guided tour of the stadium. The Sixth Directive permitted member states to apply a reduced rate to, amongst other things, admissions to museums, exhibitions and similar cultural events and facilities. Dutch domestic law applied a reduced rate to admissions to public museums, theme parks and other similar facilities "intended for entertainment and daytime recreation". The Dutch Court of Appeal ruled that the tours constituted a single supply of services which could not be divided for the purposes of applying VAT at a special rate to one of the components of that supply. The court therefore held that the total consideration for the tour should be subject to VAT at the standard rate. On appeal, a question was referred noting that the CJEU's case law indicated that the guided tour of the stadium and the visit to the museum should be regarded as a single supply on CPP principles. However, it was conceivable, the Dutch court said, that the effect of the decisions in *Talacre Beach* and *French Undertakers* was that where it is possible to distinguish a concrete and specific element within a single supply, to which the reduced rate of VAT would be applied if it were supplied separately, that reduced rate of VAT would apply to that identified element, to

the exclusion of the other aspects of that supply, provided of course there was no distortion of competition.

32. In its preliminary ruling in *Stadion Amsterdam*, the CJEU emphatically confirmed the line of cases establishing that in general a transaction comprising several elements as a single supply will be subject to one rate of VAT: [26]. However the Court examined whether an exception to that principle can be derived from *Talacre Beach* and *French Undertakers*. At [32] and [33] the Court described the judgment in *Talacre Beach* as establishing that a member state was not prevented from levying VAT at the standard rate on the supply of items which it had carved out of a zero-rated category of goods simply because those items were part of a single supply the principal item of which did benefit from zero-rating. *French Undertakers* was authority for the proposition that national legislation which provided for a selective application of a reduced rate of VAT was compatible with the PVD because "the question whether a transaction including several elements must be considered to be a single supply was not decisive for the purpose of the exercise by the member states of the discretion left to them": [34]. The Court described the issue in the case before it as concerning "a problem of a different nature". The facts of the case did not create an exception to the general *CPP* principle that a single supply is taxed at the rate applicable to the principal element even if the ancillary elements would be taxed at a different rate if they were provided separately.

33. On the domestic front, as explained above, *Colaingrove (CA)* was decided after the FTT determined the appeal in *AN Checker*. The taxpayer in that case owned a holiday park with static caravans. Customers paid an overall sum for staying in the park. This included a minor charge for electricity supplied. The taxpayer purported to account for VAT on the provision of electricity at a reduced rate pursuant to s.29A of VATA and Group 1 of Sch.7A. Group 1 specified supplies of fuel and power for domestic use. The question in *Colaingrove (CA)* was therefore whether Group 1 of Sch.7A to VATA 1994 applied the benefit of the lower rate when the supply of electricity was not the only supply from the taxpayer to the customer but where the electricity was supplied as part of a larger CPP supply of services the predominant element of which would be taxed at the standard rate.

34. The FTT in *Colaingrove* held that, provided the supply of electricity was a concrete and specific aspect of the supply, which they held it was, it benefited from the lower rate provided for by Group 1 of Sch.7A. That result was overturned by the Upper Tribunal (Hildyard J) applying the analysis of Vos J in *Wm Morrison.* Hildyard J also relied on the decision of the FTT in *AN Checker* that the "supply" benefiting from the reduced rate had to be of the description in the relevant Group and not part of a larger supply going wider than that description.

35. On further appeal, Arden LJ (with whom Lindblom and Henderson LJJ agreed) upheld the Upper Tribunal's decision. She noted at [47] that s.29A applies the reduced rate to supplies which are "of a description" specified in Sch.7A. Although the reduced rate was limited to supplies of fuel for domestic purposes, the application of the rate was not determined by reference to use but by reference to the description of the supplies in Sch.7A. She accepted that a provision which applied the lower fuel charge to only part of a supply would have to be clearly worded because the UK was exercising a derogation from the PVD. However, it was not necessary to rely on that principle because Arden LJ agreed with Vos J when he held in *Wm Morrison* that, as a matter of general construction, there would have to be specific wording in order for the legislation to apply to part of a

composite supply. So far as pointers in the legislation to Parliament's intention were concerned, she said:

