[2020] UKUT 0170 (TCC)

Appeal number: UT/2019/0050

VAT – Place of supply – construction of s18(3) of the Value Added Tax Act 1994 in the light of the Principal VAT Directive – whether s18(3) limited to goods warehoused in the UK – no – appeal allowed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

AMPLEAWARD LIMITED **Appellant**

-and-

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

TRIBUNAL **MR JUSTICE MILES**
JUDGE JONATHAN RICHARDS

Sitting in public by way of remote video hearing on 27 and 28 April 2020

Kieron Beal QC and Michael Firth, instructed by Morrisons Solicitors LLP and TT Tax for the Appellant

Natasha Barnes and Paul Reynolds, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. The Appellant appeals against a decision (the "Decision") of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 11 February 2019. In the Decision, the FTT determined four preliminary issues relevant to an assessment to acquisition VAT of £1,308,648 that HMRC made in respect of the Appellant's VAT periods 09/12 to 03/16.

2. The appeals before us took the form of a "fully remote" video hearing over the Skype for Business platform. All parties were content for the hearing to take that form.

The factual background

3. The proceedings concern the correct VAT analysis of a series of transactions in alcohol involving multiple jurisdictions. The FTT reached its determination of the preliminary issues by reference to an assumed factual background. We will base our analysis on the same assumed factual background which can be summarised as follows:

> (1) The Appellant is an alcohol wholesaler that has at all material times been registered for UK VAT and approved to own excise duty suspended alcoholic goods in tax warehouses in the UK.
>
> (2) During the period in question, the Appellant purchased alcohol from a supplier (the "Supplier") established in a member state of the EU other than the UK (the "Supplier Jurisdiction").
>
> (3) The Appellant did not, however, take delivery of the alcohol in the UK. Instead, the Supplier delivered the alcohol to a bonded warehouse (with which the Appellant had an account) located in a third EU member state[1] (the "Delivery Jurisdiction").
>
> (4) The Supplier included the Appellant's UK VAT registration number in its domestic VAT returns. That enabled the Supplier to treat the sale of the alcohol as an exempt movement of goods across an EU border for the purposes of VAT in the Supplier Jurisdiction.
>
> (5) The Appellant was not registered for VAT in the Delivery Jurisdiction. It did not itself account for VAT in respect of the acquisition of the alcohol in the Delivery Jurisdiction. (The reason why the Appellant did not account for VAT in the Delivery Jurisdiction, and the steps it took to comply with VAT law in the Delivery Jurisdiction are not material to our decision and we will not, therefore set them out.)
>
> (6) The Appellant would then on-sell the alcohol to a customer (the "Customer") established in a fourth member state[2] (the "Customer Jurisdiction"). The alcohol would be physically located in the Delivery

[1] i.e. a member state other than the UK or the Supplier Jurisdiction

[2] i.e. neither the UK, the Supplier Jurisdiction nor the Delivery Jurisdiction

Jurisdiction at the time of this sale and the Customer was not registered for VAT in the Delivery Jurisdiction.

(7) All of the above transactions took place at a time when the alcohol was held in duty suspense, so delivery of the alcohol pursuant to those transactions resulted in the alcohol moving from one bonded warehouse to another.

4. These proceedings concern the correct analysis, for UK VAT purposes, of the transaction set out at [3(2)]. The Appellant argues as follows:

(1) Its purchase of the alcohol from the Supplier was not subject to acquisition VAT in the UK since, by virtue of s18(3) of the Value Added Tax Act 1994 ("VATA"), that acquisition was treated as taking place outside the UK.

(2) Alternatively, if its acquisition of the alcohol was subject to UK VAT, it was entitled to an equal and opposite credit for input VAT with the result that it has no actual obligation to account for acquisition VAT that is the subject of HMRC's assessments.

5. HMRC's position is the diametric opposite. It argues first that s18(3) of VATA is not engaged with the result that the Appellant's acquisition of the alcohol from the Supplier is subject to acquisition VAT in the UK. Moreover, in HMRC's submission, the Appellant is not entitled to credit for input VAT and so is liable for the amount as shown in the assessments HMRC made.

Applicable UK and EU law

6. VAT is a largely harmonised tax whose terms are set out in Council Directive (EC) 2006/112/EC (the "PVD"). The UK has enacted statutory and secondary legislation to implement the requirements of the PVD.

7. The Appellant's positive case emerges most clearly from the domestic UK law provisions and we will, therefore, start by setting out those provisions and, in doing so, provide an overview of the parties' competing analyses of them. We will then turn to provisions of EU law (on which HMRC's rebuttal of the Appellant's case is largely based) and, in doing so, will outline the parties' respective positions on those EU law provisions.

UK domestic law

8. VAT is, by s1(1)(b) of VATA charged on "the acquisition in the United Kingdom from other member States of any goods"[3]. In order to be subject to acquisition VAT,

[3] "Acquisitions" are therefore to be distinguished from "imports" which involve goods being acquired from a country other than an EU member state.

the acquisition needs to be in the UK. Section 13 of VATA sets out provisions which determine whether an acquisition is to be treated as made in the UK as follows:

> **13. Place of acquisition.**
>
> (1) This section shall apply (subject to sections 18 and 18B) for determining for the purposes of this Act whether goods acquired from another member State are acquired in the United Kingdom.
>
> (2) The goods shall be treated as acquired in the United Kingdom if they are acquired in pursuance of a transaction which involves their removal to the United Kingdom and does not involve their removal from the United Kingdom, and (subject to the following provisions of this section) shall otherwise be treated as acquired outside the United Kingdom.
>
> (3) Subject to subsection (4) below, the goods shall be treated as acquired in the United Kingdom if they are acquired by a person who, for the purposes of their acquisition, makes use of a number assigned to him for the purposes of VAT in the United Kingdom.
>
> (4) Subsection (3) above shall not require any goods to be treated as acquired in the United Kingdom where it is established, in accordance with regulations made by the Commissioners for the purposes of this section that VAT—
>
> > (a) has been paid in another member State on the acquisition of those goods; and
> >
> > (b) fell to be paid by virtue of provisions of the law of that member State corresponding, in relation to that member State, to the provision made by subsection (2) above.
>
> (5) The Commissioners may by regulations make provision for the purposes of this section—
>
> > (a) for the circumstances in which a person is to be treated as having been assigned a number for the purposes of VAT in the United Kingdom;
> >
> > (b) for the circumstances in which a person is to be treated as having made use of such a number for the purposes of the acquisition of any goods; and
> >
> > (c) for the refund, in prescribed circumstances, of VAT paid in the United Kingdom on acquisitions of goods in relation to which the conditions specified in subsection (4)(a) and (b) above are satisfied.

