[2021] UKUT 0270 (TCC)

Appeal number: UT/2020/00361

VALUE ADDED TAX– whether a supply of medical care by company supplying consultants and GP Specialists indirectly to NHS– Group 7 Schedule 9 VATA 1994 and Article 132 of the Principal VAT Directive

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

MAINPAY LIMITED	**Appellant**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

TRIBUNAL: **MR JUSTICE MELLOR**
JUDGE GUY BRANNAN

Sitting in public by way of remote video Microsoft Teams hearing treated as taking place in London on 16 June 2021 with further written submissions on 1 September 2021

Michael Firth, counsel, for the Appellant
Jennifer Newstead Taylor, counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

Introduction

1. The Appellant, Mainpay Limited ("Mainpay"), appeals against the decision ("the Decision") of the First-tier Tribunal (Judge Cannan and Mr Stafford) ("the FTT") on 29 April 2020 dismissing Mainpay's appeal.

2. The question in this appeal is whether Mainpay is supplying medical care within the meaning of Group 7 Schedule 9 Value Added Tax Act 1994 ("VATA"), so that its supplies are thus exempt from VAT, or whether it is making a standard rated supply of staff.

3. Mainpay supplied medical consultants ("consultants") and specialist general practitioners ("GP Specialists") to an intermediary company – an agency – called Accident & Emergency Agency Limited ("A&E"). A&E then supplied the consultants and GP Specialists to various hospital clients, generally NHS Trusts. The supplies which are the subject of this appeal were made in the period 1 November 2010 to 31 January 2014 ("the Relevant Period").

4. The FTT held that Mainpay's supplies were not exempt from VAT but were, instead, standard rated. Mainpay now appeals that decision on six Grounds of Appeal, with the permission of the FTT on the first five Grounds and the permission of this Tribunal on the sixth.

5. References in square brackets in this decision are references to the Decision unless the context otherwise requires. References to the Court of Justice of the European Union ("CJEU") include references to the European Court of Justice of the European Communities.

6. For the reasons given below, we dismiss this appeal.

The relevant statutory provisions

7. The Principal VAT Directive 2006/112/EC ("the Directive") makes provision in Article 132(1)(b) and (c) (superceding Article 13A(1) Sixth Directive) for the exemption from VAT of certain transactions:

> "1. Member States shall exempt the following transactions:
>
> …
>
> (b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;
>
> (c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned…."

8. Effect is given to these exemptions in Group 7 of Schedule 9 to VATA. Items 1(a) and 4 of Group 7 provide exemptions which are relevant to this appeal as follows:

> "1. The supply of services [consisting in the provision of medical care] by a person registered or enrolled in …
>
> (a) the register of medical practitioners
>
> 4. The provision of care or medical or surgical treatment and, in connection with it, the supply of any goods, in any hospital or state regulated institution."

9. Finally, Article 10 of the Directive provides:

> "The condition in Article 9(1) that the economic activity be conducted 'independently' shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards work conditions, remuneration and employer's liability."

The facts

10. The following summary of the facts is based on the Decision at [24]-[99]. The primary facts were not in dispute.

11. Mainpay employed, or treated as employed, various doctors. 80% of the doctors which it placed indirectly with hospitals were consultants and the remaining 20% were GP Specialists. It is not in dispute that all the medical practitioners to whom this appeal relates were registered on the register of medical practitioners and that the care provided by those medical practitioners was provided in hospitals: see [9].

12. The operation of Mainpay's payroll, including the processing of workers' timesheets, its invoicing and bookkeeping were outsourced to a company called Accuco Ltd ("Accuco"), which prepared payment information in accordance with which Mainpay made payments to its consultants and GP Specialists. Accuco also provided a sales support function, dealing with day-to-day employee matters such as maternity pay, maternity leave and pension payments. A second company, called Awakino Ltd was responsible for signing up workers to Mainpay's services. Doctors were generally introduced to Mainpay by a recruitment agency, such as A&E, or by word of mouth.

13. As we have indicated, Mainpay did not supply its medical practitioners directly to hospitals but did so via A&E. There were, therefore, three contracts:

> (1) a contract between Mainpay and each medical practitioner;
>
> (2) a contract between Mainpay and A&E under which Mainpay supplied the medical practitioners to A&E; and
>
> (3) contracts between A&E and various clients, usually NHS Trusts.

The FTT were not provided with the contracts referred to at (3) above.

14. Mainpay assumed various obligations to its medical practitioners, such as pensions and sick pay and, via Accuco, accounted for PAYE and National Insurance Contributions. Those obligations were funded by the amounts that Mainpay charged A&E. Mainpay earned a 4% gross margin, being the difference between what it charged A&E and the total costs of employing its medical practitioners (including tax deductions and payments).

15. Consultants were employed on fixed term assignments which could be renewed.

16. A&E's gross margin would be the difference between what it was paid by the NHS Trust and what it had to pay Mainpay.

17. Typically, an agency such as A&E would identify an assignment which they would introduce to a consultant registered with them. If the consultant agreed to the assignment, A&E would then inform Mainpay and provide an Assignment Schedule once the assignment was accepted by the consultant. Mainpay would communicate with the consultant in relation to payroll matters.

18. An agreement between Mainpay and A&E dated 13 March 2012 ("the A&E Agreement") was produced to the FTT. The A&E Agreement recited as follows:

> "(A) The Supplier [Mainpay] is an Umbrella Company which employs and assigns the services of its employees to work on projects for third parties.
>
> (B) The Supplier shall ensure that assigned employees shall provide the Services for the Client in accordance with the terms of this Agreement which is a contract for services."

19. For these purposes "the Client" would be an NHS Trust. An "Umbrella Company" was defined as a company which engages consultants under an "overarching contract of employment"[1], which treated all income generated by the consultants as employment earnings and which accounted to HMRC for PAYE and National Insurance Contributions. The "Services" were defined as the services described in the Assignment Schedule to the A&E Agreement – those services for the purposes of the A&E Agreement were described, for example, as "the services of a consultant anaesthetist", in other words a description of the consultant's specialism.

20. Clause 2.1 of the A&E Agreement provided that Mainpay was obliged to do the following:

> "(a) throughout the term of the Assignment supply the Services in accordance with Good Industry Practice at all times taking responsibility for the way in which the Services are performed;
>
> …

[1] If the relationship between Mainpay and a consultant was that of an overarching contract of employment covering periods between temporary assignments during the Relevant Period then the consultant might also obtain a beneficial tax treatment for travel and subsistence costs.

> (c) comply with all health and safety, site and security regulations applicable at the Locations(s) to the extent that they apply to the type of work required for the provision of the Services.
>
> (d) comply with all the Client's reasonable requirements, regulations, policies and protocols…
>
> (e) comply with the Client's IT security policies…
>
> …
>
> (h) be covered by appropriate professional indemnity insurance in connection with the Services …
>
> (i) supply to [A&E] copies of any relevant qualifications or authorisations that the Supplier and/or the Consultant is required by the Client or by law or any professional body to have in order to provide the Services to the Client.
>
> (j) where necessary, provide at its own cost all such equipment and training for the Consultant as is reasonable for the adequate performance of the Services…"

21. The only way that Mainpay could comply with these obligations was to require the consultants to comply with them. "Good Industry Practice" was defined as "the skill, diligence, prudence, foresight and judgment which would be expected from a suitably skilled and experienced person engaged in the same type of services."

22. The A&E Agreement required Mainpay to deliver weekly timesheets to the Client for approval and to return those timesheets to A&E. Mainpay was required to issue invoices for the Services in accordance with the Assignment Schedule. The Assignment Schedule defined a "payment rate" which took into account Mainpay's employment costs. The payment rates were set at a level which enabled Mainpay to pay the consultant at a market rate.

23. Further, the A&E Agreement also provided an acknowledgement from A&E and Mainpay that neither Mainpay nor the consultant was an employee or worker of A&E or the Client. Mainpay warranted that the consultant had the experience, training and qualifications which the Client considered necessary or which were required by law or by any professional body for the consultant to possess in order to perform the Services.