> "48. Within Schedule 7A and 8 are a number of provisions for apportionment, but none of them applies where the fuel is part of a composite supply of fuel and some other goods or services. So the provisions for apportionment are not an indication that Parliament intended the fuel charge to apply where there was a composite supply of which fuel was the minor part, but to the contrary. If it had been Parliament's intention that the reduced rate should apply to an element of the supply, it would have inserted some similar apportionment provision. This is not a case (such as the exclusion of contents from caravans) where the CPP principles need to be excluded since fuel forms the minor part of a composite supply and is subject to the limitation that it must be supplied for domestic use."

36. Arden LJ rejected arguments based on the purpose for which Parliament granted the lower rate. Use for domestic purposes was necessarily a defining characteristic but need not be a defining purpose. While (except in the case of charities) every supply must be for residential use, not every provision of fuel for domestic purposes would be within the fuel charge. She accepted HMRC's argument that there was no necessary reason why Parliament should have applied the fuel charge to composite transactions. Its purpose may have been limited to helping people in their homes rather than also subsidising the prices of self-catering accommodation for holidaymakers. That was a rational distinction, and enabled the provision to be purposively interpreted on the basis of the language of the provision. In those circumstances the courts could not say that the provision was inserted for some other purpose.

37. HMRC argued before us that the decision of the Court of Appeal in *Colaingrove (CA)* was binding on us and determinative of this appeal. Arden LJ referred at several points in her judgment to Judge Paines' judgment in *AN Checker* in the FTT and approved his reasoning in analysing the issue that arose in *Colaingrove*. We accept, of course, that the principles set out in *Colaingrove (CA)* are binding on us but the Court there was not hearing the appeal from the FTT's decision in this case, as we have done. The Court's references to HHJ Paines' decision do not, in our judgment, render the present appeal nugatory.

38. Turning to the two recent Upper Tribunal cases in point, *Pinevale* concerned the application of the reduced VAT rate for energy saving materials falling within Group 2 of Sch.7A. The dispute was whether supplies of polycarbonate roof panels and radiation strips for conservatory roofs supplied by the taxpayer fell within the Group. The roof panels in issue were used to form the roof of a conservatory, either replacing or constituting the entire roof or replacing parts of an existing roof. Their purpose was to achieve much higher levels of insulation than would be the case with a conventional conservatory roof, including a double-glazed roof. Pinevale argued that the panels were insulation for roofs within Note 1(a) of Group 2. HMRC argued that they were not insulation for roofs because they made up the roof itself. David Richards J held that the reduced rate did not apply:

> "16. As counsel for HMRC submitted, while the common feature of the goods listed in Note 1 is that they can be expected to produce energy-savings once installed in residential accommodation, Note 1 provides an exhaustive definition of 'energy-saving materials' for the purposes of

> items 1 and 2 of Group 2. Rather than making the reduced rate available to all types of goods with energy-saving properties that could be installed in homes certain types of goods are specified as eligible for the reduced rate.
>
> 17. There is a distinction between Note 1(a), which specifies insulation 'for walls, floor, ceilings, roofs or lofts or for water tanks, pipes or other plumbing fittings' and para (c) to (j) which specify particular products such as central heating system controls or solar panels. A material which is insulation for a roof is not the same thing as the roof itself. It presupposes that there is a roof to which the insulating material is applied. If the intention had been to apply the reduced rate of VAT to energy-efficient roofs or walls, this could have been specified, just as more generally building materials are specified in Sch 8. The same point can be made in respect of water tanks. It is not energy-efficient water tanks, such as those which incorporate insulation as part of their construction, which attract the reduced rate of VAT, but insulation for water tanks. Again it presupposes that there is a water tank to which an insulating material is attached or applied."

39. In *Wetheralds* the Upper Tribunal also considered the application of Note 1(a) to Group 2 of Sch.7A. It held at [31] and [34] that the First-tier Tribunal had erred in not asking itself the question whether, however the supply is analysed, it could be said that the taxpayer had supplied insulation for a roof rather than a roof itself. It was, therefore, unnecessary in that case to consider a detailed CPP analysis and determine what the dominant element of the overall supply was.

