Appeal number: UT/2018/0141

VAT – operation of salary sacrifice scheme to provide travel and subsistence payments to employees – whether supply for VAT purposes – no – whether economic activity – no – appeal dismissed.

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

PERTEMPS LIMITED

Respondent

Tribunal: Mr Justice Nugee
Judge Greg Sinfield

Sitting in public in London on 9 July 2019

James Puzey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Timothy Brennan QC, instructed by Anthony Collins Solicitors LLP, for the Respondent

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DECISION

Introduction

1. This appeal concerns the VAT treatment of an arrangement, known as the Mobile Advantage Plan (**'MAP'**), between the Respondent, Pertemps Limited (**'Pertemps'**), and some of its employees.

2. As its name suggests, Pertemps provides permanent and temporary workers to clients. In this appeal, we are only concerned with those employees who were working on temporary assignments for clients of Pertemps. The employees were offered the option of being paid a salary, out of which they would have to meet any travel and subsistence expenses, or participating in the MAP under which they would be paid their travel and subsistence expenses but receive a reduced salary. The amount of the reduction was equal to the amount of the expenses payment plus a fixed amount. The fixed amount (**'the MAP adjustment'**) was, at different times, 50p or £1 per shift.

3. The advantage conferred by using the MAP was that the expenses were reimbursed free of tax and national insurance contributions (**'NICs'**). Thus, even after the payment of the MAP adjustment, the employees were better off. Pertemps also benefited as it did not pay primary Class 1 NICs in relation to those employees using the MAP.

4. The Appellants (**'HMRC'**) took the view that the MAP involved a taxable supply of services by Pertemps to its participating employees. HMRC considered that the services were supplied in return for the MAP adjustment of £1 or 50p and that Pertemps was liable to account for VAT on those amounts. Accordingly, HMRC notified Pertemps of their decision in a letter dated 17 April 2013 and assessed Pertemps for VAT of £715,918 in two assessments covering periods 07/09 to 07/14. There are further assessments standing behind these appeals.

5. Pertemps appealed to the First-tier Tribunal (**'FTT'**) against the decision and assessments. In a decision released on 6 July 2018, [2018] UKFTT 369 (TC), the FTT concluded that Pertemps did supply services to the employees but the supply was not within the scope of VAT because the operation of the MAP was not an economic activity for VAT purposes and allowed the appeal. The FTT also held that, if there had been a supply, it would have been exempt.

6. HMRC now appeal, with permission of the FTT, against the FTT's decision that that the MAP was not an economic activity and, in the alternative, that any supply was exempt.

7. For the reasons set out below, we have decided that the FTT erred in law when it concluded that Pertemps made a supply of services to the employees who participated in the MAP but that the FTT was correct when it concluded that Pertemps was not carrying on any economic activity when it provided the MAP to employees. Accordingly, HMRC's appeal is dismissed.

Factual background

8. The FTT set out its detailed findings of fact at [11] to [83] of the decision and those findings are not in dispute. In its decision, the FTT refers to the employees who were eligible to benefit from the MAP as "flexible employees". For the purposes of this decision, the key findings of fact were as set out below.

9. The FTT summarised the MAP as follows at [18] – [20]:

> "18. Flexible employees were offered the opportunity to participate in MAP. Under MAP, a flexible employee agreed to a reduction in the wage which he or she would earn. In return, Pertemps agreed to make a payment to the employee of an amount of travel and subsistence expenses. The amount of the reduction applied to the employee's wages was equal to the amount of the expenses payment plus a fixed amount.
>
> 19. The fixed amount was at different times in the periods in question 50p or £1 per shift. The parties referred to the fixed amount as the 'MAP adjustment'. I have used the same term in this decision notice.
>
> 20. Although the total amount of the payments (before tax and national insurance contributions) to which an employee was entitled from Pertemps under MAP was less than that to which he or she would have been entitled if he or she had not elected to participate in MAP (by the amount of 50p or £1 per shift), the operation of MAP did provide some benefits to flexible employees. These are described in more detail below, but, in summary, the employee obtained a cash flow benefit because the payment of the expenses was not subject to deduction of income tax or national insurance contributions."

10. At [23] – [35], the FTT set out the treatment of the payment of expenses for income tax and NICs. In summary, a payment of expenses made by an employer to an employee is usually treated as earnings and taxed as income. However, the employee may claim a deduction for those expenses if relief is available under specific provisions listed in section 72(3) of the Income Tax (Earnings and Pensions) Act 2003 (**'ITEPA'**). For example, expenses incurred "wholly, exclusively and necessarily" in the performance of the duties of the employment and travel expenses "attributable to the employee's necessary attendance at any place of performance of" those duties are deductible from taxable income. There are similar reliefs from the obligations to account for primary and secondary Class 1 NICs.

11. Under section 65 ITEPA, an officer of HMRC must give a dispensation to an employer if the officer is satisfied that no additional tax is payable on the payments or benefits specified in the dispensation by virtue of, among other provisions, section 72 ITEPA. The FTT explained the effect of the dispensation in [30]:

> "30. When a dispensation is given, the payments or benefits covered by the dispensation are taken out of the charge to tax. In the context of a payment of expenses by an employer to an employee, the employee does not have to include the expenses within his or her taxable income for income tax purposes and then claim the relevant deduction (for example, under s336 or s338 ITEPA); the employer is not required to deduct or account for PAYE income tax and national insurance contributions in respect of the payment; and the employer does not have to include the payment in any return to HMRC of benefits provided to the employee."