24. The A&E Agreement stated that the essence of the services which A&E provided was primarily the introduction by A&E of a candidate to provide medical services to a Client and the facilitation of prompt payments to the consultant.

25. As already mentioned, the A&E Agreement included an "Assignment Schedule", which was completed in relation to each assignment undertaken by each consultant. The Assignment Schedule provided for the following details to be entered:

> (1) Details of each assignment including start and end dates, normal working hours, payment rate and a description of the services to be provided by the consultant.

(2) Details of the client, including name, address, contact details and the location at which the services were to be performed.

(3) Details of the consultant, including name, address, contact details and the experience, training and qualifications "required". The reference "required" was to requirements of the client in so far as they might be specified.

26. The FTT was provided with two versions of the contracts between Mainpay and the consultants in force during the Relevant Period: those versions were referred to as the 2010 Contract and the 2013 Contract.

27. The 2010 Contract was described as "a contract for services" stating that it did not give rise to a contract of employment between Mainpay and the consultant. The contract provided:

> 8. …[the consultant] will:
>
> 1. Co-operate with the Client's reasonable instructions and accept the direction, supervision and control of any responsible person in the Client's organisation;
>
> 2. Observe any relevant rules and regulations of the Client's establishment …
>
> 3. … comply with the Health and Safety policies and procedures of the Client."

28. The FTT noted that the definition of "Client" in the 2010 contract was the person which had contracted with Mainpay for the services of the consultant. The FTT noted that the only person to contract with Mainpay for services was A&E, rather than the NHS Trusts. The extent to which A&E might retain the right to direct, supervise and control the consultant and the extent to which A&E gave such rights to the NHS Trusts would depend on its contractual arrangements with the NHS Trusts. Those contractual arrangements were not before the FTT.

29. The 2013 Contract, introduced with effect from April 2013, contained significantly different provisions. In particular, it stated that it was a contract of service giving rise to a contract of employment which would be effective between assignments. The 2013 Contract provided:

> "8.1 [The consultant] agrees as follows:
>
> …
>
> 8.1.3. to take all reasonable steps during an Assignment to safeguard his or her own health and safety and that of any other person who may be present … and to comply with the Client's or any other applicable health and safety laws, regulations and statutory requirements relating to the type and location of work required for any assignment;
>
> 8.1.4. to abide by the reasonable and relevant rules and regulations of the Client's establishment (including but not limited to normal hours of work, security or operational matters, dress code, information technology practices …) …

> 8.1.5. to co-operate with the Clients requests to the extent reasonably required to enable the Client to progress its work requirement, but not to the extent that the Client is acting as his/her employer or that [the consultant] considers that he/she will have a direct contractual obligation with the Client …"

30. The definition of the Client in the 2013 Contract was the same as that in the 2010 Contract, i.e. it referred to A&E. Mainpay was obliged to obtain suitable assignments for the consultant for at least 336 hours per year. The consultant was obliged "to consider" any suitable assignments.

31. There was no reference in the two contracts specifying where the consultant would work or how many hours he or she would work. Such details were to be provided by Mainpay to the consultant in relation to each assignment. Mainpay would know the consultant's normal working hours and the NHS Trust for which the consultant was working from the Assignment Schedule provided pursuant to the A&E Agreement. Mainpay would not know the consultant's specific working patterns, either in terms of where in the hospital the consultant was working or what hours the consultant actually worked on any specific day.

32. Consultants employed by Mainpay received a Mainpay Employee Handbook and a Mainpay Guide – the FTT referred to the October 2015 version which was the closest to the Relevant Period. These documents were not specific to medical practitioners.

33. The Employment Handbook included a description of the relationships between the worker, Mainpay, the recruitment agency and the end client. The worker was employed by Mainpay. Mainpay provided suitably qualified personnel to the recruitment agency under a contract for services. The recruitment agency placed consultants with the end client. As regards payments, the client paid the recruitment agency, the recruitment agency paid Mainpay and Mainpay operated a payroll system to pay the consultant. The Mainpay Guide stated:

> "Mainpay specialises in providing temporary workers (contractors) to recruitment agencies and end clients…and every year we employ thousands of temporary workers throughout the UK.
>
> We maximise your income, save you time and effort, and provide you with full employment rights."

34. The FTT rejected the evidence of one of Mainpay's witnesses (Mr Harker) who had maintained that Mainpay could direct a consultant in its position as the employer of that consultant to do an assignment. He said it was unlikely to do so if the consultant was unhappy with the assignment because it would be "bad for business". However, the FTT found that, in fact, the written contracts did not support that evidence. The 2010 Contract provided that a consultant was not obliged to accept an assignment offered by Mainpay. The 2013 Contract provided only that a consultant was obliged "to consider any suitable assignments obtained by [Mainpay]."

35. There was no evidence of any contact between consultants and Mainpay, save in relation to payroll matters. There was no evidence of Mainpay ever being involved in complaints against a consultant. In practical terms, if a replacement consultant was

needed that was something that would be agreed between A&E and the NHS Trust. There was no evidence that Mainpay ever had any contact with the NHS Trusts.

36. The FTT did not accept Mr Harker's evidence to the effect that Mainpay provided consultants with much more than a payroll function, viz Mainpay undertook a number of additional obligations as an employer, including sick pay, maternity pay, pension contributions and travel and subsistence allowances. The FTT found at [59] that, as regards the Relevant Period, the extent of Mainpay's obligations in the 2010 and 2013 Contracts appeared to be the statutory minimum applicable to workers in relation to leave and statutory sick pay.

37. No consultants contracted to Mainpay in the Relevant Period gave evidence. However the FTT referred to redacted notes of two interviews conducted by HMRC with individuals who were employed by Mainpay in the Relevant Period. Both interviewees regarded Mainpay as simply providing a payment or payroll function.

38. The FTT concluded at [61] that in the Relevant Period the perception of consultants would have been that Mainpay was simply providing a tax efficient payroll function in relation to assignments negotiated between the consultants, A&E and the NHS Trusts.

39. When consultants registered with Mainpay, Accuco would call the consultant to confirm the consultant's details. At that stage the consultant would be sent an email with login details for Mainpay's website. The website included links to the contract which they were required to sign up online. The consultant would also click on the link to financial information which would show payslip details as well as expense claims. Accuco would check that the consultant was registered with the GMC but there was no evidence that they would check any other specialist qualifications that the consultant might have or whether a consultant's experience, training and qualifications matched the requirements of the NHS Trust. A witness for Mainpay (Mr Harker) accepted that it would be A&E which checked the consultants' qualifications and carried out CRB checks.

40. The FTT then considered the evidence of two of Mainpay's witnesses: Dr Bily and Dr Berry.

41. Dr Bily had worked for Mainpay since 2015. Dr Bily said that in the first instance, A&E would offer him a position at a specific hospital. A&E would provide him with details as to where and when he would be working, the hours and the rate of pay. That information would be provided to A&E by the hospital. Once the position was agreed between A&E and the hospital on the one hand, and A&E and Dr Bily on the other, A&E would provide details about the post to Mainpay in the form of the Assignment Schedule.

42. The FTT concluded at [69] that there was no evidence that Mainpay had ever exercised its right under clause 7.2 of the A&E Agreement to provide a replacement consultant to A&E or that A&E had ever required Mainpay to do so. This was not surprising because it was A&E and the NHS Trust which would choose the consultant to work in the relevant hospital.

43. The contact between consultants and Mainpay through the website was purely in relation to contractual and financial matters. It did not involve any contact relating to what might be described as medical or professional matters.

44. The evidence of Dr Bily and Dr Berry was mainly directed towards how consultants worked on a day-to-day basis. The FTT accepted their evidence at [73].

45. The NHS Trusts had induction procedures which Dr Bily would follow when he first started to work at a hospital: for example, in relation to health and safety matters, IT systems, where he would be given a username and password. The hospital would provide him with a name badge and/or photo ID for security purposes. He was not required to wear any particular clothing in carrying out his duties, although the NHS Trust would provide aprons when necessary. Consultants and other specialisms might be required to wear clothing such as "scrubs" provided by the hospital. As a consultant, Dr Bily would work "day sessions" with some "on calls." The required working pattern would be notified to him in advance by the hospital "rotamaster" software. He might swap day sessions with a colleague or he might agree to cover another consultant who was sick; in that case he would inform rotamaster and the lead consultant for haematology, who would usually be a consultant employed directly by the hospital. Patient clinics would be arranged administratively by the hospital. The hospital would inform Dr Bily where and when he was required to attend a clinic.