Common ground in the present appeal

40. By the end of the hearing before us the following was common ground:

> (1) the appellant accepted that, following *Stadion Amsterdam*, it was not sufficient simply for the court to find that the supply of, say, hot water controls are a concrete and specific part of an overall CPP supply of a hot water system in order for the reduced rate derogation to be applied – it depended on whether the member state has in fact exercised its discretion to apply the reduced rate to a concrete and specific element of a complex single supply. That in turn depended on whether, as a matter of statutory construction, Parliament had legislated that the supply of controls should benefit from the reduced rate even where they were supplied as part of a larger composite supply;
>
> (2) on the facts relevant to the business of AN Checker there was a single CPP supply of the installation of boilers or central heating systems in residential accommodation of which the supply of energy saving materials formed part;
>
> (3) no issue of fiscal neutrality arose in the present case.

41. Accordingly, the parties agreed that the question was whether, on its true construction, Parliament had in enacting Group 2 of Sch.7A exercised its powers under the PVD to subject a supply of an item described there to a reduced rate even when it is a part of a wider CPP supply.

Discussion

42. We consider that the following principles relevant to the issues before us can be derived from the EU case law that we have described:

(1) it is a fundamental principle of EU VAT law that a transaction comprising several elements is to be regarded as a single supply if it would be artificial to view it instead as a combination of distinct and independent supplies;

(2) generally, the rate to be applied to a composite supply is the rate applicable to the principal element, even if some of the ancillary goods or services could, if supplied separately, benefit from a lower rate;

(3) this is not, however, a principle of universal application: there may be cases where, *exceptionally*, it is appropriate to apply different rates of VAT to different components of a single CPP supply;

(4) the United Kingdom's system of zero-rating, so far as it specifically removes the zero-rate from items that form part of a CPP supply taxed at the zero-rate, is an example of such an exceptional case;

(5) the CJEU's reasoning in *Talacre Beach* was directed at ensuring that the United Kingdom's zero-rates, viewed by the EU as an exception to the ordinary operation of the VAT system, did not exceed the limits of the 1991 'standstill': in the particular case, the *CPP* principle yielded to the principle that zero-rating should, as a clear exception to the normal rules, not be increased in its reach;

(6) member states are entitled, in accordance with the provisions of the PVD, to exercise a derogation in relation to rates of VAT by applying reduced rates to supplies described in the PVD, and, as with any derogation, any such exercise is to be construed strictly;

(7) consistent with that principle, it follows that it must be permissible for a member state to apply a reduced rate to a *subset* of a description of a supply set out in the PVD provided that the subset is itself a "specific and concrete" aspect and provided that there is no resulting risk of distortion of competition;

(8) *French Undertaker*s was concerned only with determining whether France had, as a member state, lawfully exercised the power to derogate in respect of reduced VAT rates (see also *Stadion Amsterdam* at [34]), and, accordingly, the CJEU focused on whether the service described in the French legislation was a "specific and concrete" element and on whether fiscal neutrality was respected: as the CJEU observed in *Stadion Amsterdam* at [34] the Court did not consider it necessary in *French Undertaker*s to determine whether the supply of services by undertakers was a CPP supply.

43. What emerges clearly from the judgment of the Upper Tribunal in *Wm Morrison* and from the Court of Appeal's decision in *Colaingrove (CA)* is that the question we have to decide is whether, on its true construction, the reference in s.29A(1)(a) to "any supply that is of a description" specified in Sch.7A is intended to include any component of a supply where the component is of a description specified in Sch.7A (but the supply of which the component forms part is not). In other words, when AN Checker installs a boiler or central heating system (which – as acknowledged by Mr Milne QC appearing for AN Checker – is plainly *not* a supply of a description specified in Group 2 of Sch.7A) where the installation includes the installation of energy-saving materials (which *are* of a description specified in that Group), is there a supply of a description specified in that Group so far as relating only to the installation of the energy-saving materials?

44. It is also clear from *Wm Morrison* and *Colaingrove (CA)* that the starting point is that the word "supply" in s.29A means the same in this context as it does elsewhere in

VATA 1994 and that that meaning is the single CPP supply rather than the individual component parts of the CPP supply.