12. The effect of the MAP for direct tax purposes was therefore that the employee's taxable salary was reduced by an amount equal to the amount of the payment of the travel and subsistence expenses paid to the employee plus the MAP adjustment. The employee was nevertheless better off under the MAP because he or she received the payment of

expenses free of income tax and NICs which Pertemps was not required to deduct by virtue of the dispensation under section 65 ITEPA. Even though an employee who did not participate in the MAP could have made a claim for a deduction for the expenses on his or her self-assessment tax return at the end of the year, the participating employee still benefited from the cash flow advantage of an immediate deduction.

13. The employees were not the only beneficiaries of the MAP as the FTT explained at [35]:

> "35. We should be clear, however, that the main benefits from the operation of the MAP scheme accrued to Pertemps: the cash amounts paid to flexible employees were reduced by the MAP adjustment; Pertemps did not have to account for employer's national insurance contributions on the MAP payment; and Pertemps was not required to include the MAP payment in its returns of benefits provided to employees."

14. The FTT described a sample contract of employment and the employee handbook which set out the terms of participation in the MAP at [38] – [48]. Clause 4 of the contract dealt with expenses:

> "4.1 You will be reimbursed for any expenses properly incurred in connection with your duties in accordance with the Company's expenses policy as amended from time to time.
>
> 4.2 You may be entitled to a payment of a travel and food allowance ('MAP') which will be paid weekly in arrears directly into your bank account and will not be subject to deduction of tax and National Insurance (see Employee Handbook for further information and details of eligibility). The Company reserves the right not to pay a travel and food allowance ('MAP') if the Client advises us not to do so."

15. The information for employees in the employee handbook included FAQs which included the following:

> "In taking part in MAP, you agree to give up some of your gross taxable pay – this is sometimes referred to as a 'salary sacrifice' (see below). But the addition of your tax/NIC free MAP allowance means that your take home money increases.
>
> …
>
> What is salary sacrifice?
>
> Salary sacrifice is an increasingly common arrangement, recognised by HMRC, whereby you give up some taxable pay. Typically you receive some other benefit instead. In the case of MAP, you will be paid a tax/NIC free allowance as explained above. Because this allowance is tax/NIC free, this means that you actually take home more money."

16. The FAQs explained that an eligible employee would qualify to be paid a MAP payment if they met certain conditions which included making a claim each week for expenses under the MAP. The FAQs also explained that the MAP adjustment of £1 or 50p is intended to offset the cost to Pertemps of running the MAP.

Legislation

17. The relevant provisions in the present case are articles 2, 9 and 135(1)(d) of Council Directive 2006/112/EC (the **'Principal VAT Directive'**). The Value Added Tax Act 1994 (**'VATA94'**) implements the relevant provisions of the Principal VAT Directive in the UK. Subject to a minor point mentioned in [22] below, it was not suggested that there was any relevant difference between the Principal VAT Directive and VATA94 and so we will only refer to the former.

18. Article 2 defines the scope of VAT. It provides, so far as relevant:

> "Article 2
>
> 1. The following transactions shall be subject to VAT:
>
> …
>
> (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;
>
> …"

19. Article 9 contains the definition of 'taxable person'. It provides:

> "Article 9
>
> 1. 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity.
>
> 2. …"

20. Article 24(1) defines 'supply of services' as any transaction which does not constitute a supply of goods, which is defined by article 14 as primarily the transfer of the right to dispose of tangible property. Certain transactions are deemed to be supplies of goods by articles 14 to 19 but they are not relevant to this appeal.

21. Article 135(1)(d) provides:

> "1. Member States shall exempt the following transactions:
>
> …
>
> (d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;
>
> …"

22. Article 135(1)(d) has been transposed into UK law by Item 1 of Group 5 of Schedule 9 to the VATA94, which exempts:

> "1 The issue, transfer or receipt of, or any dealing with, money, any security for money or any note or order for the payment of money.

…"

Mr Timothy Brennan QC, who appeared for Pertemps, agreed that the words "dealing with" in Item 1 of Group 5, which are not to be found in the Principal VAT Directive, must be construed so that the exemption in UK legislation conforms to that in article 135(1)(d).

The FTT's decision

23. The three issues before the FTT were defined as follows at [4] and [93] of the decision:

> (1) whether or not the operation of MAP involved a supply of services for consideration by Pertemps to participating employees for VAT purposes;
>
> (2) if so, whether or not the supply was an exempt supply falling within item 1 of Group 5 of Schedule 9 to the VATA94;
>
> (3) if Pertemps made a taxable supply, whether HMRC was entitled to collect the tax or whether it was precluded from doing so by the issue of Business Brief 28/11 for periods to which it applied as a result of application of its powers of collection and management.

24. Following the guidance given by David Richards LJ in *Wakefield College v HMRC* [2018] EWCA 952 (***'Wakefield College'***) at [52], which both parties agreed was the correct approach, the FTT divided the first issue into two separate questions:

> (1) whether Pertemps made a supply of services for a consideration within article 2(c) (**'the article 2 issue'**); and
>
> (2) whether the supply is part of an economic activity within article 9 carried on by Pertemps (**'the article 9 issue'**).