46. Mainpay had no involvement in these procedures or in any other aspect of Dr Bily's day-to-day work at the hospital. In relation to health and safety, if Dr Bily had a concern he would raise it with someone at the hospital, rather than with Mainpay. The Mainpay Employee Handbook stated that, in relation to health and safety, it did not supervise employees on site.

47. Dr Bily's evidence to the FTT in relation to the framework in which he performed his services as a consultant haematologist, particularly clinical decision-making, was considered in some detail at the hearing before us. Dr Bily said that he provided treatment as part of what was described as a complex program involving doctors, nurses, carers, social workers and other support services. Patients were referred to him either with an established diagnosis of a haematological cancer or with suspicion of such a condition. He organised all investigations necessary to confirm the diagnosis and to establish the extent and stage of the cancer. Thereafter, there would be a multi-disciplinary team responsible for the patient. Multidisciplinary meetings would involve doctors and others with various specialities such as haematologists, radiotherapists, radiologists and microbiologists, nurses and other support workers. The lead consultant would usually attend these meetings. The outcome was a team recommendation for treatment of that patient. There was usually a consensus as to the recommended treatment and rarely any disagreement. If a disagreement arose it would be resolved by further discussion.

48. At [78]-[81] the FTT recorded Dr Bily's evidence as follows:

> "78. Whilst there would be a team approach, Dr Bily regarded himself as having "final responsibility" for treatment recommendations, discussing those recommendations with the patient and agreeing with

> the patient a course of treatment. The hospital might have local policies as to how a particular condition was to be treated. He viewed these as recommendations rather than directions. Treatments and drugs are governed by NICE guidelines. If he wanted to prescribe a specific drug which was not within the NICE guidelines, which he described as "an extraordinary drug" then that would be a matter for agreement at a multidisciplinary meeting. He would then put a case to the hospital trust for funding. Whilst Dr Bily considered that he had final responsibility for treatments recommended to his patients, he accepted in cross-examination that he was under the direction, supervision and control of the hospital in relation to treatment and drugs offered to patients. It seems to us that this was a reference to prescription of extraordinary drugs.
>
> 79. Dr Berry's witness statement described the clinical decision-making process in the context of anaesthesia as a "shared process between the clinician and patient". It might involve investigation or advice from other specialists, for example a cardiologist. Discussions between surgical and nursing colleagues would be led by the anaesthetist. An individual treatment plan may be governed by a hospital's local policies but overall decision making would be led by the anaesthetist. His evidence was that he would not regard himself as under the control of another person in his decision making as a clinician.
>
> 80. Dr Berry distinguished national NHS guidelines, and Trust guidelines. An example of the former would include how to manage a cardiac arrest. An example of the latter might concern measures to reduce the use of antibiotics. However, such guidelines would not usually dictate the treatment to be delivered. There may be times when a consultant needed to step outside the guidelines. If an extraordinary drug was being considered, a case would be presented to senior clinical management, involving a group of senior consultants and a senior pharmacist.
>
> 81. Dr Berry agreed that consultants exercise their own judgment in a hospital environment provided by the NHS Trust. He agreed that they did so within the remit and local policies of the NHS Trust. However, he considered that a consultant would be entitled to take a different approach if necessary and the personal clinical decision of a consultant would not be questioned."

49. It was necessary for consultants to have regular appraisals. In recent years these were carried out by specialist organisations. A&E gave Dr Bily contact details for the relevant organisation. He would receive a copy of the appraisal and his understanding was that the organisation also gave a copy to A&E but he did not give a copy to Mainpay. His evidence was that such appraisals would not be sent to the NHS Trust. Furthermore, Dr Bily's said that if any complaints were made about his professional conduct they would be dealt with by a department at the relevant hospital. He was not aware, "somewhat surprisingly" in the view of the FTT, what professional indemnity arrangements were put in place by the hospital, A&E or Mainpay.

50. The FTT noted that HMRC relied on an NHS document headed "NHS Terms and Conditions of Contract" ("The NHS Terms and Conditions") dated November 2007

which was expressed to apply to the supply of all medical locums excluding GP locums, and to all NHS bodies. "Agency Workers" were defined as "any registered medical practitioner … supplied by the supplier as a temporary worker whether employed or engaged by the supplier". The document provided:

> "24 Health and Safety
>
> 24.5 All Agency Workers are deemed to be under the exclusive direction, supervision and control of the Authority throughout the engagement. The Authority undertakes to the Supplier that it will assume responsibility for the health and safety and supervision of each Agency Worker from the start of any engagement."
>
> "Schedule 2
>
> 5 Agency Worker Obligations
>
> 5.1 The Supplier shall use all reasonable endeavours to ensure that all Agency Workers to be deployed in the provision of the Services are aware that at all times whilst on the Authorities premises they:
>
> 5.1.1 must work as directed by the Authority and follow all reasonable requests, instructions, policies, procedures and rules of the Authority."

51. The FTT concluded at [86] that if these NHS Terms and Conditions did reflect the basis on which consultants contracted by Mainpay were working within NHS Trusts that pointed to control, direction and supervision being with the NHS Trusts. However, in the absence of any evidence as to the agreement between A&E and the NHS Trusts, it was simply not known whether that agreement may have incorporated or been consistent with the NHS Terms and Conditions.

52. The FTT concluded at [91] that it was not satisfied that in the Relevant Period Mainpay arranged professional indemnity cover for its medical practitioners.

53. Further, it held at [92] that it was not satisfied that Mainpay dictated which consultant provided medical care. Instead this was a matter decided between A&E and the NHS trust, prior to the involvement of Mainpay in the assignment.

54. Mainpay did not determine the consultant's rate of pay – that was negotiated between A&E and the NHS Trust. The FTT concluded at [95] that A&E would provide the consultant with details of his or her rate of pay but the consultant would not know what the NHS Trust paid to A&E.

55. The FTT noted at [97] that in the period between March 2010 and April 2013, the 2010 Contract provided that the consultant must accept the direction, supervision and control of A&E. However there was no evidence as to A&E's contract with the NHS Trust. On the evidence before the FTT, it concluded that direction, supervision and control was more likely to have passed to the NHS Trust given the description of A&E's services in clause 11 of the A&E Agreement, which were the introduction by A&E of candidates to the NHS Trust.

56. In the period between April 2013 and January 2014, the 2013 Contract provided that the consultant was an employee of Mainpay. However, the consultant was required

to abide by the reasonable and relevant rules and regulations of A&E and to cooperate with A&E's requests "to the extent reasonably required to enable [A&E] to progress its work requirement." The FTT concluded that, in practice, those would be the requests of the NHS Trust.

57. In relation to GP Specialists, the FTT did not hear evidence as to how they carried out their role. The FTT recorded at [99] that it was common ground that control was a key feature in distinguishing a supply of medical care from a supply of staff. The FTT noted that it had been provided with no evidence as to the contracts entered into by GP Specialists and no evidence as to how they were to carry out their work, or how their work might be directed or supervised. Accordingly, at [99] the FTT stated that it was unable to make any findings of fact relevant to the question whether GP Specialists were under the control, direction and supervision of the NHS Trusts

The FTT's Decision

58. The FTT noted at [103] that what Mainpay supplied to A&E, according to the A&E Agreement, were the services described in the Assignment Schedule. Those services might be described for example as "the services of a consultant anaesthetist." The FTT did not consider that to be consistent only with the supply of medical care. An agreement to supply the services of a consultant anaesthetist, in the FTT's view, was equally consistent with the supply of staff, in the form of a consultant anaesthetist.

59. The FTT concluded at [104] that it was not satisfied that Mainpay did arrange professional indemnity insurance for consultants. The absence of any evidence that Mainpay itself was insured against liability for professional negligence suggested that it was supplying staff and not medical care.