45. It is, in our view, clear that the supply described in Group 2 of Sch.7A is the CPP supply itself. It follows that the reduced rate provided for by that Group does not extend to a component part of a CPP supply where the CPP supply is not within any of the descriptions of supply in that Group.

46. The opening words of s.29A(1) of VATA 1994 are: "VAT is charged on any supply that is …". Accordingly, the supply must *first* be identified before then asking whether it is a supply of a description within Sch.7A. Applying normal CPP principles, in the case of AN Checker, what is being supplied is a single supply of a boiler or central heating system. Once that supply is identified, the question is whether that description of supply is specified in Group 2 of Sch.7A. And it is plain that it is not.

47. To approach things like this is to apply the ordinary meaning of the words in a straightforward manner in a way that is wholly consistent with core principles of EU law and leads to a coherent result for Sch.7A as a whole. The opening words of s.29A(1) govern the whole of that Schedule. We have great difficulty with a construction which would mean that the supply referred to in s.29A(1) is, as decided in *Colaingrove (CA)*, the CPP supply in Group 1 of Sch.7A but could be a component of a CPP supply in Group 2 of the same Schedule: if that were right, the reference to 'supply' in s.29A(1) would mean different things in different cases.

48. It is true that the Court of Appeal acknowledged in *Colaingrove (CA)* that the starting point as to the single meaning of "supply" in VATA 1994 might not be the end point if there is a good reason to ascribe a different meaning to the word in a particular statutory context. But many of the pointers relied on by Arden LJ when concluding that the supply of electricity as part of a CPP supply of caravan park services could not be described as the supply of electricity within Group 1 and by Vos J when concluding that the supply of charcoal as part of a disposable barbeque could not be described as the supply of a solid substance for use as fuel within Group 1 also apply here.

49. First, there is no provision in the legislation dealing with how to apportion the consideration that AN Checker receives when installing and supplying a whole system in order to work out how much of it should be subject to VAT at the reduced rate. Arden LJ referred to other provisions in Schs 7A and 8 where there are such apportionment provisions, stating at [48] that "if it had been Parliament's intention that the reduced rate should apply to an element of the supply, it would have inserted some similar apportionment provision".

50. Mr Milne sought to distinguish this case from the earlier cases on the basis that the list of "energy-saving materials" in Note 1 to Group 2 of Sch.7A to VATA 1994 comprises a number of items that, by definition, are supplied as part of a larger whole. Accordingly, Parliament has revealed an intention to apply a reduced rate to components of a wider CPP supply. In particular, Mr Milne focused on the reference to central heating system controls (including thermostatic radiator valves) in paragraph (c) of Note 1 to Group 2 of Sch.7A and the reference to hot water system controls in paragraph (d) of that Note. Mr Milne submitted there was no need for Parliament to refer to a thermostatic radiator valve as part of a radiator because it was inevitably the case that the valve would be part of the radiator – the words "as part of radiators" are necessarily implied.

51. We reject that submission. It seems to us that it begins by asking the wrong question. The statutory focus is on the description of the supply in question referred to in s.29A(1) of VATA 1994. It is no part of the statutory test to ask whether the thing that is installed forms part of a wider product. That is something that follows from the performance of the supply concerned: it is not part of the description of it in Group 2 of Sch.7A. Moreover, a supply of central heating system controls, or of hot water system controls, can be made independently as separate supplies. They may be made as part of a wider supply but it is not necessary for that to happen.

52. We also think that we must consider more than just paragraphs (c) and (d) of Note 1 to Group 2 of Sch.7A (although they were the paragraphs most relevant to AN Checker). The definition of "energy-saving materials" needs to be considered as a whole, having regard to the overall statutory context. There are a number of other items falling within the definition that can be supplied as products that are complete in themselves or, put another way, can independently perform an energy-saving function. That is true of wind or water turbines (paragraphs (f) and (g)), solar panels (paragraph (e)) and draught stripping for windows and doors (paragraph (b)). It is no doubt true that in those cases the items all need to connect to something else but we do not see how that it is relevant to the statutory test. The result is that some items (such as a thermostatic radiator valve), when installed, will form part of another item. Others (such as insulation for a roof) will be ancillary to other things (in the sense that they pre-suppose the existence of something else). And other things (such as wind or water turbines) will be, if we may put it in this way, significant items in and of themselves. The reduced rate applies to them all, without distinction.