9. The parties are agreed that s13(2) of VATA sets out a general rule to the effect that goods that are physically brought into the UK are to be treated as acquired in the UK. However, since the alcohol that is the subject of the transaction under analysis was not delivered physically to the UK, both parties are agreed that the general rule in s13(2) is not applicable in the circumstances of this appeal.

10. HMRC argue that, even though the general rule in s13(2) does not apply, what is known as the "fallback" rule in s13(3) of VATA does because the Supplier used the

Appellant's UK VAT number to enable its supply of the alcohol to be exempt from VAT in the Supplier Jurisdiction. Under that fallback rule, in HMRC's submission, the alcohol is to be treated as acquired in the UK. As we discuss in more detail below, HMRC accept that the Appellant would be able to escape the "fallback" charge if it could demonstrate, that VAT was "paid" (a term that they accept to have a wider meaning in s13(4) than it might otherwise have) in the Delivery Jurisdiction even though no regulations have been made for the purposes of s13(4) of VATA.

11. The Appellant argues that, by s13(1) of VATA, the place of acquisition rules are made subject to s18 of VATA which sets out different rules that apply where goods are subject to a warehousing regime. That alternative regime, the Appellant argues, applies in priority to s13 and provides as follows:

> **18 Place and time of acquisition and supply**
>
> …
>
> (2) Subsection (3) below applies where—
>
> (a) any dutiable goods are acquired from another member State; or
>
> (b) any person makes a supply of—
>
> (i) any dutiable goods which were produced or manufactured in the United Kingdom or acquired from another member State; or
>
> (ii) any goods comprising a mixture of goods falling within sub-paragraph (i) above and other goods.
>
> (3) Where this subsection applies and the material time for the acquisition or supply mentioned in subsection (2) above is while the goods in question are subject to a warehousing regime and before the duty point, that acquisition or supply shall be treated for the purposes of this Act as taking place outside the United Kingdom if the material time for any subsequent supply of those goods is also while the goods are subject to the warehousing regime and before the duty point.
>
> (4) Where the material time for any acquisition or supply of any goods in relation to which subsection (3) above applies is while the goods are subject to a warehousing regime and before the duty point but the acquisition or supply nevertheless falls, for the purposes of this Act, to be treated as taking place in the United Kingdom—
>
> (a) that acquisition or supply shall be treated for the purposes of this Act as taking place at the earlier of the following times, that is to say, the time when the goods are removed from the warehousing regime and the duty point; and
>
> (b) in the case of a supply, any VAT payable on the supply shall be paid (subject to any regulations under subsection (5) below)—
>
> (i) at the time when the supply is treated as taking place under paragraph (a) above; and

(ii) by the person by whom the goods are so removed or, as the case may be, together with the duty or agricultural levy, by the person who is required to pay the duty or levy.

…

(6) In this section—

"dutiable goods" means any goods which are subject—

(a) to a duty of excise; of

(b) in accordance with any provision for the time being having effect for transitional purposes in connection with the accession of any State to the European Union, to any EU customs duty or agricultural levy of the European Union;

"the duty point", in relation to any goods, means—

(a)in the case of goods which are subject to a duty of excise, the time when the requirement to pay the duty on those goods takes effect; and

(b) in the case of goods which are not so subject, the time when any Community customs debt in respect of duty on the entry of the goods into the territory of the European Union would be incurred or, as the case may be, the corresponding time in relation to any such duty or levy as is mentioned in paragraph (b) of the definition of dutiable goods;

"material time"—

(a) in relation to any acquisition or supply the time of which is determined in accordance with regulations under section 6(14) or 12(3), means such time as may be prescribed for the purpose of this section by those regulations

(b) in relation to any other acquisition, means the time of the event which, in relation to the acquisition, is the first relevant event for the purposes of taxing it; and

(c) in relation to any other supply, means the time when the supply would be treated as taking place in accordance with subsection (2) of section 6 if paragraph (c) of that subsection were omitted;

"warehouse" means any warehouse where goods may be stored in any member State without payment of any one or more of the following, that is to say—

(a) customs duty;

(b) any agricultural levy of the European Union ;

(c) VAT on the importation of the goods into any member State;

(d) any duty of excise or any duty which is equivalent in another member State to a duty of excise.

> (7) References in this section to goods being subject to a warehousing regime is a reference to goods being kept in a warehouse or being transported between warehouses (whether in the same or different member States) without the payment in a member State of any duty, levy or VAT; and references to the removal of goods from a warehousing regime shall be construed accordingly.

12. The Appellant argues that s18(3) applies. The alcohol it purchased constituted "dutiable goods". The Appellant bought the alcohol while it was subject to a "warehousing regime" and sold the alcohol while it was subject to a "warehousing regime" and before an excise duty point was triggered.

13. HMRC argue that, having appropriate regard to provisions of the PVD, s18(3) does not apply. We will examine their argument in detail below, but in essence their case is that the Appellant's interpretation runs contrary to the provisions of the PVD and would, if correct, facilitate a loss of tax in member states. HMRC make the specific point that s18(3) could only apply to the Appellant's acquisition of the alcohol if that alcohol was subject to a warehousing regime in the UK. On the assumed facts, the alcohol was subject to a warehousing regime in the Delivery Jurisdiction, and HMRC argue that this is insufficient to engage s18(3).

14. The UK's domestic provisions relating to the credit of input tax are set out in s24 and s26 of VATA which provide, so far as relevant, as follows:

> **24 Input tax and output tax**
>
> (1) Subject to the following provisions of this section, "input tax" , in relation to a taxable person, means the following tax, that is to say—
>
> (a) …
>
> (b) VAT on the acquisition by him from another member State of any goods; and
>
> (c) …
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him…

15. Section 26 of VATA specifies the amount of input tax that can be credited as follows:

> **26 Input tax allowable under section 25**
>
> (1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisition and importations in the period) as is allowable by or under regulations[4] as being attributable to supplies within subsection (2) below.

[4] The parties were agreed that, while regulations have been made under s26 of VATA, those regulations shed no additional light on the question whether input tax credit would be available.