60. At [105] the FTT considered that the key issue in the appeal was whether NHS Trusts had the power of control, direction and supervision over the consultants. Mr Firth, who appeared for Mainpay before the FTT and before us, accepted before the FTT that Mainpay had no control over clinical decisions, but submitted that neither did the NHS Trust. In this regard, the FTT at [106] considered that the fact that Mainpay did not have control over clinical decisions was significant. It illustrated how consultants at the top of their profession operated in practice. Their role was to take clinical decisions and they would do that whether Mainpay supplied medical care or staff. In the FTT's view at [106] it was the framework within which the consultants operated which was more relevant.

61. At [107] the FTT considered five propositions put forward by Mr Firth (but which were not accepted by HMRC) as follows:

> "(1) Control over the environment in which a service takes place does not amount to control over the service and does not affect the characterisation of the service. Hence, control over health and safety is not relevant to the characterisation of the service. What is relevant is control over the way in which a service is supplied.

We do not accept that control over the environment is necessarily irrelevant. Rules in place at a site where a consultant is working may not affect in any relevant way what is actually being provided, whether it is medical care or staff. However, to the extent that any rules in place directly affect the way in which a service is provided, that may be relevant in characterising the nature of the service provided, in our context whether it is medical care or staff. The evidence before us as to the requirement to comply with hospital health and safety rules was very general and it seems to us that it is consistent with both a supply of medical care and a supply of staff.

(2) The nature of a service is not characterised by the fact that the end-user can dictate when and where the service is provided.

A hospital will make arrangements for patients to be seen at clinics in various wards at various times. The role of the consultant is to treat those patients, and Mr Firth submitted that the service is supplied regardless of when and where the role is performed. We do not accept that such control is necessarily irrelevant. On the present facts, control as to when and where a consultant must work does tend to suggest a supply of staff, but it is not in our view a very strong indicator.

(3) Any limitation as to the range of solutions the user will accept from a service provider does not affect the characterisation of the supply.

Mr Firth submitted that local policies which the service provider must adhere to because of financial limits or by reference to an approved supplier list does not turn a supply of services into a supply of staff. We have some difficulty with this proposition on the facts of this case. Consultants may be subject to much less control in their day to day work than other workers, and indeed other medical practitioners. In practical terms, the occasions on which an NHS Trust might have to exercise such control are probably rare. Indeed, neither Dr Bily or Dr Berry could give an example of where it had happened. However, both accepted that their clinical decisions might be subject to local policies of the NHS Trust, for example in relation to prescribing extraordinary drugs. In our view it is significant that both Dr Bily and Dr Berry accepted that they were required to take clinical decisions within what Dr Berry described as the remit of the NHS Trust policies. They were required to at least take those policies into account.

(4) The fact a service provider uses the skills of other people in carrying out the service does not affect the character of the service supplied.

We broadly accept this proposition. Mr Firth acknowledged that treatment decisions might be a matter of consensus, engaging the skills of other medical professionals. However, he submitted that ultimate responsibility for a clinical decision lies with the consultant and that indicated a lack of control on the part of the NHS Trusts. We have already considered the significance of responsibility for clinical decisions. It is the framework within which such decisions are taken that is relevant.

(5) The organisational structure through which a service is delivered does not affect the characterisation of the service.

> Mr Firth submitted that a consultant could be an employee of Mainpay or an independent contractor engaged by Mainpay. The end-user gets precisely the same service whatever the organisational structure. The extent to which the consultant reports back to Mainpay is irrelevant. We agree that whether the consultant is an employee or an independent contractor does not in itself affect the nature of the supply made by Mainpay. What is more important are the terms on which the supply is made. The 2010 contract was described as a contract for services which did not give rise to a contract of employment. [The consultant] agreed with Mainpay that he would accept the direction, supervision and control of A&E. The 2013 Contract was described as a contract of service giving rise to a contract of employment. [The consultant] agreed that he would abide by the reasonable and relevant rules and regulations of the NHS Trust's establishment, and that he would co-operate with requests made by the NHS Trust to the extent reasonably required to enable it to progress its work requirement."

62. In relation to this fifth proposition, the FTT rejected Mr Firth's submission that it was necessary to look at the "essence of the supply" and responsibility for health and safety matters was irrelevant to that question. He submitted that the essence of the supply in the present case was that the NHS Trust needed someone to diagnose and treat patients. In this regard, Mainpay was fulfilling precisely the same need. The FTT at [111] accepted that the NHS Trust was looking for someone to diagnose and treat patients. However, it considered that the NHS Trust could obtain what it was looking for either through the supply of a consultant or the supply of medical care.

63. At [113] the FTT considered HMRC's submissions based on the Mainpay Guide in which Mainpay described itself as "providing temporary workers (contractors) to recruitment agencies and end clients", and as "operating a high quality and tax-efficient payroll structure". In the Employee Handbook it described itself as providing "suitably qualified personnel to [a] Recruitment Agency" whom the agency then "places" with end clients. Noting HMRC's submission that this was consistent with the anonymous employee interviews, the FTT accepted that this evidence pointed towards a supply of staff rather than medical care.

64. The FTT also accepted at [114] HMRC's submission that it was not realistic to suggest that Mainpay would supply medical care without ensuring for itself that the consultant was suitably qualified to provide the medical care it says it was contracting to provide. The only documents Mainpay required consultants to provide when registering were documents relating to proof of identity, address and right to work in the UK. It did not check professional qualifications. At most, Accuco checked whether the consultant was on the GMC register. Further, Mainpay was not involved in appraisals, unlike A&E it was not provided with a copy of a consultant's appraisal, and the FTT was not satisfied that it had professional indemnity insurance for the provision of medical care.

65. The FTT then considered at [116] Mr Firth's submission that a conclusion that Mainpay was providing medical care was consistent with Article 10 of the PVD which provided that employees are not to be regarded as carrying on an economic activity for the purposes of VAT. The FTT accepted at [117] that the effect of Article 10 was that

the economic activity of the consultant employed by Mainpay was treated as part of Mainpay's economic activity for VAT purposes. Therefore, the employee was not carrying on an independent economic activity for VAT purposes. The FTT did not consider this added anything to Mainpay's argument – the issue remained, in the FTT's view, whether Mainpay was supplying medical care or staff.

66. Next, the FTT considered Mr Firth's overall submission that for a supply of staff, the recipient must obtain a right of control and direction over the individual and the activities performed by the individual. Mr Firth submitted that the NHS Trusts had no such right of control and direction in the present case. The FTT rejected the submission at [119]:

> "We do not accept this submission for reasons we have already given. In our view the question is not whether there is a transfer of control over clinical decision making, but over the way in which the consultant works. In cases such as this, operational control is more important than it might be in other cases. In particular, control over when, where and what work the consultant carries out. In our view the consultants engaged by Mainpay carried out their work within the framework of the NHS Trust, in the sense that they operated within the remit of local policies laid down by the NHS Trust. Mainpay's consultants were incorporated into the organisation of the NHS Trust in the same way as a consultant who might have been employed directly by the NHS Trust. Mr Firth described the question in terms of "what is the essence of the supply". Based on the evidence as a whole we regard the essence of the supply as being that of staff, rather than medical services."

67. Finally, the FTT considered Mr Firth's submissions on a purposive interpretation of the exemption for medical care which involved applying an interpretation which was consistent with the objectives of the exemption and the principle of fiscal neutrality. The FTT noted at [121] that it was common ground that:

> (1) the objective of the exemption is to reduce the cost of medical care; and
>
> (2) the principle of fiscal neutrality requires supplies of similar goods or services to be treated the same for VAT purposes.

68. As regards the objective of the exemption, the FTT decided at [123]:

> "In our view it is not inconsistent with the purpose of the exemption for the supplies in the present case to fall outside the exemption. Mr Firth did not submit that it was not possible for Mainpay to supply consultants as staff, or indeed for the NHS to require a supply of staff rather than medical care. Clearly a supply of staff would come with an additional VAT cost but that is effectively a choice for the parties involved which will depend on the nature of the agreements entered into by the parties. We do not know whether A&E charged VAT on its supplies to the NHS Trusts. Whether it was payable would depend on an analysis of the contractual arrangements between A&E and the NHS Trusts."