53. Our conclusion on this point is also consistent with the decision in *Pinevale*. The Upper Tribunal in *Pinevale* at [17] drew a distinction between insulation for roofs and the other items covered by different paragraphs of Note 1. It concluded that insulation for a roof and the roof were not the same (inviting the inference that if Parliament had meant to apply a reduced rate to a supply of a roof as a product in its own right, it could quite easily have done so). That was in a context where at [16] the Upper Tribunal had – rightly in our view – held that the "common feature of the goods listed in Note 1 is that they can be expected to produce energy-savings once installed in residential accommodation".

54. We have considered whether the existence of Group 3 of Sch.7A to VATA 1994 (which, *in terms*, deals with boilers, radiators, etc) affects the resolution of this issue. The existence of that Group is certainly part of the wider context. But the fact that Parliament has chosen to apply a reduced rate of VAT to the *whole* of the consideration for the supply of a boiler etc within Group 3 is not revealing – one way or the other – of the question whether such *proportion* of the consideration provided for a radiator as is attributable to a thermostatic radiator valve benefits from a reduced rate. The Group 3 treatment is more generous than the Group 2 treatment in the extent of the materials covered by it, no doubt explained by the fact that Group 3 is focused on a description of final consumer (namely, the over-60s and those on income-related benefits) for which a more generous treatment is often provided in legislation.

55. In the present case AN Checker is not seeking to argue, as the appellant in *Talacre Beach* argued, that the whole of its CPP supply should benefit from the reduced rate because an element within it does. Mr Milne is, however, right to note that there is no apportionment provision *as such* in Group 9 of Sch.8 to VATA 1994, excluding the contents of caravans from the zero-rating of the caravan itself. That did not prevent the

CJEU from concluding that the legislation required the application of different VAT rates to the excluded contents of the caravan from the rate applied to the caravan itself. Mr Milne says that, in this case, we should arrive at the same outcome by reference to the express way in which Group 2 of Sch.7A is constructed. It is, in his view, merely a question of the means to the end: Parliament could use general words subject to specific exclusions or could define the smaller in terms.

56. We are unable to accept this. In our view, the absence of an apportionment provision is, applying the reasoning in *Colaingrove (CA)*, a clear indication that a component of a CPP supply does not benefit from a reduced rate, particularly in the light of the presence of apportionment provisions elsewhere in Sch.7A to VATA 1994 describing the supplies that do benefit from one.

57. Moreover, we consider that there is a particular aspect of Mr Milne's case which makes it more, rather than less, likely that his argument is not correct. It is a part of his case that the reduced rate applies to an energy-saving component of a finished product where the purchaser buys the finished product and not the individual components comprised in the product. As the FTT described, the evidence was that AN Checker uses the 'VAT optimiser' software to attribute a value to the relevant component part of the service and apply the reduced rate only to that component. To take an example: it is Mr Milne's case that the supply of the service of installing a radiator (which includes a thermostatic valve) in residential accommodation and the supply of the radiator itself benefit from the reduced rate but only in so far as the consideration provided by the purchaser can be properly attributed to the valve and to the installation of the radiator so far as that installation relates to the valve. That would be the case whether or not the supply is itself part of a wider CPP supply.

58. As we understand it, if a radiator was supplied to a customer for £100 (exclusive of VAT), the 'VAT optimiser' used by AN Checker would determine the proportion of that sum that consists in the price paid by the supplier for the valve as a separate item (say, £10) so that the reduced rate of VAT was payable on £10 and the standard rate was payable on £90.