> (2)The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business –
>
> …
>
> (b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom.

16. The Appellant's case on input tax recovery is that even if HMRC were correct that its acquisition of the alcohol from the Supplier was subject to VAT under the fallback provisions, s24 and s26 entitled it to credit for input tax incurred on that acquisition. The acquisition VAT falls unambiguously within the definition of "input tax" set out in s24(1)(b). Moreover, that input tax was attributable to the Appellant's supplies of the alcohol to Customers which supplies would, if made in the UK, be taxable supplies so that credit is available under s26(2)(b).

17. HMRC's case on input tax recovery is that the UK provisions need to be read in the light of the PVD and EU jurisprudence, specifically the decision of the Court of Justice of the European Union (the "CJEU") in Case C -539/08 *Facet Trading BV* which prevents tax incurred under the fallback mechanism from being recovered as input tax.

Provisions of EU law

18. The general rules determining the place of an intra-EU acquisition of goods are set out in Articles 40 and 41 of the PVD which provide as follows:

> **Article 40**
>
> The place of an intra-Community acquisition of goods shall be deemed to be the place where dispatch or transport of the goods to the person acquiring them ends.
>
> **Article 41**
>
> Without prejudice to Article 40, the place of an intra- Community acquisition of goods as referred to in Article 2(1)(b)(i) shall be deemed to be within the territory of the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition, unless the person acquiring the goods establishes that VAT has been applied to that acquisition in accordance with Article 40.
>
> If VAT is applied to the acquisition in accordance with the first paragraph and subsequently applied, pursuant to Article 40, to the acquisition in the Member State in which dispatch or transport of the goods ends, the taxable amount shall be reduced accordingly in the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition.

19. Thus, Article 40 of the PVD sets out a general rule (that the acquisition is made where the transport ends) which was enacted in s13(2) of VATA. Article 41 sets out the "fallback" provision, enacted in s13(3) and s13(4) of VATA although there are some important differences in wording between the UK provisions and their EU

counterparts. For example, Article 41 of the PVD provides that a trader can escape the application of the fallback provision by demonstrating that VAT has been "applied" to the acquisition in the Delivery Jurisdiction. By contrast, under s13(4) of VATA, fallback provision is only disapplied if VAT has been "paid" on the acquisition in the Delivery Jurisdiction.

20. Articles 155 to 162 of the PVD permit, but do not oblige, member states to make special provision for goods that are subject to warehousing regimes in the following terms:

> **Article 155**
>
> Without prejudice to other Community tax provisions, Member States may, after consulting the VAT Committee, take special measures designed to exempt all or some of the transactions referred to in this Section, provided that those measures are not aimed at final use or consumption and that the amount of VAT due on cessation of the arrangements or situations referred to in this Section corresponds to the amount of tax which would have been due had each of those transactions been taxed within their territory.
>
> …
>
> **Article 157**
>
> Member States may exempt the following transactions:
>
> …
>
> b) the supply of goods which are intended to be placed, within their territory, under warehousing arrangements.
>
> …
>
> **Article 162**
>
> Where Member States exercise the option provided for in this Section, they shall take the measures necessary to ensure that the intra-Community acquisition of goods intended to be placed under one of the arrangements …referred to in … Article 157(1)(b) … is covered by the same provisions as the supply of goods carried out within their territory under the same conditions.

21. It is notable that these provisions entitle member states to make provision exempting acquisitions from VAT. Yet the UK's domestic provisions set out in s18 of VATA do not provide for exemption at all, but rather treat an acquisition as being made outside the UK (with the result that it is outside the scope of UK VAT). We will consider the significance or otherwise of this point further below.

22. HMRC rely strongly on member states' discretion to implement the regime set out in Articles 155 to 162 and on what they submit to be the overall coherence of the scheme of VAT imposed by the PVD. They observe that Article 157 only permits exemption to be applied where goods are to be placed under warehousing arrangements within the territory of the member state exercising the discretion. If a member state exercises that discretion then, by analogy, the obligation to exempt acquisitions imposed by Article

162 should similarly apply only to acquisitions of goods subject to a warehousing arrangement in that member state. Moreover, they argue that the discretionary regime set out in Articles 155 to 162 should not be permitted to oust the operation of the fallback regime set out in Article 41 on the facts of this appeal since that fallback regime is a crucial component of the VAT system designed to ensure that acquisition VAT is properly accounted for on intra-EU supplies of goods.

23. Ordinarily input VAT attributable to exempt transactions is not creditable. However, by Article 169(b) of the PVD, a taxable person is entitled to deduct VAT attributable to transactions exempt under Article 157(1)(b) with the result that the "exemption" permitted by Article 157(1)(b) is exemption with recovery of VAT, or what UK VAT lawyers would term "zero-rating". Moreover, given the provisions of Article 162, input VAT associated with an acquisition that is exempt under Article 162 is similarly creditable.

24. The general provisions governing the deduction of input tax are set out in Articles 167 and 168 of the PVD in the following terms:

> **Article 167**
>
> A right of deduction shall arise at the time the deductible tax becomes charged.
>
> **Article 168**
>
> In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> > (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person.

25. HMRC submit that the entitlement to input tax recovery needs to be understood in the light of the CJEU's decision in *Facet* and that, having regard to that judgment, the Appellant is not entitled to deduct input tax associated with acquisition VAT arising under the fallback regime.

The Decision

26. Both parties presented the FTT, as they presented this Tribunal, with a number of competing conclusions that they considered should be drawn from both the UK and EU legislation. Moreover, both parties gave a variety of reasons why the other party's interpretations either went against the grain of the legislation, or produced anomalies. We mean no disrespect to either the FTT or the parties in not summarising all arguments before the FTT or the FTT's response to all arguments. Rather, in this section we will simply set out the key conclusions that the FTT reached insofar as relevant for present purposes.

27. The parties agreed that the FTT should determine the following four issues as preliminary issues:

> (1) Does VATA s 18(3) take precedence over VATA s13(3) if both provisions would otherwise apply?
>
> (2) If VATA s13(3) takes precedence over VATA s18(3) is the occurrence of the acquisition subject to VATA s 18(4)?
>
> (3) Is s 18(7) limited to goods warehoused in the UK?
>
> (4) Is acquisition VAT due under s 13(3) recoverable as input tax in accordance with the rules in VATA ss 24-26?