Only if both questions were answered in the affirmative would HMRC's assessments stand.

25. In relation to the article 2 question, the FTT held, at [162] to [178] of the decision, that there was a supply of services by Pertemps to those employees who participated in the MAP for a consideration, namely the MAP adjustment. Pertemps challenges this conclusion in its Respondent's Notice. In [176] and [177], the FTT rejected HMRC's description of the services as the provision of the operation of the MAP itself and concluded that the supply was better described as "the exchange by the employee of a right to receive salary for a right to receive a [tax-free] payment of expenses [and a reduced salary] for a consideration, the MAP adjustment".

26. The FTT then went on to consider the article 9 question. For reasons given in [181] of the decision, the FTT held that the operation of the MAP by Pertemps was not an economic activity. HMRC contest the FTT's conclusion on this question whereas Pertemps supports it. Having held that the operation of the MAP was not an economic activity, the FTT concluded at [183] that the operation of MAP did not involve a supply of services for VAT purposes and the appeal by Pertemps was allowed.

27. Having found that there was no supply, the FTT did not need to consider the second issue which only arose if there was a supply. Nevertheless, the FTT did consider the point briefly because it had heard arguments on it. The question was whether, if there was a

supply, it was exempt as a "transfer or receipt of, or any dealing with, money" within Item 1, Group 5 of Schedule 9 to VATA94 (**'the exempt supply issue'**). The FTT concluded, at [193] – [194], that "an exchange by the employee of the employee's right to the payment of part of his or her original salary for a right to receive an expenses payment of a lower amount" is a "dealing in money" within item 1 of Group 5. For that reason, had the point needed to be decided, the FTT would have allowed the appeal. HMRC challenges this conclusion on appeal. Pertemps supports it.

28. As a result of its decision on the first two issues, the FTT found it unnecessary to reach a conclusion on the third issue of whether HMRC were precluded from assessing and collecting VAT as a result of the statements in Business Brief 28/11 (**'the collection and management issue'**). At the hearing before us, Mr Brennan confirmed that, as stated in his skeleton argument, Pertemps was not pursuing that point in this appeal.

Grounds of appeal and issues

29. The FTT gave permission to appeal in relation to the two issues that it decided against HMRC, namely the article 9 issue and the exempt supply issue. In the Respondent's Notice, Pertemps challenges the FTT's decision in relation to the article 2 issue. Accordingly, those are the issues for decision in the appeal. If Pertemps succeeds on any one of the issues then HMRC's appeal must be dismissed.

Whether the appeal is on a point of law

30. In relation to both of the issues raised by HMRC in their grounds of appeal, Mr Brennan submitted that they were challenges to findings of fact and evaluations of the facts which were not perverse and accordingly there is no error of law. He drew our attention to the recent decision of the Court of Appeal in *UT (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 1095 in which Floyd LJ said at [19]:

> "I start with two preliminary observations about the nature of, and approach to, an appeal to the UT. First, the right of appeal to the UT is 'on any point of law arising from a decision made by the [FTT] other than an excluded decision': Tribunals, Courts and Enforcement Act 2007 ('the 2007 Act'), section 11(1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12(1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although 'error of law' is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in *AH (Sudan) v Secretary of State* for the Home Department at [30]:
>
>> 'Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.'"

31. Mr James Puzey, who appeared on behalf of HMRC, responded that the issues raised by HMRC concern the existence of economic activity and the characterisation of a supply of services. HMRC did not dispute the facts as found by the FTT. HMRC contended that the FTT failed to apply the established legal principles to the facts as

found. Mr Puzey relied on the observations of Lord Carnwath in *HMRC v Pendragon Plc* [2015] UKSC 37 (***'Pendragon'***).

32. We accept Mr Puzey's submissions on this point and respectfully agree with Lord Carnwath's comments at [48] – [51] of *Pendragon*. The economic activity issue is not one of those exceptional cases which is an issue of pure fact. There is no dispute about the findings of fact. HMRC's challenge is, in our view, related to the FTT's understanding of the concept of economic activity and its application to the facts in the light of that understanding. That is a matter which, as Lord Carnwath observed in [50], is particularly well suited to detailed consideration by the Upper Tribunal, with a view to giving guidance for future cases.

Case law on whether activity supply for VAT purposes

33. Whether a person is making a supply of services in return for consideration in the course of carrying out an economic activity been the subject of many cases in the Court of Justice of the European Union (**'CJEU'**) as well as the domestic courts. The leading cases include Case C-246/08 *Commission v Finland* [2009] ECR I-10605 (***'Finland'***), the Court of Appeal's decision in *Longridge on the Thames v HMRC* [2016] EWCA Civ 930, [2016] STC 2362 (***'Longridge'***) and *Gemeente Borsele v Staatsecretaris van Financien* (Case C-520/14) [2016] STC 1570 (***'Borsele'***). All of those cases were referred to by the parties in the FTT. However, after the hearing, the Court of Appeal released its decision in *Wakefield College*. As the FTT correctly observed at [137] of the decision, the judgment of David Richards LJ in *Wakefield College* considers the leading authorities on the article 2 issue and the article 9 issue and provides, at [55] a useful summary of the relevant principles. Neither party suggested that anything further was to be gleaned from the other cases and so we gratefully focus on the guidance given by David Richards LJ.

