Neutral Citation: **[2023] UKUT 00054 (TCC)**

Case Number: UT/2021/000175

**UPPER TRIBUNAL**
**(Tax and Chancery Chamber)**

Rolls Building,7 Rolls Building, Fetter Lane,
London EC4A 1NL

*VALUE ADDED TAX – performance fees for supply of investment management services between companies in VAT group – fees invoiced after supplier left VAT group – whether services disregarded under VAT grouping provisions – appeal allowed*

**Heard on:** 17 and 18 November 2022
**Judgment date:** 06 March 2023

**Before**

**MR JUSTICE EDWIN JOHNSON**
**JUDGE THOMAS SCOTT**

**Between**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**
**Appellants**

**and**

**THE PRUDENTIAL ASSURANCE COMPANY LIMITED**
**Respondent**

**Representation:**

For the Appellants: Peter Mantle, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: Ms Zizhen Yang, instructed by Baker McKenzie LLP

# DECISION

## INTRODUCTION

1. Silverfleet Capital Ltd ("SCL") supplied certain investment management services to The Prudential Assurance Company Ltd ("Prudential" or the "Appellant"). The services were rendered while SCL and Prudential were both members of the same group for the purposes of Value Added Tax ("VAT"). However, some of the payments for the services were invoiced and paid after SCL had ceased to be a member of that VAT group. Prudential considered that those payments were outside the scope of the charge to VAT because they fell to be disregarded under the rules for supplies between members of a VAT group. The Respondents ("HMRC") decided that the payments were liable to VAT because they were treated as taking place after SCL had left the VAT group under the provisions governing the time of supply of continuous services.

2. Prudential appealed against HMRC's decision to the First-tier Tribunal (the "FTT"). The FTT decided that the payments fell within the VAT grouping rules and allowed the appeal. With the permission of the FTT, HMRC appeal against the decision of the FTT (the "Decision").

## THE FACTS

3. There is no dispute in relation to the material facts, which can be summarised as follows:

(1) At the relevant time, Prudential was a regulated life assurance company, the business of which included with-profits life and pensions insurance business. One of its with-profits funds was the "Funds Fund". In that fund, the fund manager would typically realise the fund's investments, consisting of third-party private equity investments, between years 6 and 10 of the fund. The Funds Fund was divided into Sub-funds, each with a sequential commitment period during which new investments were made.

(2) Under an investment management agreement dated 30 August 2002 (the "2002 Agreement"), SCL provided investment management services to Prudential in relation to the Funds Fund. The consideration receivable by SCL for its services comprised (1) a management fee calculated by reference to the amount of investments made in the Funds Fund during the period when the services were provided, and (2) performance fees, payable in respect of Sub-funds 1 and 2 in the event that the performance of those sub-funds exceeded a set benchmark rate of return.

(3) As regards the performance fees, once a set hurdle rate of return had been received by Prudential, SCL was entitled to receive an amount equal to 10% of the hurdle rate, with subsequent receipts being apportioned 90/10 between Prudential and SCL. Given the time required to create value from the investments, a performance fee would only become payable in practice more than 10 years after the Sub-fund investments were made.

(4) Similar provisions were made in a further investment management agreement dated 31 August 2004 (the "2004 Agreement").

(5) At the time when SCL rendered its investment management services, Prudential was the "representative member" of a VAT group of which SCL was a member. However, on 8 November 2007 a management buy-out of SCL was effected, as a result

of which SCL ceased to be a member of Prudential's VAT group. SCL also ceased at that date to provide investment management services to the Funds Fund.

(6) The obligations in the 2004 Agreement were varied by a Variation Agreement dated 8 November 2007. This provided that SCL would not be entitled to receive management fees in respect of the Funds Fund for any period after 8 November 2007 but would continue to be entitled to performance fees in respect of the Funds Fund.

(7) During 2014 and 2015 the hurdle rate set under the 2002 Agreement was passed. As a result SCL invoiced Prudential at various dates between 16 January 2015 and 11 July 2016 for performance fees totalling £9,330,805.92 (the "Performance Fees") plus VAT at 20% (which SCL subsequently applied to HMRC to reclaim).

**THE ISSUE IN THE APPEAL**

4. The issue in the appeal is whether the Performance Fees are liable to VAT. Prudential contends that they are consideration for services rendered at a time when SCL and Prudential were members of the same VAT group, so no VAT is chargeable in respect of them. The FTT agreed. HMRC say that the services for which the Performance Fees were paid were such that the time of their supply for VAT purposes was when they were invoiced or paid. Accordingly, say HMRC, since the parties were not in a VAT group at that time, VAT is due.

**RELEVANT LEGISLATION**

5. The legislation material to this appeal and as in force during the relevant periods is set out below. References to the PVD are to the Principal VAT Directive, being Council Directive 2006/112/EC, and references to VATA 1994 are to the Value Added Tax Act 1994.

### *Supplies and supplies of services*

6. Article 2(1)(c) of the PVD provides for VAT to be charged on "the supply of services for consideration within the territory of a Member State by a taxable person acting as such".

7. Section 1(1) VATA 1994 provides that:

> (1) Value added tax shall be charged, in accordance with the provisions of this Act—
>
> (a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply)…

8. The scope of VAT on taxable supplies is dealt with in section 4(1) VATA 1994, which provides as follows:

> (1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

9. A "supply of services" is defined as meaning "any transaction which does not constitute a supply of goods": Article 24(1) of the PVD.

10. Section 5(2) VATA 1994 defines a supply and a supply of services as follows:

> **5 Meaning of supply: alteration by Treasury order**

(2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below—

(a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.