59. This would seem to invite difficult valuation issues and could give rise to the sort of value-shifting that, even if ultimately successful, HMRC might find resource-intensive to question. But, equally, if the 'VAT optimiser' approach is not a permissible approach, it is not obvious what is. Matters are even more difficult for the apportionment of labour costs, which, under the 'VAT optimiser', follow the apportionment of the components of the product in the same ratio. That certainly produces an answer; but, again, we find it somewhat questionable that this way of proceeding is related in any meaningful sense to the commercial arrangements made between the parties.

60. We therefore consider that this example might well invite just the sort of artificial exercise firmly rejected by the CJEU in *CPP*. But, whether or not that is the case, it is certainly not clear to us how the apportionment could be objectively carried out. We agree with the FTT that, in principle, whether an apportionment can be made and how it might be made are separate issues. But the latter does have a bearing on the likely existence of the former. On Mr Milne's argument this is dealt with, as a matter of law, by *implication*: it is a case (so it is said) where it is obvious what apportionment needs to be made, which is why, once Parliament has described the supplies as it has, Parliament has said no more about it. In our view, the opposite is the case: if Parliament did intend the law to produce

the outcome submitted by Mr Milne, we would have expected express provision to make it clear that, notwithstanding some obvious difficulties likely to arise, an apportionment would have to be made. A requirement by Parliament to make an apportionment may itself beg the question as to how the apportionment is in fact to be made; but it would at least have been clear that one *did* have to be made.

61. The second factor relied on by both Vos J in *Wm Morrison* and Arden LJ in *Colaingrove (CA)* that we consider relevant to the present case is that one would expect Parliament to use express words if the intention was that the legislation would apply to a composite supply: see [50] of *Colaingrove (CA)*. That conclusion is reinforced by the later ruling of the CJEU in *Stadion Amsterdam* which emphasised the primacy of the single supply principle that composite supplies must be taxed at the rate applicable to the principal element and that ancillary elements are also taxed at that rate even if those ancillary elements would be taxed at a different rate when supplied separately. The CJEU emphasised the exceptionality of the contrary principle established by *Talacre Beach* and *French Undertakers*: see [29]. We would not go so far as to say that the absence of express words providing that a supply can be of a description specified in Sch.7A even if it forms part of a larger supply rules out such a conclusion. But we hold that the absence of express words is a significant indication that the whole supply must be of the specified description before it benefits from the reduced rate.

62. Further, the reasoning of *Talacre Beach* cannot, in our view, be divorced from the central issue before the CJEU in that case, namely the extent to which a zero-rate, as an exception to the normal operation of the VAT system, could be increased in scope from the clear limits of the 1991 standstill. To hold that a CPP analysis could be used to do just that would, in the CJEU's view, have resulted in an impermissible extension of an exception in a way that clearly went beyond the very limits imposed by Parliament. The reasoning of *Talacre Beach* is directed at the rather exceptional case (as a matter of EU law) of the United Kingdom's system of zero-rates. That the zero-rates are regarded as exceptional is illustrated by, for example, the comment made by Advocate General Kokott at [23] of *Talacre Beach* that the UK's zero-rates are a "particularly wide exemption [which] is in itself foreign to the Sixth Directive".

63. Mr Milne sought to minimise the significance of the absence of express words by reliance on the Explanatory Notes for Group 2 of Sch.7A when it was introduced as clause 131 of, and Schedule 35 to, the Finance Bill 2000. Explanatory Notes are an admissible aid to construction in so far as they "cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed": see Lord Steyn at [5] in *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956.

64. Under the heading "Summary", the Explanatory Notes for clause 131 of, and Schedule 35 to, the Finance Bill 2000 said:

> "This clause extends the reduced rate of Value Added Tax for the installation of energy saving materials to all homes. It also extends the reduced rate of Value Added Tax to the installation of central heating systems and home security goods provided under grants to pensioners and grant funded heating measures in the homes of the less well off. The change took effect on 1 April 2000. (C&E 06/00)."

65. Under the heading "Details of the Schedule" the Notes said at [5]:

> "5. Paragraphs 2(1) and (2) extend the reduced rate to include the supply and fit of energy saving materials when they are supplied by the same person. These energy saving materials are called "List A". "List A" is described in paragraph 12 below.
>
> The reduced rate will apply when "List A" energy saving materials are fitted in "residential accommodation" ...."