34. Having reviewed the decisions in *Finland, Longridge* and *Borsele*, David Richards LJ says this on the interaction of article 9 and article 2 (at [52] to [55]):

> "52. Whether there is a supply of goods or services for consideration for the purposes of article 2 and whether that supply constitutes economic activity within article 9 are separate questions. A supply for consideration is a necessary but not sufficient condition for an economic activity. It is therefore logically the first question to address. It requires a legal relationship between the supplier and the recipient, pursuant to which there is reciprocal performance whereby the goods or services are supplied in return for the consideration provided by the recipient: see, for example, the judgment in *Borsele* at [24]. That is what is meant by 'a direct link' between the supply of the goods or services and the consideration provided by the recipient: see *Borsele* at [26] and contrast *Apple and Pear Development Council v Customs and Excise Comrs*. There is no need for the consideration to be equal in value to the goods or services. It is simply the price at which the goods or services are supplied. This requirement was satisfied in both *Finland* and *Borsele*.
>
> 53. Satisfaction of the test for a supply for consideration under article 2 does not give rise to a presumption or general rule that the supply constitutes an economic activity. However, as Mr Puzey for HMRC pointed out, the Advocate General remarked in her Opinion in *Borsele* at [49], 'the same outcomes may often be expected'.

> 54. Having concluded that the supply is made for consideration within the meaning of article 2, the court must address whether the supply constitutes an economic activity for the purposes of the definition of 'taxable person' in article 9. The issue is whether the supply is made for the purposes of obtaining income therefrom on a continuing basis. For convenience, the CJEU has used the shorthand of asking whether the supply is made 'for remuneration'. The important point is that 'remuneration' here is not the same as 'consideration' in the article 2 sense, and in my view it is helpful to keep the two terms separate, using 'consideration' in the context of article 2 and 'remuneration' in the context of article 9.
>
> 55. Whether article 9 is satisfied requires a wide-ranging, not a narrow, enquiry. All the objective circumstances in which the goods or services are supplied must be examined: see the judgment in *Borsele* at [29]. Nonetheless, it is clear from the CJEU authorities that this does not include subjective factors such as whether the supplier is aiming to make a profit. Although a supply 'for the purpose of obtaining income' might in other contexts, by the use of the word 'purpose', suggest a subjective test, that is clearly not the case in the context of article 9. It is an entirely objective enquiry."

35. We agree with the FTT's analysis of the key principles to be taken from *Wakefield College* which the FTT set out at [145] and [146]:

> "145. The first question is whether there is a supply of goods or services for a consideration for the purposes of article 2. As described by David Richards LJ at [52] in *Wakefield College*, this test requires a legal relationship between the supplier and the recipient, pursuant to which there is reciprocal performance whereby the goods or services are supplied in return for the consideration provided by the recipient (see also *Gemeente Borsele* [24] and *Finland* [44]). There is no requirement for the consideration to be equivalent to the value of the supply (*Wakefield College* [52], *Gemeente Borsele* [26]).
>
> 146. The second question is whether or not the supply constitutes an economic activity within article 9. As described by David Richards LJ in *Wakefield College* this is a broad enquiry which has to take into account all of the circumstances in which the goods or services are supplied (*Wakefield College* [55]). The essential test is whether the supply is made for the purpose of obtaining income on a continuing basis (*Wakefield College* [54])."

36. At [75] in *Wakefield College*, the Court of Appeal identified a number of factors taken into account in *Finland* and *Borsele* which explained why the CJEU in those cases concluded that the supplier did not carry on any economic activity. One of the factors identified was that the school bus services provided by the local authority in *Borsele* were not offered on the general passenger transport market. In the case, the authority appeared to be more like the final consumer of the transport services provided by the transport undertakings engaged by it.

37. Applying the factors that it had identified to the facts of the case, the Court of Appeal in *Wakefield College* held, at [78], that the supply of courses to students paying subsidised fees was an economic activity being carried on by the College.

38. We were also referred, as was the FTT, to the decision of the CJEU in Case C-40/09 *Astra Zeneca UK Ltd v HMRC* [2010] STC 2298 (***'Astra Zeneca'***), which concerned the VAT treatment of retail vouchers provided by the company to its employees in return for a reduction in salary paid. For reasons set out at [25] – [31], the CJEU held that there was a supply for consideration when an employee sacrificed salary in return for receiving a supply of goods or services. At [25] and [26], the CJEU determined that the provision of the vouchers was a supply of services because the vouchers did not immediately transfer the right to dispose of property and, under article 24, any transaction which does not constitute a supply of goods within the meaning of Article 14 is regarded as a supply of services. In addition, the CJEU held that there was a direct link between the provision of retail vouchers and the salary sacrifice by the employees, ie the amount by which their remuneration was reduced.

Article 2 issue

39. The FTT set out its approach to the article 2 issue at [163] and [164]:

> "163. The article 2 question requires a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the consideration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (*Gemeente Borsele* [24]). The value of the consideration is determined subjectively and must be capable of being expressed in monetary terms (*AstraZeneca* [28]).
>
> 164. There is clearly a legal relationship between Pertemps and the flexible employee in this case. The next issue is to determine whether Pertemps makes a supply to the employee pursuant to that relationship and if so if that supply is made for a consideration which is provided by the employee."