28. As a matter of construction, the FTT saw the force of the Appellant's point that s13 of VATA is expressly made subject to s18 which would appear to indicate that the provisions of s18 (including s18(3)) were to apply in priority to the provisions of s13 (see [41]). However, it did not consider that the answer could be found only in UK statutory provisions as it is necessary to have regard to the provisions of the PVD as well. The FTT rejected HMRC's argument that the provisions of s13 that made s13 subject to s18 should, in order to be consistent with the PVD either be ignored altogether ([65]) or should be treated as not applying to the fallback rule in s13(3) ([67]). Accordingly, the FTT decided the parties' formulation of the first preliminary issue in the Appellant's favour concluding, at [68] that "s18(3) predominates over s13(3)".

29. The FTT did not, however, limit itself to considering whether s18(3) "predominated" over s 13(3) or not. It also considered the separate question whether s18(3) applied at all. At [43], the FTT rejected HMRC's contention that, to be subject to a "warehousing regime" for the purposes of s18(7) of VATA, the alcohol had to be held in circumstances where supplies of it were not subject to VAT and that it was not sufficient for the regime merely to defer a charge to excise duty.

30. However, the FTT concluded that properly construed, Article 157(1)(b) and Article 162 of the PVD were not to be read as permitting the UK to exempt an acquisition into a bonded warehouse outside the UK in such a way as to override the fallback provision set out in Article 41 of the PVD ([60]).

31. Therefore, since the parties' agreed hypothetical transaction involved alcohol being taken into a bonded warehouse in the Delivery Jurisdiction (outside the UK), the FTT determined that s18(3) did not apply to treat that acquisition as taking place outside the UK. Accordingly, the ordinary rules on place of acquisition set out in s13 would apply (including the fallback provision) with the result that the Appellant's acquisition of wine was in principle subject to acquisition VAT in the UK.

32. It appears that the second preliminary question referred to at [27] was intended to deal with a secondary argument of the Appellant. Very broadly, if the Appellant lost on the first preliminary question, then it assumed that would mean that the acquisition of the alcohol in the Delivery Jurisdiction would be treated as an acquisition taking place in the UK. However, it wished to argue that because no "duty point" for the alcohol had been triggered for excise duty purposes (because, at the point of delivery to the Delivery Jurisdiction it still benefited from suspension of excise duty), s18(4) of VATA was engaged. That in turn would defer the time of acquisition to the point at which the goods left the excise duty suspension arrangement no doubt to a point at which the Appellant could not be made liable for the acquisition VAT.

33. The FTT did not answer the second preliminary question in quite the terms in which it was posed. Rather, the FTT determined that s18(4) could apply only where there has been a supply of goods to which s18(3) applies. Since it had decided that s18(3) did not apply on the assumed facts before it (an acquisition into a bonded warehouse in the Delivery Jurisdiction), s18(4) was incapable of application.

34. The FTT's conclusion on the third preliminary question followed naturally from its conclusion that s18(3) does not apply to acquisitions into warehouses located outside the UK.

35. The FTT broadly accepted HMRC's arguments to the effect that the Appellant was not entitled to credit for input tax in the light of the decision of the CJEU in *Facet*. Accordingly, the FTT answered the fourth preliminary question by concluding that the Appellant was not entitled to credit for input tax.

The Appellant's grounds of appeal against the Decision

36. With the permission of the FTT, the Appellant appeals against the Decision on the following grounds:

> (1) Ground 1 – The FTT was wrong to construe EU law in Articles 155 to 162 of the PVD as permitting a member state to exempt an acquisition only into a bonded warehouse situated in that member state.
>
> (2) Ground 2 – The FTT was wrong to construe s18(3) of VATA as applying only to acquisitions into a bonded warehouse in the UK. In particular, whether or not the FTT was correct in its interpretation of Articles 155 to 162 of the PVD, the FTT was not entitled, given the clear statutory provisions, to "read down" s18(3) of VATA so that it applied only to acquisitions into UK bonded warehouses.
>
> (3) Ground 3 – The FTT was wrong to conclude that the Appellant was not entitled to credit for any tax arising as a consequence of the operation of the fallback regime in s13(3) of VATA.

37. The Appellant is not seeking to challenge the FTT's conclusion on the first preliminary issue, namely that as a matter of construction s18(3) of VATA "takes precedence" over s13(3) of VATA.

38. In our discussion, we will take Grounds 1 and 2 together as they amount to two aspects of the same argument namely that, even having regard to the effect of the PVD, s18(3) cannot, and should not, be read as limited to acquisitions into UK bonded warehouses.

Grounds 1 and 2 – Discussion

39. The Appellant correctly observes that, when s13 and s18 of VATA are read in isolation from the PVD and jurisprudence of the CJEU, in accordance with ordinary principles of UK statutory interpretation, their meaning is clear. Section 13(1) makes the whole of s13, including the fallback provision of s13(3), subject to s18 and so, in

particular, to s18(3). Therefore, applying ordinary principles of statutory interpretation, the rule set out in s18(3), if engaged, applies in priority to s13. Moreover, considering s18 in isolation, it seems clear that it applies to an acquisition of goods which are subject a warehousing regime in any member state. The definition of "warehousing regime" in s18(7) refers to goods which are stored in a "warehouse" the definition of which, in s18(6) expressly refers to warehouses located in any member state. HMRC did not demur from this analysis in the hearing before us.

40. It follows, therefore, that only the process of reading down the domestic UK provisions to bring them into line with EU law could disturb the analysis set out at [39]. In considering Grounds 1 and 2 we will, therefore, follow a two-step process:

> (1) First, we will determine the effect of Articles 155 to Articles 162 of the PVD and other matters of EU law to which we were referred.
>
> (2) If EU law indicates that Articles 155 to 162 only permit the UK to exempt an acquisition of goods into a bonded warehouse where that warehouse is located in the UK, we will consider whether domestic legislation can be "read down" to produce that result.

Articles 155 to 162 of the PVD

41. We will start our analysis with the wording of Articles 157 and 162. Those provisions are contained within Chapter 10 of Title IX of the PVD which permits, but does not oblige, member states to exempt certain transactions from VAT. The discretion afforded to member states is fettered by, among other provisions, Article 155 and Article 162 itself.