69. In relation to fiscal neutrality, after referring to the judgment of the CJEU in *Pro Med Logistik GmbH* Case C-454/12 paragraphs 52-55, the FTT at [126] considered Mr Firth's submission that the relevant comparator was the supply of a self-employed locum in the NHS, which it was submitted would constitute the making of an exempt supply of medical care. The same would be true, it was submitted, if the locum was supplied through a personal service company. Fiscal neutrality, according to Mr Firth, required Mainpay to be treated in the same way. The FTT noted at [127] that HMRC did not accept that a self-employed consultant locum supplying services either directly or through personal service company fell within the medical care exemption.

70. The FTT stated at [128] that fiscal neutrality required the two supplies being compared to have similar characteristics, from the point of view of a typical consumer. Noting that it was not agreed that supplies by a self-employed consultant locum directly to NHS Trusts or through personal service companies were exempt from VAT, the FTT considered at [129] it was not clear that it could make a finding as to the VAT treatment of those supplies in order to rely on fiscal neutrality. It had heard no evidence as to the circumstances in which such supplies might be made. Furthermore, the FTT observed at [130] that it had heard no submissions as to whether the typical consumer of the supplies was the NHS Trust or the patient. The FTT considered that it did not have sufficient evidence as to the circumstances in which self-employed consultant locums might supply their services to the NHS Trust to say that the two services were similar.

71. In any event, the FTT concluded at [130] that if there was a supply of staff, with the NHS Trust having the power of control, direction and supervision over the consultant, it struggled to see that this was similar to a supply of medical care where the NHS Trust had no such power of control, direction and supervision. A patient might be concerned to think that it was Mainpay who was responsible for the medical care being received and who had a power of control, direction and supervision over the consultant, rather than the NHS Trust. Mainpay had no relevant qualifications or experience to exercise such power.

72. As regards the position of GP Specialists engaged by Mainpay, the FTT concluded at [131] that in the absence of any evidence in relation to GP Specialists, Mainpay had not satisfied it that in relation to their work Mainpay made a supply of medical care as opposed to staff.

73. In conclusion, at [132] the FTT decided that in relation to the supply of consultants' services, Mainpay supplied staff and not medical care in the Relevant Period. That supply was standard rated for VAT purposes. The FTT was not satisfied that the position was any different in relation to GP Specialists. Accordingly, the FTT dismissed the appeal.

Grounds of appeal

74. Mainpay has been granted permission to appeal on six Grounds, which are as follows.

Ground 1

75. Mainpay submits that the FTT applied the wrong test at [106] in deciding that the relevant test was control over the "framework within which the consultants operate" rather than control over the clinical decision-making. Mainpay contends that the same error was repeated at [107(4)] when the FTT said:

> "We have already considered the significance of responsibility for clinical decisions. It is the framework within which such decisions are taken that is relevant."

Ground 2

76. Mainpay argues that the FTT erred in drawing a "tripartite" distinction on the matter of control over clinical decisions: neither Mainpay nor the NHS exercised control over the clinical decisions: the consultants did. The consultants were not carrying on a separate economic activity and their activities fell to be treated as part of the Mainpay's economic activity in accordance with Article 10 of Directive 2006/112. Mainpay contends that if the consultants were the ones exercising control over their clinical decision-making, and their economic activity (which logically included the exercising of that control), forms part of Mainpay's economic activity, then Mainpay's economic activity does involve exercising control over the clinical decision making.

77. The error in the FTT's analysis of control, according to Mainpay, was to look only at what the administrative staff of Mainpay did (it was accepted that they did not control any clinical decision-making) and not the whole picture of Mainpay's economic activity, which included the consultants.

Ground 3

78. Third, even if the correct test was whether there was control over the framework within which the consultants operated:

(1) the FTT did not apply that test correctly; and/or

(2) took into account irrelevant considerations; and/or

(3) failed to take account of relevant considerations; and/or

(4) reached a conclusion that was outside the reasonable range of conclusions available to it.

Ground 4

79. The FTT's interpretation of the law and its conclusion were inconsistent with the purpose of the exemption for supplies of medical care. The purpose of the exemption was that of reducing the cost of medical care.

Ground 5

80. The FTT made a number of errors of law in its approach to fiscal neutrality.

81. First, it decided that it could not apply the principle of fiscal neutrality unless it received evidence about the proposed comparator supply.

82. Second, an absence of submissions on the identity of the typical consumer at [130] did not absolve the FTT of its duty to apply the law. In any event, it did not matter who was taken to be the typical customer, the result would the same.

83. Third, the FTT's engagement with the substance of the issue at [130] was inadequate and wrong. The FTT compared a supply where the NHS Trust did have "control" (of the operational framework) with one where it did not. That was not what the FTT was asked to compare. The posited alternative was a supply by a self-employed locum subject to the same characteristics as the immediate supplies, but not supplied through Mainpay (and therefore not, on any view, a supply of staff).

84. Fourth, the FTT took the comparator to be one in which Mainpay had control over the clinical decisions of the doctors (referring to a patient's concern about such a situation). That was not what was posited. Mainpay's submissions were concerned with a self-employed locum going directly to the NHS Trust.

85. Accordingly, the FTT failed to consider the submissions actually made by Mainpay in respect of fiscal neutrality, applied the wrong test and failed to reach a proper conclusion on those submissions.

Ground 6

86. The FTT considered at [131] that it had no evidence relating to GP Specialists and therefore could not reach a conclusion. Mainpay argues that this was incorrect. It says that Mr Harker gave evidence as to the position in respect of all doctors (including that they had control of their clinical decisions), without distinction and there was no evidence to rebut that.

87. Furthermore, it was implicit in the FTT's conclusion that it had formed the view that doctors who were GP Specialists were relevantly different from doctors who are consultants, but it had no evidential basis for adopting that view.

Discussion

The scope of the exemptions for hospital and medical care

88. The main issue in this appeal is whether Mainpay has supplied “medical care” for the purposes of Article 132(1)(b) and (c) of the Directive: if so, those services would be exempt from VAT.

89. The scope of the exemptions for medical care contained in Article 132(1)(b) and (c) of the Directive (and its predecessor Article 13A(1)(b) and (c) of the Sixth Directive) have been the subject of a number of decisions by the CJEU. The main principles can be summarised as follows:

(1) The exemptions envisaged in Article 13 of the Sixth Directive are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person: e.g. *Kügler* C-141/00 (" *Kügler*") at [35].

(2) Those exemptions constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another (*Card Protection Plan* C-349/96 at [15], *Commission v France* C-76/99 at [21] and *Kügler* at [52]).

(3) As regards the place where the services must be supplied, in contrast to Article 132(1)(b) which concerns services encompassing a whole range of medical care normally provided on a non-profit-making basis in establishments pursuing social purposes such as the protection of human health, Article 132(1)(c) applies to services provided outside hospitals and similar establishments and within the framework of a confidential relationship between the patient and the person providing the care, a relationship which is normally established in the consulting room of that person: *Kügler* at [35] and *EC Commission v United Kingdom* C-353/85 at [33]

(4) Article 132(1)(b) and (c) have separate fields of application and are intended to regulate all exemptions of medical services in the strict sense. Article 132(1)(b) exempts all services supplied in a hospital environment while Article 132(1)(c) is designed to exempt medical services provided outside such a framework, both at the private address of the person providing the care and at the patient's home or at any other place: *Kügler* at [36].

(5) The application of Article 132(1)(c) is not dependent on the legal form of the person supplying the medical care. Thus, a limited company supplying medical care through medically qualified staff fell within the exemption: *Kügler* at [41].

(6) The concept of 'provision of medical care' does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders: *W v D* C-384/98 at [18].