40. The FTT set out its conclusion and reasons at [170] – [171]:

> "170. For my own part, it does seem to me that the criteria in the case law for there to be a supply of goods or services for a consideration within article 2 are met. I have set out my reasons below.
>
> (1) There is a legal relationship between Pertemps and the flexible employee expressed in the contract of employment incorporating relevant terms of the Flexible Employee Handbook.
>
> (2) Pursuant to that legal relationship, the employee exchanges a right to receive a payment of salary for a right to receive a payment of expenses for a consideration. This is clear from the contractual position that I have described above. The two payments (salary and expenses) have different characteristics for tax and national insurance purposes. That exchange potentially involves the supply of a service.
>
> (3) Pursuant to that relationship, the employee provides an identifiable consideration, the MAP adjustment. It is expressed in monetary terms. It does not matter that the employee does not become entitled to the payment (and so no income tax charge arises in relation to that amount). This is clear from the *AstraZeneca* case. It is sufficient that the employee forgoes part of what could be his or her remuneration as part of a bargain in exchange for the service.
>
> (4) There is reciprocal performance. The consideration is directly referable to the supply: it is only incurred by those employees who

> make claims under the MAP scheme; and the amount of the charge is proportionate to the number of claims that are made.
>
> 171. In my view the article 2 question has to be answered in the affirmative: the provision of MAP does involve a supply for a consideration."

41. Mr Brennan submitted that the FTT's conclusion on the article 2 issue was wrong, essentially for the same reasons as relied upon by Pertemps below. His principal point was that Pertemps was not providing the employees with anything or effecting anything on behalf of the employees and nor were the participating employees paying for the operation of the scheme. He submitted that Pertemps was operating its own business of providing the services of its employees to end-users and, in order to do so, Pertemps remunerated its employees in accordance with their contracts of employment.

42. In summary, Mr Puzey submitted that HMRC agree with and rely upon the reasoning of the FTT as expressed at [170] – [171]. He maintained that, contrary to the view expressed by the FTT in [176] and [177], the service supplied by Pertemps was the operation of the MAP which provides the employees with a cash flow benefit. Mr Puzey said that the nature of the supply is irrelevant to the outcome of the article 2 issue as the only question is whether there is a supply, however it is described. He accepted, however, that the characterisation of the supply is relevant to the article 9 issue (economic activity) and to the exempt supply issue.

43. We do not agree that the characterisation of the supply is irrelevant to the article 2 issue. In our view, it is clear from the language of article 2 and article 24(1) that, to be a supply of services, there must be a transaction or, in the language of section 5(2)(b) VATA94, "anything … done". In the cases discussed above, there was no question that there were services being supplied such as legal services in *Finland*, transport services in *Borsele*, the use of an outdoor activity centre in *Longridge* and vouchers in *Astra Zeneca*, where the vouchers were of value in themselves – they were a valuable right and so involved a supply of services. In each case, an identifiable service was provided to someone and the real issue in those cases was whether that service was supplied by the taxable person acting as such, ie in the course of an economic activity which is the article 9 issue.

44. In this case, what is provided by Pertemps is the payment of expenses, ie just money, without deduction of tax because of the dispensation under section 65 ITEPA. Pertemps is simply paying the participating employees in one (tax efficient) way rather than another. Mr Puzey submitted that Pertemps was enabling the participating employees to obtain the tax deduction up front and hence a cashflow advantage. In our view, that is not a service supplied by Pertemps but merely the consequence of the application of the section 65 dispensation.

45. In his skeleton argument, Mr Puzey said that the reason the participating employees receive a service is that they provide consideration, ie the MAP adjustment of £1 or 50p, but the payment of an amount is not enough: it must be consideration paid in return for something. It is true that the FAQs state that the MAP adjustment of £1 or 50p is intended to offset the cost to Pertemps of running the MAP but that is not consideration for a service supplied to the employees unless the MAP can be regarded as the provision of a service to the employees.

46. We accept that, as the FTT noted at [175], the article 2 question sets a relatively low hurdle. The relevant question is whether, having regard to economic reality, the employees received anything in return for the payment of the MAP adjustment.

47. We cannot see that Pertemps has supplied anything at all which might be regarded as an administration service to the employees. The reality is that Pertemps offered its employees a contract of employment under which they could be remunerated in two alternative ways. One included the MAP and paid a reduced salary but had the effect of allowing the employees to be paid their expenses tax-free which conferred a cash flow benefit. This meant that the participating employees did not have to claim a deduction for the expenses in their self assessment tax return at the end of the year. In order to pay the expenses tax free, Pertemps had to obtain a dispensation under section 65 ITEPA and comply with its obligations to account for PAYE and NICs.

48. Mr Puzey contended that what Pertemps did for participating employees was analogous to accountancy or book-keeping services. We do not agree. Pertemps did not make any claim on behalf of the participating employees; what it did was comply with the requirements imposed by HMRC on employers operating PAYE. It did not act as an accountant in completing and submitting a return with a claim to HMRC on behalf of the employees. In the case of both MAP and non-MAP employment contracts, Pertemps did exactly the same thing, namely comply with its obligations re PAYE and NICs. The MAP employment contract allowed Pertemps to pay the participating employees in a particularly tax advantageous way. In neither case was Pertemps providing an administrative service to the employees when it complied with its obligations. The fact that the employees pay the MAP adjustment by way of salary sacrifice does not convert what Pertemps did in carrying out its obligations, ie activities for its own benefit, into a supply of an administrative service to the employees.