42. Article 157 permits a member state to exempt two categories of transaction that would otherwise be within its competence to tax:

> (1) Article 157(1)(a) entitles a member state to exempt "the importation of goods which are intended to be placed under warehousing arrangements…". Article 157(1)(a) does not specify any jurisdiction in which the relevant warehouse is to be located.
>
> (2) Article 157(1)(b) entitles a member state to exempt a "supply of goods which are intended to be placed, *within their territory*, under warehousing arrangements" (our emphasis). We consider that the words we have emphasised operate to limit the scope of the exemption a member state can confer. For example, they would permit the UK to exempt the supply of whisky by a Scottish distiller to a wholesaler who intends to place the whisky into a UK bonded warehouse. However, they would preclude the UK from conferring an exemption if the wholesaler proposed to hold the whisky within a bonded warehouse in France.

43. Article 157 on its own does not apply to the Appellant's assumed transaction. The Appellant's acquisition of the alcohol involves no "importation" falling within Article 157(1)(a) since the Supplier is established in a member state. Article 157(1)(b) is not engaged because the Appellant obtains the alcohol by way of acquisition from another

member state rather than as a consequence of a supply made by a taxable person in the UK. Rather, the provision of the PVD that covers the Appellant's acquisition of the alcohol from the Supplier is Article 162.

44. Article 162 requires member states availing themselves of the option to exempt transactions to:

> … take the measures necessary to ensure that the intra-Community acquisition of the goods intended to be placed under one of the *arrangements or in one of the situations referred to in Article 156, Article 157(1)(b) or Article 158* is covered by the same provisions as the supply of goods carried out within their territory under the same conditions.
>
> (our emphasis).

45. In part, the meaning of Article 162 is clear. If a member state chooses to exercise its option to exempt a supply of goods that are to be held, within its territory, under warehousing arrangements (the province of Article 157(1)(b)) it must ensure that intra-EU acquisitions of goods intended to be placed "under the arrangements referred to in Article 157(1)(b)" must benefit from a similar exemption. However, Article 162 does not itself specify whether the "arrangements" referred to are "warehousing arrangements" generally, or warehousing arrangements in the specific member state concerned. The Appellant favours the former interpretation; HMRC the latter.

46. In our judgment, the natural reading of the words supports HMRC's interpretation. Article 157(1)(b) applies only to goods placed, within the territory of a specific member state, under warehousing arrangements. Therefore, when Article 162 speaks of the "arrangements referred to in Article 157(1)(b)", there is a clear inference that it is concerned with the arrangements to which Article 157(1)(b) applies, namely warehousing arrangements within a specific member state's territory. The contrary interpretation would mean that, despite the clear cross-reference to Article 157(1)(b), Article 162 is concerned with a wider category of arrangement than that dealt with in Article 157(1)(b).

47. This linguistic conclusion is supported by considerations of policy. We agree with HMRC that Article 162 is intended to ensure anti-discriminatory treatment. Therefore if, to continue the example set out at [42(2)] above, the UK permits a whisky distiller to exempt from VAT a supply of whisky to a wholesaler who intends to hold it within a bonded warehouse in the UK, it cannot subject a cross-border supply by a French brandy distiller, also to be held in a UK bonded warehouse, to acquisition VAT. We do not see why, as a matter of policy, Article 162 should require the UK to exempt acquisitions into <u>any</u> bonded warehouse in the EU as a price for granting taxable persons in the UK an exemption when goods are transferred into a UK bonded warehouse. We agree with the conclusion of the FTT to similar effect at [51] of the Decision.

48. The Appellant argues that, if Article 162 requires a member state only to grant exemption to acquisitions into bonded warehouses in that member state, that would amount to discrimination against bonded warehouses located in another member state.

It relies in this respect on the decision of the Court of Appeal in *R (Seabrook Warehousing Limited) v HMRC* [2019] EWCA Civ 1357. That case concerned provisions of UK domestic law that precluded an owner of excise goods that did not reside in the UK, and did not have a fixed or business establishment in the UK (referred to by the Court of Appeal as "foreign owners") from obtaining the status of a "registered owner" entitled to hold the goods in bonded warehouses on duty suspended terms. Instead, UK domestic law required such foreign owners to appoint a "duty representative" and imposed sanctions if a duty representative ceased to be in place. The Court of Appeal held, at [68] of its judgment, that there was a prima facie case that these provisions either (i) infringed the EU principles of equal treatment and non-discrimination or (ii) imposed restrictions on the free movement of goods, or on the freedom of warehousekeepers or duty representatives to provide services. Having found that such a prima facie case was established, the Court of Appeal moved to an examination of the proportionality or otherwise of the UK domestic measures.

49. HMRC's narrow objection to that argument is that the *Seabrook* case involved discrimination on the basis of place of establishment and that no such discrimination is present on its reading of Article 162 since neither traders established within or outside the UK are entitled to exemption from acquisition VAT when goods are acquired into a non-UK warehouse. However, we consider that narrow objection does not take matters greatly forward since there are other forms of objectionable discrimination in EU law other than discrimination on the basis of nationality or place of establishment. For example, the EU law concept of "equal treatment" requires that similar situations should not be treated differently unless the difference in treatment is objectively justified (see for example paragraph 23 of the decision of the CJEU in *Jetair NV v FOD Financien* [2014] STC 1088).

50. Nevertheless, we agree with HMRC that their interpretation of Article 162 involves no objectionable discrimination because it involves the exercise of an option, granted in the PVD itself, which entitles member states to treat bonded warehouses established in their territory differently from bonded warehouses established in another member state. The conclusion follows from the decision of the CJEU in *Jetair*, a case that concerned a "standstill" provision of the then effective Sixth VAT Directive that gave member states an option to tax the services of travel agents relating to journeys outside the EU provided that those services were taxed prior to the adoption of the Sixth VAT Directive. Belgium decided to avail itself of that option and one of the issues raised in the case was whether, by doing so, Belgium acted contrary to the principle of equality and/or breached the fundamental freedoms relating to the free movement of goods, persons or services. The CJEU held that there was no objectionable discrimination, holding as follows:

> 46 It is true that, in granting such an option to Member States, that article introduces a system that differs between Member States that make use of it by taxing the services in question and those that apply the rules laid down in Article 309 of the VAT Directive by exempting those services.
>
> 47 However, it is an option granted by way of derogation, subject to fulfilment of the conditions provided in that article.