(7) Although the provision of medical care must have a therapeutic aim, it does not necessarily follow that the therapeutic purpose of a service must be confined within an especially narrow compass. Thus, medical services effected for prophylactic purposes may benefit from the exemption under Article 132(1)(c). Even in cases where it is clear that the persons who are the subject of examinations or other medical interventions of a prophylactic nature are not suffering from any disease or health disorder, the inclusion of those services within the meaning of provision of medical care is consistent with the objective of reducing the cost of health care, which is common to both the exemption under Article 132(1)(b) and that under (c) of that Article: *d'Ambrumenil* C-307/01 ("*d'Ambrumenil*") at [58].

(8) It is the purpose of a medical service which determines whether it should be exempt from VAT. Therefore, if the context in which a medical service is effected enables it to be established that its principal purpose is not the protection, including the maintenance or restoration, of health but rather the provision of advice required prior to the taking of a decision with legal consequences, the exemption under Article 132(1)(c) does not apply to the service: *d'Ambrumenil* at [60].

(9) Article 132(1)(b) does not include any definition of the concept of activities 'closely related to hospital and medical care'. That concept does not, however, call for an especially narrow interpretation since the exemption of activities closely related to hospital and medical care is designed to ensure that the benefits flowing from such care are not hindered by the increased costs of providing it that would follow if it, or closely related activities, were subject to VAT: *Commission v France* C-76/99 at [22]-[23].

(10) The provision of medical care which does not meet all the requirements laid down in order to benefit from the exemption from VAT under Article 132(1)(b) is not, as a matter of principle, excluded from the exemption laid down in Article 132(1)(c). It is not apparent from the wording of Article 132(1)(b) that that provision is intended to limit the scope of Article 132(1)(c). Article 132(1)(b) covers all services supplied in a hospital environment while Article 132(1)(c) covers services provided outside such a framework, both at the private address of the person providing the care and at the patient's home or at any other place, in the context of the exercise of medical and paramedical professions as defined by the Member States: *Peters* C-700/17 at [21], [27] and [28].

90. As regards the exemption contained in Article 132(1)(b), it is clear to us that the supply which is exempted is that made by ("*undertaken by*") a body governed by public law (or under social conditions comparable with those applicable to bodies governed by public law) by other bodies which are hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature.

91. At the hearing, Mr Firth argued that Mainpay's supplies fell either within Article 132(1)(b) or Article 132(1)(c). We requested written submissions from the parties on the scope of the exemptions contained in those two Articles. Those submissions made it clear that Mr Firth now relied solely on Article 132(1)(c) to exempt Mainpay's supplies. We shall discuss those written submissions further below, but we agree that Mainpay's supplies cannot be exempted under Article 132(1)(b) because Mainpay is not a hospital or its equivalent: see Advocate General Sharpston in *Klinikum* (C-366/12 ECLI:EU:C:2013:618 (26 September 2013)) at [33]. It therefore follows that the FTT

erred[2], although it makes no difference to the outcome of this appeal, when it appeared to accept at [9] the submission:

> "It was not suggested that for present purposes there was any material distinction between Item 1(a) and Item 4."

The Grounds of Appeal

92. Much of the argument before us was based not on an analysis of the terms of Article 132(1)(b) and (c) but on a consideration of whether the FTT had been correct to decide that the NHS Trusts had control over the consultants and Specialist GPs supplied by Mainpay. The argument was that if Mainpay retained control of its consultants and Specialist GPs then it could not be making a supply of staff and that its supplies were exempt under Article 132(1)(b) or (c). If, however, Mainpay ceded control over the consultants and Specialist GPs to the NHS, it was accepted that this would be a supply of staff which, it was common ground, would not be exempt from VAT.

93. To be clear, our task is only to determine whether Mainpay's supplies fell within Article 132(1) (c). Contrary to the tenor of some of the submissions made to us by Mr Firth, it is not necessary for us to determine whether those supplies constituted a supply of staff – a term used in the context of the exemption for hospital and medical care neither by the domestic legislation nor by the Directive – or to define the hallmarks of such a supply.

Grounds 1, 2 and 3

94. Essentially, Mr Firth argued that the FTT applied the wrong test at [106] in deciding that what was relevant was control over the "framework within which the consultants operate" rather than control over the clinical decision-making. In determining whether there was a supply of staff the correct test was, he contended, that a supply of staff took place where there was an assignment of control of the worker to the client. Mr Firth submitted that only the medical practitioners had control over their clinical decision-making and that this was the relevant control for these purposes. Moreover, that control could be attributed to Mainpay by virtue of Article 10 of the Directive. It followed, therefore, that Mainpay retained control of the medical practitioners with the result that it could not be correctly regarded as supplying staff.

95. We reject those submissions. Reading the FTT's decision as a whole, it is clear that the FTT's analysis was based on a consideration of all the relevant facts and circumstances in which the supply took place, including a detailed examination of the contractual provisions.[3] The question of control was one of those circumstances, albeit

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[2] Mainpay, when the parties were asked for typographical corrections on this decision released in draft, suggested that the decision indicated that Mainpay accepted that its supplies did not fall within Item 4. In fact, the decision indicates that that the supplies did not fall within Article 132(1)(b) – position which we understood from Mainpay's post hearing submission Mainpay accepted.

[3] see Laws J in *Customs and Excise Commissioners v Reed Personnel Services Ltd* [1995] STC 588 at 595: "In principle, the nature of a VAT supply is to be ascertained from the whole facts of the case. It

a significant one and one to which the FTT understandably gave careful thought in the light of the way in which the arguments were presented to it.

96. The nature and characterisation of a supply is to be determined on the basis of the conventional approach set out, for example, in *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners* [2014] UKSC 16, [2014] STC 937 (see Lord Neuberger at [31]-[32]) and *Airtours Holidays Transport Ltd v Revenue and Customs Commissioners* [2016] UKSC 21, [2016] STC 1509, *Beheersmaatschappij Van Ginkel Waddinxveen BV v Inspecteur der Omzetbelasting, Utrecht* C-163/91 at [21] and *HMRC v Paul Newey* [2013] EUECJ C-653/11, viz that it is a matter of contractual interpretation viewed in the light of commercial and economic reality. An examination of the commercial and economic reality involves a consideration of all the relevant facts and circumstances in which the supply took place.

97. We are satisfied that the FTT took account of all relevant circumstances and paid close attention to the contractual obligations of the parties.

98. In particular, we do not accept that the FTT formulated the wrong test in relation to "control" or that it misapplied its own test.

99. Mr Firth relied on the decision of the Court of Appeal in *Adecco UK Ltd and others v HMRC* [2018] EWCA Civ 1794 at [19] to show that the existence of a supply of staff depended on the assignment of control of the worker to the client. That appeal did not involve the provision of medical practitioners or the scope of the exemptions relating to hospital and medical care.

100. In *Adecco* the taxpayer bureau argued that VAT was only accountable on its fee for introductory and ancillary services rather than the totality of the fee paid to it by its clients with whom it placed a category of temporary staff ("temps"), who were not employees of the bureau. The Court of Appeal held that both contractually and as a matter of economic and commercial reality, the temps' services were supplied to clients via the bureau. The bureau did not merely supply their clients with introductory and ancillary services. VAT was therefore chargeable on the totality of the fees paid to the bureau by the clients.

101. It is true that the Court of Appeal in *Adecco* considered it significant that control over the temps had passed to the clients. However, at [49] the Court of Appeal looked at the entire arrangements between the parties and listed a number of factors which indicated that the bureau made a supply of staff to the clients so that VAT was chargeable on the entire consideration paid by the clients to the bureau. These included the following:

> (1) The temps did not provide their services under contracts with their clients: no such contracts existed. Whatever the scope of the bureau's obligations to their clients, the temps' services were provided to clients in

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may be a consequence, but it is not a function, of the contracts entered into by the relevant parties." Cited with approval by the Upper Tribunal in *Moher v HMRC* [2012] UKUT 260 (TCC) at [11].

pursuance of the contracts between, on the one hand, the bureau and its clients, and, on the other, the bureau and the temps;

(2) the bureau paid the temps on its own behalf and not as agent for the clients;

(3) the contract between the temps and the bureau spoke of the temps' services being supplied via the bureau, the bureau did not drop out of the picture once the temps had been introduced to the clients (it was obliged to pay the temps regardless of whether it had received money from the clients and it also had disciplinary powers);

(4) the bureau did not just perform administrative tasks;

(5) the amounts paid by the clients were not split into remuneration for the temp and commission for the bureau;

(6) the fact that the bureau had no control over a temp in advance of his taking up his assignment with the client did not matter;

(7) the contractual provisions were not artificial, a sham, liable to rectification or vitiated for any other reason;

(8) the bureau undoubtedly supplied the services of employed temps to its clients; and

(9) both contractually and as a matter of economic and commercial reality, the temps' services were supplied to clients via the bureau.