49. The FTT considered that the relevant service was the "the exchange by the employee of a right to receive salary for a right to receive a [tax-free] payment of expenses for a consideration, the MAP adjustment". Neither Mr Puzey nor Mr Brennan adopted the FTT's characterisation of the service and we do not accept it. It seems to us that Pertemps did not (and could not) confer the benefit, which was only a cash flow benefit, of the immediate payment of the expenses without deduction of tax. That was simply a consequence of the legislation once the section 65 ITEPA dispensation had been granted.

50. We also cannot see that there is any supply if the FTT meant that simply changing from one method of being remunerated under the employment contract (full salary) to another (reduced salary but plus tax free expenses) is a service if done in return for the consideration of the MAP adjustment. If that were right then it seems to us to follow that the employees would (if they were taxable persons) be providing a service to Pertemps if they ceased to use MAP and reverted to the full salary, which they could do by simply not making a weekly claim, as Pertemps would be paying an additional element of salary equal to the MAP adjustment. The economic reality is that Pertemps offered its employees two methods of being remunerated in its employment contract, each of which had slightly different tax consequences and, as a result, Pertemps agreed to pay slightly different salaries. We do not regard that arrangement as showing that there is any service supplied by the employer even where an employee chooses the method that provides a greater weekly or monthly take home amount but a lower salary element.

51. In conclusion, we consider that the FTT erred when it held that Pertemps provided any service to participating employees and, therefore, even though we accept that the MAP adjustment is capable of being consideration, there was no supply of services for VAT purposes.

Article 9 issue

52. The FTT set out its reasons for holding that the operation of the MAP by Pertemps was not an economic activity at [181] of the decision:

> "(1) The operation of MAP does not provide an income stream to Pertemps. It reduces the cost to Pertemps of employing its workers and accordingly increases the profits which Pertemps makes from its business of providing those workers to its clients.
>
> (2) MAP is not a service that could be provided by a third party supplier. The MAP scheme relies upon the issue of the dispensation by HMRC to the employer. It can only be operated by a person who is the employer. It is not "an activity likely to be carried on by a private undertaking on a market, organized within a professional framework generally performed in the interest of generating profit" (*Banque Bruxelles Lambert SA v Belgium*, per Advocate General Poiares Maduro at [10]).
>
> (3) In a similar vein, this is a supply that is being made pursuant to the employment relationship. The principal supply that is being made in the context of that relationship is the supply by the employees of their labour in consideration for the remuneration and benefits provided by Pertemps. The same was, of course, true in the *AstraZeneca* case. But this supply is, in my view, too ancillary to the fundamental elements of the employment relationship. This is not a case – as in *AstraZeneca* – where the employer also makes available to the employee goods or a separate service (the voucher in the *AstraZeneca* case) which could have been provided by a third person outside the obligations normally performed by the employer as part of the employment relationship.
>
> (4) This is also not a case in which it is necessary to impose a charge to VAT in order to ensure that the coherence of the VAT system is maintained or to ensure that a level playing field is maintained between participants in a market. This was a factor in the *AstraZeneca* case. It is not so here."

53. In summary, Mr Puzey submitted that the FTT erred in law in concluding that the supply of services under the MAP scheme was not an economic activity because it adopted an unduly narrow approach to the concept of economic activity.

54. The FTT's first reason for concluding that the MAP was not an economic activity was that it did not produce an income stream. Mr Puzey submitted that the meaning of the phrase "income stream" used by the FTT in considering whether there was an economic activity was unclear but on any view the conclusion at [181(1)] that there was no income stream was contrary to the FTT's findings of fact. The evidence recorded at [18] – [19] and [56] – [57] showed that there were thousands of participating employees who paid the MAP adjustment which therefore provided an income stream. Mr Puzey contended that it was irrelevant, also, whether Pertemps sought to make a profit and the essence of an economic activity was present, namely the obtaining of income on a continuing basis.

55. We do not think that there is any doubt about what the FTT meant when it used the phrase "income stream". The discussion of the case law in the decision shows that the FTT had the correct test in mind. We agree with the FTT, at [146], that determining whether a person is carrying on an economic activity requires a broad enquiry which has to take into account all of the circumstances in which the goods or services are supplied and the essential test is whether the supply is made for the purpose of obtaining income on a continuing basis. It seems to us that the FTT was stating that Pertemps did not operate the MAP for the purpose of obtaining income. That was an incidental consequence as was made clear by the evidence of Mr Spencer Jones, who was Group Tax Director and later Group Finance Director of Pertemps, recorded by the FTT at [56] and [57]:

> "56. ... the evidence of Mr Jones was that the company did not perform any scientific calculation of the amount of the MAP adjustment by reference to the costs of running the scheme. The MAP adjustment helped to reduce the costs of providing workers to clients. He described the MAP adjustment as "a bit of additional profit" for Pertemps. I accept Mr Jones's evidence on these points.
>
> 57. Mr Jones said that the decision to increase the MAP adjustment to £1 per shift in April 2011 was a decision made by the Pertemps board. Once again, the increase did not reflect the costs of running the scheme, it was a business decision designed to ensure that Pertemps's rates charged to its clients remained competitive."