> 48 As the Court has previously held, the retention of that derogation reflects the gradual and still partial harmonisation of national VAT legislation (see, to that effect, Case C-240/05 *Eurodental* [2006] ECR I-11479, paragraph 50). The harmonisation envisaged has not yet been achieved in so far as Article 28(3)(a) of the Sixth Directive and Article 370 of the VAT Directive authorised the Member States to retain certain provisions of their national legislation existing on 1 January 1978 which would, without those authorisations, be incompatible with those directives (see, to that effect, with regard to the Sixth Directive, Eurodental, paragraph 51).
>
> 49 It is for the European Union legislature to establish the definitive system of exemptions from VAT and thereby to bring about the progressive harmonisation of national VAT laws (see Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 39).
>
> 50 As long as the European Union legislature has not established that definitive system and the Member States may retain their existing legislation, it must be accepted that differences may exist between those Member States without those differences being contrary to European Union law.

51. Thus far we have based our conclusions as to the meaning of Articles 155 to 162 on the wording of the relevant provisions of the PVD, together with appropriate indications that can be found from context. HMRC submitted that there is a further reason why Article 162 should not apply to an acquisition into a bonded warehouse in the Delivery Jurisdiction namely that such an interpretation would frustrate the proper functioning of Article 41 and would lead to a loss of tax. In HMRC's submission, Article 41 is a corrective mechanism designed to ensure that acquisitions are subject to tax in the same way as domestic supplies and therefore the fall-back should only be disapplied if the Appellant could demonstrate that VAT has been accounted for in the Delivery Jurisdiction. That approach evidently found some favour before the FTT (see [54] of the Decision).

52. HMRC's submissions to this effect prompted a clear difference of opinion between the parties as to the true purpose and effect of Article 41 with each side pointing out anomalies in the other's interpretation. For example, the Appellant postulated a scenario in which the Delivery Jurisdiction had, as permitted by the PVD, provided that the acquisition of the alcohol was exempt from VAT. In such a case, the Appellant argued that applying HMRC's approach, it would never be able to escape the fallback VAT imposed by Article 41 as it would not be able to demonstrate that VAT had been "applied to" the acquisition in the Delivery Jurisdiction. The Appellant described such a result as involving "VAT imperialism" since the UK would be imposing a VAT charge under the fallback provisions even though the Delivery Jurisdiction, which should have the primary right to tax, had entirely appropriately exercised its right to exempt the acquisition.

53. HMRC postulated a different situation under which the Delivery Jurisdiction had not chosen to exempt acquisitions into bonded warehouses from acquisition VAT. In such a case, if a UK-based trader entered into a transaction similar to the hypothetical one considered in this appeal, but simply chose not to register for VAT in the Delivery

Jurisdiction and fraudulently or otherwise did not account for VAT in the Delivery Jurisdiction when it subsequently sold the alcohol, no output VAT would have been collected in the Delivery Jurisdiction and, on the Appellant's interpretation, the fallback provisions would not result in a charge in the UK either. That, HMRC submitted, would be contrary to the very purpose of the fallback provision which, in such a situation, is to ensure that VAT is properly accounted for in the Delivery Jurisdiction.

54. We accept that this debate raises issues of some complexity relating to the operation of the fallback provision in particular situations. However, we do not consider that it sheds much light on the interpretation of Articles 155 to 162 with which we are presently concerned. We say this because Articles 155 to 162 are concerned with an optional power of member states to confer exemption from VAT whereas Article 41 is an aspect of the rules governing place of supply. We do not consider it obvious that the rules on place of supply necessarily shed much light on the scope of member states' optional power to exempt particular transactions. Of course we accept that the PVD is intended to lay down a coherent and rational scheme for the imposition of VAT throughout the EU. However, in circumstances where the rules on place of supply are complicated and involve various exceptions and amplifications (including the fallback provisions of Article 41) and the option to exempt in Articles 155 to 162 may, or may not, be exercised by different member states, it is perhaps unsurprising that anomalies could arise from the interaction of the provisions.[5]

55. The Appellant also referred us to Article 140 of the PVD which provides that:

> **Article 140**
>
> Member States shall exempt the following transactions:
>
> (a) the intra-Community acquisition of goods, the supply of which by taxable persons would in all circumstances be exempt within their respective territory
>
> …

56. We do not, however, consider that this provision advances the debate. Goods whose supply is exempt by virtue of a member state's exercise of the option conferred by Article 157(1)(b) are not exempt in "all circumstances". On the contrary, they are exempt only if intended to be held under warehousing arrangements in the particular member state conferring the exemption.

57. Finally, the Appellant notes the close relationship between Articles 155 to 162 of the PVD and provisions of what is now Directive 2008/118/EC (the "Excise Directive"). It points out that Excise Duty Directive permits excise goods to be transported freely within the EU under "duty suspension" arrangements and that duty

[5] It follows that we do not need to consider related issues that were raised before us arising out of the UK's implementation of the fallback regime set out in s13(3) of VATA such as whether a trader can claim repayment of VATA under s13(4) even though no regulations have been made under that section and whether ss13(3) and 13(4) involve one place of acquisition or two.

suspended excise goods are held within a "closed circuit" under which their location is closely tracked, partly with the assistance of the Excise Movement and Control System (the "EMCS"). Accordingly it submits that there is "nothing alarming about a duty suspended movement of excise goods not giving rise to any chargeable event for VAT purposes until such time as the excise goods are released for consumption". It notes that Recital 36 to the PVD provides:

> (36) For the benefit both of the persons liable for payment of VAT and the competent administrative authorities, the methods of applying VAT to certain supplies and intra-Community acquisitions of products subject to excise duty should be aligned with the procedures and obligations concerning the duty to declare in the case of shipment of such products to another Member State laid down in Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products.

58. Recital (36) seems to be concerned with the desirability of alignment of procedural matters rather than the incidence of tax more generally. However, even putting that point to one side, the difficulty with the Appellant's submissions is that at most they demonstrate that the European-wide system might protect member states from the risk of revenue loss if Articles 157 and 162 permitted both acquisition VAT and excise duty to be deferred while goods are in duty suspense[6]. That sheds little, if any, light on the scope of member states' option to exempt goods held on duty suspended terms from acquisition VAT.

59. Our conclusion, therefore, is that, properly construed Article 157(1)(b) permits a member state to exempt supplies of goods that are intended to be placed under warehousing arrangements within that member state. If a member state avails itself of that option, Article 162 requires a member state to grant an exemption where goods are to be placed under warehousing arrangements in that member state following an acquisition from another member state.