66. Under the heading "Background" the Notes said at [15]:

> "15. The UK has a disproportionately high level of winter deaths compared to other countries of continental Europe and Scandinavia. New Research establishes for the first time a link between cold homes, excess winter deaths and ill health. The Government is, therefore, widening the reduced VAT rate to cover installation of energy saving materials in all homes in order to reap the widest benefit in health terms. The cut in the VAT rate, from 17.5 per cent to 5 per cent, will apply to all insulation, draught stripping, hot water and central heating system controls that people pay to have fitted in their homes. It will also apply to the installation of solar panels, which can make an important contribution to energy saving."

67. In our view, the summary is an accurate description of the provisions of the Finance Bill in question but sheds no more light on those provisions than they do themselves. The same is true of paragraph 5 of the Notes. It is already plain on the face of the relevant provisions of the Finance Act 2000 that the intention was to give a tax relief to the installation of energy-saving materials in residential accommodation and that this was an extension of the previous regime.

68. So far as the background explanation is concerned, we accept that this sets out the overarching policy reason as to why the Treasury considered that relief should be granted by Parliament. But we find it of limited assistance in construing the provisions. The expressed policy aim "to reap the widest benefit in health terms" by extending the regime to "all homes" seems to us to be, in context, an explanation as to why the relief has been widened to cover recipients of supplies regardless of their age or means: in effect, the Treasury was saying that the wider health benefits are more likely to be achieved if the coverage went wider than the over-60s or those on income-related benefits. That is why the focus was on "all homes". We do not think it was intended to mean all homes regardless of whether the home owner had contracted for the supply just of the energy saving material or for the installation of a whole heating system. Similarly, in our view, the reference to the change applying to "all" insulation etc "that people pay to have fitted in their homes" says little (if anything) further about the context. It is merely another way of describing the new regime rather than a further explanation of the *reason* for the change.

69. There is nothing in the words of the legislation (whether in Group 2 of Sch.7A to VATA 1994 or elsewhere in that Schedule or Act) that suggests that Parliament intended the widest possible application of the relief. We endorse the approach adopted by the Upper Tribunal in *Trigg v HMRC* [2016] UKUT 165 (TCC) at [34] that "whatever underlying purpose may be identified, it is not the task of the courts to import a different meaning to the provision in question than can properly be attributed to it, merely because of a perception that such a meaning would better suit the purpose so identified" and at [35] that "if the statutory language adopted by Parliament displays a narrower, or more focused, purpose than the more general underlying policy or reason, it is no part of an

exercise in purposive construction to give effect to a perceived wider outcome than can properly be borne by the statutory language." The general approach to statutory construction argued for by HMRC in that case (and accepted by the Upper Tribunal) was approved by the Court of Appeal at [40] in *Trigg v HMRC* [2018] EWCA Civ 17, although the court reversed the decision of the Upper Tribunal.

70. The third factor that emerges as relevant from *WM Morrison* and *Colaingrove (CA)* is whether it is possible to discern a rational purpose behind the restrictive application of the reduced rate. Mr Milne submitted that unless his interpretation was accepted, Parliament would have succeeded in applying a reduced rate to only a small proportion of the supplies contrary to the policy purpose as revealed by the Explanatory Notes. In particular he relied on the FTT's description of Mr Checker's evidence which was that the majority of AN Checker's domestic central heating work involved installing new boilers into existing central heating systems. He estimated that work as amounting to some 75% of the business. Full installations of central heating systems account for about 20% of AN Checker's business and installations limited to energy-saving materials such as thermostatic valves or insulation account for about 5%. In the light of this, Mr Milne submitted, the reduced rate would apply only in the minority of cases (about 5%) where the energy-saving materials are supplied by themselves rather than together with a boiler or central heating system. This cannot have been Parliament's intention.