56. In relation to the FTT's reason in [181(2)], Mr Puzey submitted that the FTT had misunderstood the legal question which was not whether the exact scheme could be replicated by another provider but whether the MAP was the type of activity that could be undertaken by a third party provider. Mr Puzey contended that the answer to that question was "yes". The provision of a service whereby employees recover tax on their expenses without having undertaken the necessary calculations and form-filling themselves could be and plainly is provided by accountants or book-keepers generally.

57. We do not accept Mr Puzey's description of the relevant test or the service. It is clear from [75] of *Wakefield College* and *Banque Bruxelles Lambert SA v Belgium* referred to by the FTT in [181(2)] that one of the factors to be considered is whether the services identified were offered on the general market or likely to be carried on by a private undertaking on a market for the purpose of generating profit. In this case, the answer is clearly no. In relation to the general market point, it is significant that, as we have already noted, Pertemps was not providing accountancy or book-keeping services to the employees. Pertemps was acting as an employer in making deductions of tax and NICs in accordance with the law. We understood Mr Puzey to accept that this 'service' could only be provided by an employer to its employees but he submitted that it was nevertheless part of a general market because other employers offered the same or similar arrangements. We do not think that is right. The fact that other employers offered schemes similar to the MAP does not show that there is a general market but many individual markets because each employer could only offer the scheme to its own employees.

58. Mr Puzey also criticised the FTT's reasoning in [181(3)] for saying that the supply was made pursuant to the employer/employee relationship. Mr Puzey said that did not mean that the MAP was not an economic activity, as was shown by *Astra Zeneca*. We cannot see anything to criticise in the FTT's reasoning at this point. The paragraph begins

with the words "in a similar vein" and it is clear that the FTT was initially making the point that we discuss above, namely that the fact that the MAP was operated pursuant to the employment relationship supported the view that it was not the type of supply that could be made in a general market. The FTT then contrasted that with the position in *Astra Zeneca* where the vouchers provided by the employer to employees could have been provided by a third party independent of any employer/employee relationship. We do not understand what the FTT meant when it said that the supply was "too ancillary" to the employer/employee relationship but that does not affect the point that the supply (if there was one) was one that could only be made between employer and employee.

59. At [181(4)], the FTT observed that one of the considerations, the need for fiscal coherence or a level playing field, in the *Astra Zeneca* case was not relevant in the case of Pertemps and the MAP. Mr Puzey pointed out that the fact that this consideration was irrelevant was not a positive reason why the operation of the MAP was not an economic activity. We agree that it is not a positive reason because the issue of fiscal neutrality did not arise in this case. Equally, the point made by the FTT does not detract from the other reasons which support the conclusion that Pertemps was not carrying on an economic activity when it operated the MAP.

60. In conclusion, we consider that whether the operation of the MAP by Pertemps was an economic activity is a question of mixed fact and law. The FTT applied the correct test and was entitled to make the findings of fact that it did. The FTT's conclusion that Pertemps was not carrying on an economic activity when it operated the MAP contains no error of law. Accordingly, we dismiss HMRC's appeal on this point.

Exempt supply issue

61. Although it did not need to do so in the light of its conclusion that Pertemps was not carrying on an economic activity when it operated the MAP, the FTT went on to consider whether the operation of the MAP was an exempt supply of a "transfer or receipt of, or any dealing with, money" within Item 1, Group 5 of Schedule 9 to VATA94. The FTT concluded, at [193] – [194], that "an exchange by the employee of the employee's right to the payment of part of his or her original salary for a right to receive an expenses payment of a lower amount" is a "dealing in money" within item 1 of Group 5.

62. The FTT referred to the guidance given by the CJEU on the meaning of "payments, transfers" in Article 135(1)(d) of the Principal VAT Directive at [195]:

> "195. The transaction does involve a change in the legal and financial position between the parties as required by the CJEU case law (in particular, *SDC* at [53]). It involves the exchange by the employee of a right to receive a payment with certain characteristics for a right to receive a payment with certain other characteristics: the employee gives up a right to receive a payment from the employer for his or her work; the employee receives from the employer a right to reimbursement of certain expenses that the employee has incurred. The different nature of those payments has different tax consequences. Furthermore, the amount of the payment due from the employer is reduced."

63. The reference to *SDC* in [195] is to the leading case on the meaning of "transfers" in the materially identically worded predecessor to Article 135(1)(d), namely Case C-2/95 *Sparekassernes Datacenter (SDC) v Skatteministeriet* [1997] ECR I-3017, at paragraph 53:

> "53. On this point, it must be noted first of all that a transfer is a transaction consisting of the execution of an order for the transfer of a sum of money from one bank account to another. It is characterized in particular by the fact that it involves a change in the legal and financial situation existing between the person giving the order and the recipient and between those parties and their respective banks and, in some cases, between the banks. Moreover, the transaction which produces this change is solely the transfer of funds between accounts, irrespective of its cause. Thus, a transfer being only a means of transmitting funds, the functional aspects are decisive for the purpose of determining whether a transaction constitutes a transfer for the purposes of the Sixth Directive."