The parties' respective positions on the "reading down" issue

60. We have already noted at [39], that applying ordinary rules of statutory interpretation, s18(3) of VATA, when read together with s18(6) and s18(7) applies to an acquisition of goods into a warehousing regime in any member state. However, given the conclusion that we have reached at [59], HMRC urge us to "read down" the UK statutory provisions so as to provide that s18(3) only alters the place of supply in relation an acquisition where goods are to be subject to a "warehousing regime" in the UK.

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[6] We say "might" because HMRC suggested in their submissions that, in some member states, the authorities responsible for excise duties are different from those administering VAT (with the result that the VAT authorities in such member states might not necessarily have access to the EMCS).

61. In some respects, the parties' arguments on this issue proceeded at cross-purposes. For example:

> (1) In its written submissions, the Appellant criticised the manner in which the UK had sought to implement the provisions of the PVD into domestic legislation noting that the PVD gave member states the power to exempt acquisitions from VAT but the UK, while purporting to exercise that power, enacted legislation that altered the place of acquisition. That prompted HMRC, in their written submissions, to argue that the Appellant could not simultaneously argue that s18 should be "disapplied" but, at the same time, argue that it should be interpreted as conferring a much more favourable treatment than was permitted by the PVD. However, during the hearing the Appellant confirmed that it was not arguing for "disapplication" of s18. Rather, its point was simply that, in circumstances where the UK had chosen not to follow the course that the PVD permitted, of exempting acquisitions, from VAT, the scope to "read down" the UK statutory provisions so as to give effect to the provisions of the PVD was correspondingly limited.
>
> (2) In its written submissions, the Appellant referred to the principle of EU law to the effect that a member state could not rely on its own defective, or unlawful, implementation of a directive against its own citizens (see, for example *Faccini Dori* (Case 91/92) [1994] ECR I -3325 at [22] to [25]). However, it seemed to us that HMRC's argument was not that they were entitled to rely on the terms of the PVD directly against the Appellant but rather that the UK statutory provisions should be construed consistently with the Directive. Understood in that light, we took the Appellant to be arguing that the proposed "conforming" interpretation that HMRC were proposing should be rejected because it was tantamount to giving HMRC the benefit of a provision of the PVD even though it had not been transposed adequately into UK law.

62. Ultimately, therefore it seemed to us that notwithstanding some differences between the ways that the parties chose to articulate the issue, the question we need to consider in this section is as to the correct interpretation of a UK statute. Given that, where a member state avails itself of the option in Article 157(1)(b) Article 162 of the PVD only requires a member state to exempt an acquisition into a bonded warehouse located in that member state, should the acquisitions whose place of supply is shifted by s18(3) of VATA be construed as limited only to acquisitions into bonded warehouses in the UK?

63. In essence, HMRC's position was that a "conforming interpretation" should be given, so that only acquisitions into bonded warehouses situated in the UK fall within s18(3). The Appellant's position was that, given the clarity of the words used, a conforming interpretation could not be applied.

Authorities on "reading down" UK statutes

64. We were referred to a number of authorities on that question of interpretation. We start with the decision of the Court of Appeal in *Vodafone 2 v HMRC* [2009] EWCA

Civ 446. That case concerned the question of how the UK's domestic legislation on "controlled foreign companies" which imposed tax charges on a UK parent in respect of profits of an non-UK resident subsidiary should be interpreted in the light of provisions of the EC Treaty conferring a directly applicable right to freedom of establishment and s2 of the European Communities Act 1972 which gave effect to that right in UK statute law. At [37] of his judgment, the Chancellor of the High Court (with whom all members of the court agreed) quoted without criticism the following principles of interpretation which the parties had agreed between themselves (for ease of reference we omit references to the decided cases from which the principles were drawn):

> In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:
>
> > (a) It is not constrained by conventional rules of construction …;
> >
> > (b) It does not require ambiguity in the legislative language… ;
> >
> > (c) It is not an exercise in semantics or linguistics …;
> >
> > (d) It permits departure from the strict and literal application of the words which the legislature has elected to use …;
> >
> > (e) It permits the implication of words necessary to comply with Community law obligations …; and
> >
> > (f) The precise form of the words to be implied does not matter ….

65. The Chancellor also quoted (again without criticism), the parties' agreement as follows:

> The only constraints on the broad and far-reaching nature of the interpretative obligation are that:
>
> > (a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed." … An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; ….and
> >
> > (b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. …

66. The Court of Appeal in *Vodafone* clearly considered that there were parallels between the obligation (ultimately derived from s2 of the European Communities Act 1972) to construe UK statutory provisions consistently with provisions of the EC Treaty and the obligation imposed by s3 of the Human Rights Act 1998 to construe primary legislation, so far as possible, in such a way as to give effect to rights conferred by the European Convention on Human Rights. That can be seen because the principles we

have quoted at [65] were derived in large part from the decision of the House of Lords in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, dealing with s3 of the Human Rights Act 1998, in which Lord Nicholls said, at [33]:

> 33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

67. *Vodafone* was therefore concerned with the construction of UK statutory provisions in the light of "fundamental freedoms" set out in the EC Treaty and given effect in domestic law by s2 of the European Communities Act 1972. Principles similar to those set out in *Vodafone* apply to the construction of a UK statutory provision intended to implement an EU directive. That can be seen from the decision of the High Court (Roth J) in *Alstom Transport v Eurostar International Limited* [2012] EWHC 28.

68. In that case, Roth J noted the following statement of EU law as set out by the CJEU in *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases C-397/01 to C-403/01) [2005] IRLR 137, [2005] ICR 1307:

> 111 It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.
>
> 112 That is a fortiori the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned (see *Wagner Miret v Fondo de Garanatia Salarial* Case C-334/92 [1993] ECR I-6911 (para 20)).
>
> 113 Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC [authorities omitted].

69. Thus, the obligation to construe a UK statutory provision "so far as possible in the light of the wording and purpose of the directive concerned" is an obligation imposed by the EC Treaty which in turn takes effect in UK domestic law by s2 of the European Communities Act 1972. It follows that principles similar to those set out in *Vodafone* and *Ghaidan* apply and indeed Roth J referred extensively to *Ghaidan* when considering how he should approach the UK statutory provision before him.