102. Therefore, in our view, *Adecco* does not stand as an authority for the proposition that the question whether there has been a supply of staff depends wholly or mainly upon the assignment of control of the worker to the client, but rather as an authority for the proposition that all the circumstances, particularly the contractual arrangements, must be considered and that control over the employees was one of those factors.

103. Mr Firth also relied on the decision of the Upper Tribunal in *Moher v HMRC* [2012] UKUT 260 (TCC) (Judges Bishopp and Sadler) ("*Moher*"). In that case the taxpayer carried on an employment business. Her principal activity was the supply to dentists of temporary staff ('temps') – mainly nurses and some auxiliaries. Article 13 (1) of the Sixth Directive provided an exemption for: "(e) services supplied by dental technicians in their professional capacity and dental prostheses supplied …." The Upper Tribunal held that once it was accepted, as the FTT had found, that the temporary nurses were under the control of the dentist to whom they were assigned, it was difficult to see how it could be considered that the taxpayer was making supplies of medical care. That was so even if the nurses were to be regarded as employees of the taxpayer. The taxpayer did not control, or even know, whether, and if so the extent to which, the dentist directed a nurse or auxiliary to carry out other duties which themselves were not exempt supplies, such as acting as receptionist or assisting with cosmetic dentistry. At [14] the Upper Tribunal said:

> "Even in relation to dental services which were exempt, the appellant did not dictate the treatment offered to the patients, or play any part at all in determining what treatment was offered or how it was provided,

> nor did she supervise the nurses and auxiliaries. She had no relationship, contractual or otherwise, with the patients to whom the medical care was provided. It is in our view beyond argument that her supply was of staff to dentists, who (as the tribunal found) assumed all the responsibility for directing the nurses as to what they should do, and for determining the treatment to be offered to the patients and the manner of its delivery. That the staff (and, indeed, the appellant herself) had a medical qualification cannot affect the nature of the supply. The tribunal correctly concluded that the appellant could not benefit from the exemption, and that the respondents were right to refuse the repayment."

104. In that case, dental staff (i.e. nurses and auxiliaries) were supplied to more senior dental practitioners who, unsurprisingly, exercised control over the more junior staff. That is a very different case from the facts in the present appeal where it was not to be expected that either A&E or the NHS Trusts would exercise control over the medical practitioners' clinical decision-making. Nonetheless, it could still be said of Mainpay, as of the appellant in *Moher*, that it did not play any part in the treatment given, nor did it supervise its medical practitioners. Mainpay had no relationship with the patients to whom medical care was provided.

105. In our view, therefore, *Moher* on its facts provides little support for the general proposition that whether there is a supply of medical care within Article 132(1) (c) or a supply of staff turns mainly on the question of control and that control, in this case, relates only to control of clinical decision-making.

106. The present case involves consultants and Specialist GPs. As with any highly skilled and specialised worker, the amount of control that the person engaging that worker could exercise over the day-to-day discharge of the worker's duties was very limited. Plainly, none of Mainpay, A&E and the relevant NHS Trust could have day-to-day control over the medical practitioners' clinical decisions. However, we do not consider that to be necessary in order to establish the necessary degree of control exercised by the NHS Trusts. As Ms Newstead Taylor, appearing for HMRC, correctly observed, if control over clinical decision-making were to be the hallmark of control for these purposes, then, taken to the limits of its logic, there could never be a supply of staff where the employee had control over decision-making in relation to their area of specialist expertise. In other words, there would rarely be a supply of staff where the employees concerned were highly skilled or had specialist expertise. That would be a strange conclusion which of itself suggests that Mr Firth's submission, that control over clinical decision-making was the touchstone of whether there was a supply of staff or the provision of medical care, could not be correct.

107. In this case, the FTT carefully considered the contractual arrangements.

108. At [21] the FTT stated that the contractual framework was common ground and that:

> "…Mainpay contracts to supply A&E, and A&E contracts to supply NHS Trusts. The dispute focusses on the terms of the contracts, the effect of those terms and the nature of the supplies made pursuant to the contracts."

109. At [32]-[34], [87]-[88] and [100]-[103] the FTT considered the terms of the A&E Agreement. At [103] the FTT concluded:

> "We have noted that what Mainpay supplied to A&E according to the A&E Agreement was the services described in the Assignment Schedule. Those services might be described for example as "the services of a consultant anaesthetist". We do not consider that is consistent only with a supply of medical care. An agreement to supply the services of a consultant anaesthetist is equally consistent in our view with a supply of staff, in the form of a consultant anaesthetist."

110. Next, the FTT considered Mainpay's contract with the consultants at [42]-[52]. The FTT noted at [52] that Mainpay would not know where in a hospital or what hours the consultant was working on any particular day. Mainpay could not direct consultants to undertake an assignment [56]. Instead, it was A&E and the NHS Trusts that decided which consultant which consultant would undertake an assignment [92]. Furthermore, the FTT held that pursuant to the 2010 Contract, which covered most of the Relevant Period, control, direction and supervision of the consultants was transferred to A&E [97]-[98]. Although the FTT had not seen the contracts between A&E and the NHS Trusts, it considered it more likely that that direction, supervision and control passed to the NHS Trust given the description of A&E's services in the A&E Agreement, which were the introduction by A&E of candidates to the NHS Trust.

111.The FTT considered the issue of clinical decision-making. At [105] the FTT recorded Mainpay's concession that it did not have control over the consultants' clinical decision-making but the FTT concluded at [107(3)]:

> "Consultants may be subject to much less control in their day to day work than other workers, and indeed other medical practitioners. In practical terms, the occasions on which an NHS Trust might have to exercise such control are probably rare. Indeed, neither Dr Bily or Dr Berry could give an example of where it had happened. However, both accepted that their clinical decisions might be subject to local policies of the NHS Trust, for example in relation to prescribing extraordinary drugs. In our view it is significant that both Dr Bily and Dr Berry accepted that they were required to take clinical decisions within what Dr Berry described as the remit of the NHS Trust policies. They were required to at least take those policies into account."

112.The FTT noted at [78] that Dr Bily accepted in cross-examination that he was under the direction, supervision and control of the hospital in relation to treatment and drugs offered to patients. It seemed to the FTT that this was a reference to prescription of extraordinary drugs.

113. The FTT then considered the framework of control within which the consultants operated:

> (1) all communication between Mainpay and the consultants related to payroll matters. Mainpay had no involvement in complaints against consultants [58];

(2) there was no contact between the consultants and Mainpay as to medical or professional matters [78];

(3) A&E and the NHS Trust chose the consultant to work in the relevant hospital and not Mainpay [69], including any replacement [94];

(4) Mainpay was not involved in any aspect of Dr Bily's day-to-day work in the hospital and he would not involve Mainpay in health and safety issues but would raise such matters with the hospital [76] and complaints were dealt with by the hospital [83] not by Mainpay;

(5) A&E were Dr Bily's contact for his appraisals – Mainpay had no involvement and did not receive a copy of his appraisals [82];

(6) Dr Bily accepted that consultants exercise their own judgment in the hospital environment which was provided by the NHS Trust. He agreed that they did so within the remit and local policies of the NHS Trust [81];

(7) the consultants' rate of pay was determined by negotiation between A&E and the NHS Trusts and not by Mainpay [95];

(8) Mainpay presented itself in its Employee Handbook and Guide as supplying staff not medical care consistently with the employee interviews which regarded Mainpay as simply providing a payroll function [60], [61] and [113]. The FTT accepted that the Mainpay Guide and Employee Handbook pointed towards a supply of staff.