64. The judgment in *SDC* was considered by the Court of Appeal in *FDR Ltd v Commrs of Customs and Excise* [2000] STC 672 (***'FDR'***) and Laws LJ provided the following guidance at [37] – [38]:

> "37. … if one leaves aside transfers in specie (of coin, goods or other property), a transfer of money means no more nor less than the entry of a credit in the payee's account and the entry of a corresponding debit in the payor's account. There may be - will be - problems in cases of error or fraud in the posting of entries to the accounts. But however those may fall to be resolved, there is no further, elusive, event by which the money is really transferred: no Platonic Form, of which day-to-day transfers are only shadows. The pro and con entries constitute the transfer. There is nothing else. I recognise, of course, that this reasoning boils down the reality to the simplest case. In truth, creditor and debtor may have accounts at banks A and B respectively; banks A and B may themselves have accounts at banks C and D respectively; and it may be only when one comes to banks J and K that one finds both of them having accounts at the Bank of England. But the logic is unaffected.
>
> 38 If this reasoning is right it is, I think, very significant for a sensible and intelligent understanding of *SDC*. It demonstrates that what the Directive imports by the term "transfer" inheres in the notion of a "change in the legal and financial situation" - an expression used in both paragraphs 53 and 66 - where that is a reference to the effects of the corresponding credit and debit entries in the accounts of the paying and receiving parties. This is a point which in my judgment possesses particular resonance when one comes to counsel's submissions relating to 'netting-off'."

65. Mr Puzey contended that, applying the guidance in *SDC* as explained in *FDR*, the correct analysis is that the MAP was not a payment or transfer or dealing with money and did not fall within the exemption because the activity went beyond the narrow scope of the exemption and included an administrative service that enabled the employee to receive the reimbursement of expenses without any deduction of tax.

66. It is well established that exemptions must be construed strictly (see Case C-348/87 *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën* [1989] ECR 1737 at [12] and [13]) but not restrictively (see *Expert Witness Institute v Commrs of Customs and Excise* [2002] STC 42 CA at [17] - [19]). In *Expert Witness Institute*, Chadwick LJ said that "the task of the court is to give the exempting words a meaning which they can fairly and properly bear in the context in which they are used". It is apparent from the

guidance in *SDC* and *FDR* that the exemption for payments or transfers or "dealing with money" in Item 1 of Group 5 of Schedule 9 VATA94 is concerned with movements of money by the receipt of credits and making of debits. We do not accept Mr Puzey's submission that the inclusion of other administrative services necessarily excludes the MAP from being within the exemption. That would require a different enquiry, namely whether the MAP was a single supply or several separate supplies and, if a single supply and no more, what was the principal or predominant element (see Case C-349/96 *Card Protection Plan Ltd v Commrs of Customs and Excise* [1999] STC 270 and Case C-41/04 *Levob Verzekeringen BV v Staatssecretaris van Financiën* [2006] STC 766). The service provided to Pertemps employees under the MAP scheme extends well beyond such narrow scope, for the reasons set out above.

67. We consider that the answer in this case is more straightforward. The supply identified by the FTT, in [170], was "the exchange by the employee of a right to receive salary for a right to receive a [tax-free] payment of expenses [and a reduced salary] for a consideration, the MAP adjustment". The FTT described the supply in [193] as follows:

> "193. As I have described above in the context of the first issue, if there is a supply, it seems to me that the economic reality is that it involves an exchange by the employee of the employee's right to the payment of part of his or her original salary for a right to receive an expenses payment of a lower amount. For that exchange, the employee pays a consideration in the form of the MAP adjustment."

68. The FTT stated, in [194], that this was a transaction in a right to receive a payment of money and a "dealing in money" within item 1 Group 5 Schedule 9. In our view, what the FTT describes is a supply by the employee (who, of course, is not a taxable person). Pertemps does not exchange any right to receive any payment. At most, Pertemps agrees to amend the contract of employment to pay the employee in a different way (although it might be more accurate to say that Pertemps agrees to permit the employee to exercise an option under the terms of the contract to be paid in a different way). An agreement to change the terms of a contract (or allow the employee to exercise such an option) is not a payment or transfer or "dealing in money". That remains true even where the effect of the change is to change the way the payment is characterised or calculated.

69. Mr Brennan submitted that the exchange of a right to salary for a right to a reduced salary plus expenses was the "transfer or receipt of, or any dealing with, money" for the purposes of item 1 of Group 5 of Schedule 9 VATA94. He relied on the decision of the Upper Tribunal in *Coinstar Ltd v HMRC* [2017] UKUT 256 (TCC), [2017] STC 1519 (***'Coinstar'***) as authority for this proposition. *Coinstar* is a very different case to the present one. It concerned the chargeability to VAT of supplies made through machines in supermarkets which allowed customers to exchange their loose change for a voucher that could be redeemed at the supermarket. In return for the service, Coinstar charged a fee of 9.9% of the value of the coins accepted. *Coinstar* clearly involved an exchange of money for another form of payment, ie a voucher with a monetary value. That is not what happened in this case. There was no exchange of money, merely an agreement to pay an amount of salary as expenses because it was more tax efficient. That cannot, in our view, be seen as the same type of transaction as the exchange in *Coinstar*.

70. Accordingly, had it been necessary to do so, we would have allowed HMRC's appeal in relation to the exempt supply issue.

Disposition

71. For the reasons given above, HMRC's appeal against the FTT's decision is dismissed.

Costs

72. Any application for an order for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and, unless both parties agree that the costs should be the subject of detailed assessment, be accompanied by a schedule of the costs claimed sufficient to allow summary assessment of such costs as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Hon Mr Justice Nugee

Judge Greg Sinfield
Upper Tribunal Judge

Release date: 7 August 2019