71. There are a number of difficulties with that submission. The first is that the FTT made no findings of fact as such (see [7]). In any event, its summary of the facts was directed only at the case of AN Checker. It is not possible to infer any wider significance from the particular facts of that business to the industry generally. In the absence of any evidence, there is simply no way of knowing whether it is representative of other businesses installing hot water or heating systems. Moreover, there was no evidence at all in relation to other businesses supplying other types of energy-saving materials (for example, businesses specialising in the supply of draught stripping or solar panels). It may, or may not, be the case that, taken as a whole, a minority of the supplies of energy-saving materials of *all* kinds within Group 2 of Sch.7A made in 2000 or 2008 or made today were (or are) made as part of wider CPP supplies. We do not know one way or the other.

72. In addition, it is clear that the breakdown of the business for AN Checker now is influenced by the regulatory changes made in 2005 and 2010, which occurred *after* the enactment of the Finance Act 2000. The FTT noted in its decision Mr Checker's evidence that regulations introduced in 2005 had required new domestic boiler installations to be of a condensing boiler and to be accompanied by the fitting (if not already fitted) of thermostatic radiator valves to upstairs radiators, a room thermostat on the ground floor and a hot water tank thermostat. Further regulations introduced in 2010 required thermostatic radiator valves to be fitted to ground floor radiators also, except in the room fitted with the room thermostat. A boiler replacement job therefore typically has to include the supply and fitting of a number of components falling within the definition of energy-saving materials.

73. The fact that regulations *now* require the incorporation of energy saving materials as standard so that the business of retro-fitting them to existing systems as a separate service has substantially diminished does not, in our judgment, make it illogical for Parliament to have restricted the reduced rate to such retro-fitting. The question is to discern Parliament's intention when it first enacted the changes in 2000 (the very reason

that Mr Milne is relying on the Explanatory Notes for the 2000 Finance Bill) and the effect of future regulatory changes cannot have any bearing on that question. If anything, those changes would indicate that the incentive provided by the reduced rate of VAT is no longer needed as such energy saving measures are now required. But it would then be a policy question for Parliament whether, in the light of those changed circumstances, the reduced rate ought to be re-evaluated.

74. At [42] of the judgment in *AN Checker* the FTT observed:

> "I have considerable sympathy for Mr Milne's argument. […] while I accept Miss Bretherton's submission that introducing a reduced rate limited to the 'retro-fitting' of energy-saving materials into existing installations could be a perfectly rational legislative choice, designed to encourage people to improve the efficiency of their heating systems in this way, it is not obvious to me why Parliament would not have wished to people to give a similar tax relief in respect of energy-saving materials fitted in new installations."

75. We agree with the FTT that (subject to any EU limitations) it would have been a rational choice to have enacted a more extensive reduced rate regime. But that it is to choose between two different policy outcomes with different fiscal outcomes. In determining whether Parliament has chosen the one rather than the other, there is no presumption in favour of a more liberal application of the reduced rate. The question is, applying normal principles of statutory interpretation and having due regard to the wider context, what did Parliament intend by the words that it chose in the form of s.29A of, and Group 2 of Sch.7A to, VATA 1994. The question is not whether another policy choice could, rationally, have been made by Parliament.

76. Mr Milne also argued that the FTT's narrow construction of s.29A would lead to surprising results because if AN Checker so organised their business that they separated out the supply of the energy saving materials from the overall supply of the system so that, for example, the supply of the controls was carried out by a different entity, or at a later time, then the reduced rate would apply. That is undoubtedly true but much the same can be said about *any* CPP supply.

77. It is inevitable that the VAT system makes fine distinctions. A line always has to be drawn somewhere and changes in the facts (including small changes) can give rise to a very different VAT analysis. In that connection, we note the observation by Lord Reed in *WHA Ltd v HMRC* [2013] UKSC 24 at [26] that "decisions about the application of the VAT system are highly dependent upon the factual situations involved. A small modification of the facts can render the legal solution in one case inapplicable to another." In this case the rate of VAT for a supply of a boiler or central heating system differs from the rate of VAT for (say) a supply of central heating system controls for the very simple reason that the supplies are not the same. It is not without significance that both parties agreed that no issue of fiscal neutrality arose in the case: in essence, different transactions are being taxed differently, and there is nothing particularly surprising about that.

Disposition

78. For the reasons given above, we dismiss the appeal.

Costs

79. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Mrs Justice Rose

Judge Andrew Scott

Release date: 14 September 2018