70. Finally, we note that the CJEU's jurisprudence also recognises, through the doctrine of legal certainty, the limitation implicit in the requirement that a conforming interpretation be adopted "so far as possible". In Case C-268/06 *Impact* the CJEU said at [100]:

> However, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem* …

71. In the light of these authorities, we consider that our task when construing the UK statutory provisions is to apply the broad principles of purposive interpretation set out in the extract from *Vodafone* that we have quoted at [64] and [65]. Applying those broad principles, we should interpret the UK statutory provisions, so far as possible, in the light of the wording and purpose of the PVD. However, we should note that there are limits to this approach: a conforming construction must "go with the grain" of the legislation. We cannot construe the UK provisions "contra legem".

Application of the principles

72. Section 18(3) of VATA deals with both supplies effected by a person within a UK and acquisitions by a person in the UK. As such, it represents Parliament's legislative response to the provisions of both Article 157(1)(b) and Article 162 of the PVD. In s18(3), therefore, Parliament seeks to avail itself of the option afforded by Article 157(1)(b) to provide a favourable treatment for domestic supplies and, having done so, comply with the mandatory provisions of Article 162 by affording the same favourable treatment to acquisitions from another member state.

73. This appeal does not concern the treatment of supplies falling within Article 157(1)(b). Rather, it is concerned with acquisitions falling within Article 162. The essence of HMRC's argument is that, since the UK only had power in the PVD to afford a favourable treatment to supplies intended to be placed under warehousing arrangements in the UK, s18(3) in making provision for <u>both</u> supplies and acquisitions is similarly limited to goods intended to be placed under warehousing arrangements in the UK.

74. HMRC therefore ask us to read the "warehousing regimes" that are referred to in s18(3) as being limited to warehousing regimes within the UK despite Parliament having provided, quite clearly, by means of the definitions set out in s18(6) and 18(7) that a warehousing regime within any member state is covered. That, we consider would

involve a significant amendment to a cardinal feature of the legislation that is before us that would go against the grain of the legislation.

75. Moreover, the reading of s18 that HMRC propose would in our judgment be contrary to the doctrine of legal certainty. A UK VAT-registered trader acquiring goods into a bonded warehouse situated in an EU member state other than the UK could read s18 and conclude that the acquisition was unambiguously treated as made outside the UK and so outside the scope of VAT. Yet, on HMRC's view, the acquisition would be subject to VAT, and the trader potentially liable to penalties if it failed to reflect the acquisition VAT due in its VAT returns. We consider that such an approach would cross the boundary between interpretation of the legislation and amendment of it.

76. In reaching this conclusion, we respectfully differ from the FTT's conclusion at [62] of the Decision which HMRC supported:

> 62.Reading s 18(3) as limited to goods which are already within, or arrive within, a bonded warehouse the UK, does not deprive s 18(3) of its intended meaning; on the contrary it limits s 18(3) to the derogation that Parliament no doubt intended to implement. Parliament cannot have intended to go beyond the permitted extent of article 157(1)(b) and indeed the references to 'goods… acquired from another member State' in s 18(2) suggests the author was envisaging the goods would be present or arrive in bonded warehouses in the UK and had merely overlooked the fall-back provision which deemed goods to be acquired in the UK even if never actually present in the UK.

77. In particular, in our judgment the FTT was wrong to conclude that, by referring in s18(2) to "goods … acquired from another member State", Parliament was signifying an intention that the goods must be present in, or arrive in, bonded warehouses in the UK. That is because s11(1) of VATA provides the following general definition of "the acquisition of goods from another member State" which contains no suggestion that it applies only to goods that arrive in, or are present in, the UK:

> **11 Meaning of acquisition of goods from another member State**
>
> (1) Subject to the following provisions of this section, references in this Act to the acquisition of goods from another member State shall be construed as references to any acquisition of goods in pursuance of a transaction in relation to which the following conditions are satisfied, that is to say—
>
> (a) the transaction is a supply of goods (including anything treated for the purposes of this Act as a supply of goods); and
>
> (b) the transaction involves the removal of the goods from another member State;
>
> and references in this Act, in relation to such an acquisition, to the supplier shall be construed accordingly.

78. Finally, we note that our conclusions as set out above have not been materially affected by the fact that Parliament chose, when giving effect to Articles 157(1)(b) and Article 162, to do so by amending the rules on place of acquisition rather than providing

for exemption with recovery of input VAT, as stipulated in the PVD. The Appellant submitted that, since Parliament stepped outside the scope of the provisions permitted by the PVD, the scope for a "conforming" interpretation was reduced. We have our doubts about that submission since it is clear that member states enjoy latitude in the way they choose to implement directives. We do not, however, need to express any concluded view on this submission since in our judgment a conforming interpretation is in any event precluded by the considerations we have outlined above.

79. Our decision on Grounds 1 and 2, therefore, is that the FTT was wrong to conclude that s18(3) did not apply to the Appellant's acquisition of alcohol delivered to a bonded warehouse in the Delivery Jurisdiction. Section 18(3) did apply and provided for that acquisition to be treated as taking place outside the UK with the result that it was outside the scope of acquisition VAT in the UK.

Ground 3 – Input tax

80. Our conclusion on Grounds 1 and 2 means that the Appellant was not liable to acquisition VAT on its acquisition of the alcohol. It follows that we do not need to consider the extent, if any, to which it is entitled to credit input VAT against that liability to acquisition VAT and we will not do so.

Disposition

81. As will be seen from our decision, the argument before us centred on the question of whether s18(3) applied to the facts of the assumed transaction and neither party sought to challenge any other aspect of the FTT's determination of the preliminary questions before it.

82. We have therefore decided that the FTT's determination of the preliminary issues before it should be set aside and replaced with the following:

(1) Question 1(a) -Section 18(3) of VATA does apply to the Appellant based on the assumed facts before us.

(2) Question 1(b) - Section 18(3) takes precedence over s13(3) of VATA.

(3) Question 2 does not arise since it assumes that s13(3) takes precedence over s18(3).

(4) Question 3 – s18(7) of VATA is not limited to goods warehoused in the UK.

(5) Question 4 does not arise as, on the assumed facts, no acquisition VAT is imposed on the Appellant under s13(3) of VATA.

MR JUSTICE MILES

JUDGE JONATHAN RICHARDS

RELEASE DATE: 29 May 2020