(9) The FTT was not satisfied that in the Relevant Period Mainpay arranged professional indemnity insurance and considered this pointed towards a supply of staff and not medical care [91], [104] and [114].

114. At [119] the FTT concluded that the relevant test was not whether there was a transfer of control over clinical decision-making, but over the way in which the consultant worked. The FTT said:

> "[115] Based on the evidence as a whole, including the contractual arrangements and the circumstances in which consultants worked, we are satisfied that throughout the Relevant Period consultants were under the control, direction and supervision of the NHS Trusts and operated within the framework of the NHS Trusts. They effectively became part and parcel of the organisations of the NHS Trusts which were themselves providing medical care to patients.
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> …
>
> [119] In our view the question is not whether there is a transfer of control over clinical decision making, but over the way in which the consultant works. In cases such as this, operational control is more important than it might be in other cases. In particular, control over when, where and what work the consultant carries out. In our view the consultants engaged by Mainpay carried out their work within the framework of the NHS Trust, in the sense that they operated within the remit of local policies laid down by the NHS Trust. Mainpay's consultants were incorporated into the organisation of the NHS Trust in the same way as a consultant who might have been employed directly by the NHS Trust.

> Mr Firth described the question in terms of "what is the essence of the supply". Based on the evidence as a whole we regard the essence of the supply as being that of staff, rather than medical services."

115. In our view, the FTT did not err in its analysis and there is no basis for us to interfere with its conclusion. The FTT considered all the relevant evidence. Moreover, we consider it was correct to reject Mr Firth's submission that control over clinical decision-making was the key test to determine whether there was a supply of staff or, instead, medical care. That test is, as we have said, impractical to apply in the context of highly skilled and specialised workers. Moreover, the FTT's finding that the consultants operated within the framework of the NHS Trusts was fully supported by the evidence. Indeed, the NHS Trusts appear to have exercised the same degree of control over the consultants and Specialist GPs as it did over the consultants which it employed. In addition, in taking into account all the facts and circumstances in which the supply took place, paying particular attention to the contractual provisions, the FTT applied the correct analysis and did not take into account irrelevant considerations. The FTT's conclusion discloses no error.

116. Mr Firth also argued that if the medical practitioners exercised control over clinical decision-making then Article 10 of the Directive had the effect that the activities of those practitioners were attributed to the economic activity of Mainpay. This had the result that Mainpay did not supply control of the medical practitioners (a supply of staff) but supplied clinical decision-making (medical care).

117. We have no hesitation in rejecting this argument. Article 10 of the Directive is intended to prevent the activities of employees constituting an independent economic activity for the purposes of Article 9 of the Directive (which supplies the basic definition of a "taxable person" for VAT purposes). Whilst it is true that the activities of the employee are treated as part of the economic activities of the employer for VAT purposes, so that supplies made by the employee in the course of the employment are treated as supplies made by the employer, that does not mean that every characteristic or attribute of the employee (such as control over clinical decision-making) is thereby deemed to belong to the employer. In this case, as a matter of economic and commercial reality, it is impossible to say that Mainpay, an entity which had no medical qualification nor any medical expertise or knowledge, exercised any degree of control over the clinical decision-making undertaken by the medical practitioners and Article 10 does not deem it to do so.

Ground 4

118. We accept that the exemption for medical care in Article 132(1)(c) was designed to ensure that the benefits flowing from such care were not hindered by the increased costs of providing it that would follow if it were subject to VAT.

119. Mr Firth invited us to apply that exemption in a way which would give effect to that purpose. However, in our view, the purpose of the exemption is to reduce the cost of hospital and medical care in circumstances where the exemptions apply. It cannot be correct to extend the scope of those exemptions simply on the basis that by doing so the cost of medical care would be reduced. That is an entirely circular argument which

would promote a very wide interpretation of the exemptions. We note, furthermore, that the CJEU has been very circumspect in dealing with attempts to broaden the ambit of Article 132(1)(b) and (c) (see e.g. *EC Commission v United Kingdom* Case C-353/85, *W v D* C-384/98, *Kügler* C-141/00 and *d'Ambrumenil* C-307/01) even though in all those cases a broader interpretation of the exemptions for hospital and medical care would have reduced the cost to patients of medical and related treatment.

Ground 5

120. In relation to fiscal neutrality, Mr Firth submitted that the relevant comparator was the supply by a self-employed consultant of his or her services directly to an NHS Trust. He submitted that this supply was undoubtedly a supply of medical services which was exempt under Article 132(1)(c). Ms Newstead Taylor did not accept this proposition, contending that the consultant was simply supplying his or her own services to the NHS, although the point was not fully argued before us.

121. Be that as it may, it seems to us that the direct supply of a self-employed consultant to the NHS Trust is not a relevant comparator. Even if Mr Firth is correct in his submission that such a supply would be exempt – and we express no view on this point – we consider that the supplies made by Mainpay were not comparable.

122. In the first place, the self-employed consultant would be providing his or her services directly to the NHS Trust. In the present case, Mainpay provided its services to A&E which then on-supplied the consultants to the NHS Trust which then, in turn, supplied medical services to patients. It seems to us that that indirect supply is not comparable with the direct supply by a self-employed consultant posited by Mr Firth. It cannot be said, in our view, that A&E received medical care and, certainly, it did not do so as a patient. Moreover, unlike a self-employed consultant, Mainpay had no medical qualifications or expertise.

123. In this context, we reject Mr Firth's submission that the case-law of the CJEU indicates that the corporate structures through which exempt supplies are made do not matter.

124. Certainly, it is true that in *Kügler* at [41] the CJEU held that the application of Article 132(1)(c) was not dependent on the legal form of the person supplying the medical care. Thus, a limited company supplying medical care through medically qualified staff fell within the exemption. That analysis was based on the wording of Article 132(1)(c), which did not specify the nature of the legal person which supplied the medical care.

125. But we do not accept Mr Firth's submission, based on the CJEU decision in *Canterbury Hockey Club & Anor* [2008] EUECJ C-253/07, that the identity of the recipient of the medical care was irrelevant. In that case the exemption applied to "persons taking part in sport or physical education" in Article 132(1)(m). Although the CJEU acknowledged that according to "normal linguistic usage" [26], only natural persons took part in sport, the exemption could not be limited to natural persons and could extend to organisations through which sporting activities took place. Otherwise,

large numbers of supplies of services essential to sport would automatically be excluded from the benefit of the exemption, thus frustrating the purpose of the exemption.

126. We do not think that the *Canterbury Hockey Club* establishes a general principle that intermediate corporate entities can simply be disregarded, on a purposive interpretation, when applying an exemption. Each case must depend on its facts. It was no doubt influential in that case that many group sporting activities were organised through sports clubs. In the present case, there is no need to extend the exemption for medical care provided to individuals i.e. patients, to intermediaries higher up the supply chain.

Ground 6

127. Mr Harker's evidence mainly went to the question of control. The FTT clearly considered his evidence but rejected significant portions of it.

128. We do not consider that the FTT erred in this regard or that Mr Harker's evidence was sufficiently specific to alter the outcome of the appeal.

Final observations

129. We have determined this appeal on the basis of the submissions made to us at the hearing. As we have explained, we asked the parties for written submissions in relation to the scope of the exemptions in Article 132(1)(b) and (c) and that Mr Firth abandoned his reliance on Article 132(1)(b) and concentrated his submissions instead on Article 132(1)(c).

130. We have some reservations as to whether Mainpay's supplies would, in any event, fall within the scope of Article 132(1)(c) in the light of the authorities of the CJEU i.e. whether supplies made in a hospital environment otherwise than by a hospital (or its equivalent) fell within Article 132(1)(c). In the light of our conclusion on the arguments put to us at the hearing it is unnecessary for us to express a view on this point and we do not do so.

Conclusions

131. For the reasons given above, we have concluded that the exemption contained in Article 132(1)(c) and Item 1(a) of Group 7 of Schedule 9 to VATA does not apply to the supplies made by Mainpay.

132. Accordingly, we dismiss this appeal.

Signed on original

MR JUSTICE MELLOR
JUDGE GUY BRANNAN

RELEASE DATE: 2 November 2021