***Liability to VAT and time of supply for VAT purposes***

11. Articles 62 to 64 of the PVD deal with when a liability to VAT is triggered (being when a "chargeable event" occurs) and when the VAT becomes chargeable. They provide as follows:

**Article 62**

For the purposes of this Directive:

(1) 'chargeable event' shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;

(2) VAT shall become 'chargeable' when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred.

**Article 63**

The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.

**Article 64**

1.Where it gives rise to successive statements of account or successive payments, the supply of goods, other than that consisting in the hire of goods for a certain period or the sale of goods on deferred terms, as referred to in point (b) of Article 14(2), or the supply of services shall be regarded as being completed on expiry of the periods to which such statements of account or payments relate.

2.Continuous supplies of goods over a period of more than one calendar month which are dispatched or transported to a Member State other than that in which the dispatch or transport of those goods begins and which are supplied VAT-exempt or which are transferred VAT-exempt to another Member State by a taxable person for the purposes of his business, in accordance with the conditions laid down in Article 138, shall be regarded as being completed on expiry of each calendar month until such time as the supply comes to an end.

Supplies of services for which VAT is payable by the customer pursuant to Article 196, which are supplied continuously over a period of more than one year and which do not give rise to statements of account or payments during that period, shall be regarded as being completed on expiry of each calendar year until such time as the supply of services comes to an end.

Member States may provide that, in certain cases other than those referred to in the first and second subparagraphs, the continuous supply of goods or services over a period of time is to be regarded as being completed at least at intervals of one year.

12. As to when VAT becomes due, section 1(2) VATA 1994 provides that:

> VAT on any supply of goods or services is a liability of the person making the supply and (subject to provisions about accounting and payment) becomes due at the time of supply.

13. Section 6 VATA 1994, entitled "time of supply", provides as follows:

> **6 Time of supply**
>
> (1) The provisions of this section shall apply, subject to sections 18, 18B, 18C and 57A, for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge to VAT.
>
> …
>
> (3) Subject to subsections (4) to (14) below, a supply of services shall be treated as taking place at the time when the services are performed.
>
> …
>
> (14) The Commissioners may by regulations make provision with respect to the time at which (notwithstanding subsections (2) to (6) and (11) to (13) above or section 55(4)) a supply is to be treated as taking place in cases where—
>
> (a) it is a supply of goods or services for a consideration the whole or part of which is determined or payable periodically, or from time to time, or at the end of any period, or
>
> …
>
> and for any such case as is mentioned in this subsection the regulations may provide for goods or services to be treated as separately and successively supplied at prescribed times or intervals.

14. One of the regulations made pursuant to section 6(14)(a) is Regulation 90 of the Value Added Tax Regulations 1995 (SI 1995/2518) ("Regulation 90"), which is central to this appeal. This states as follows:

> **90 Continuous supplies of services**
>
> (1) Subject to paragraph (2) below, where services…are supplied for a period for a consideration the whole or part of which is determined or payable periodically or from time to time, they shall be treated as separately and successively supplied at the earlier of the following times—
>
> (a) each time that a payment in respect of the supplies is received by the supplier, or
>
> (b) each time that the supplier issues a VAT invoice relating to the supplies.

### *VAT grouping*

15. Article 11 of the PVD permits Member States to regard certain persons as a single taxable person for VAT purposes:

> After consulting the advisory committee on value added tax (hereafter, the 'VAT Committee'), each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.

> A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.

16. The United Kingdom introduced VAT grouping pursuant to Article 11. Sections 43A to 43D VATA 1994 set out the requirements for bodies corporate wishing to be treated as members of the same VAT group, and it is not in dispute that Prudential and SCL satisfied those conditions during the period when the investment management services were rendered. Section 43(1) VATA 1994, the other provision which is central to this appeal, provides as follows:

> **43 Groups of companies**
>
> (1) Where under sections 43A to 43D any persons are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and—
>
> (a) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and
>
> (b) any supply which is a supply to which paragraph (a) above does not apply and is a supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member; and
>
> (c) any VAT paid or payable by a member of the group on the importation of goods shall be treated as paid or payable by the representative member and the goods shall be treated, for the purposes of sections 38 and 73(7), as imported by the representative member;
>
> and all members of the group shall be liable jointly and severally for any VAT due from the representative member.

**DISCUSSION: THE LEGISLATION**

17. The question of whether the VAT liability on the performance fees is determined by Regulation 90 or by section 43 might at times resemble a choice between the chicken and the egg. Certainly the FTT's highly discursive analysis indicates some difficulty in coming to a conclusion as to "which came first".

18. We consider that the answer to this question is primarily to be found in the legislation itself. While relevant case law must, of course, be taken into account in interpreting the legislation, it is important to note at the outset that none of the authorities addresses the particular question in this appeal. In these circumstances we adopt the following approach. We begin by construing the relevant statutory provisions without reference to relevant case law, with a view to reaching, by reference to that construction exercise, preliminary conclusions in answer to the question in this appeal. We will then consider the extent to which those preliminary conclusions, based on a simple construction of the relevant statutory provisions, are consistent with relevant case law or require modification in the light of relevant case law.

19. It was common ground that the UK legislation is in conformity with the relevant provisions in the PVD, so our analysis focuses primarily on the VATA provisions.

20. Prudential accepts that unless section 43 applies in relation to the relevant supplies, the services under appeal are liable to VAT as a result of Regulation 90, because they are continuous services within the wording of Regulation 90 and their time of supply would take place when the two companies were no longer within a VAT group. If section 43 does apply to the supplies, then that would generate the various assumptions and disregards which appear

in section 43(1). Logically, then, the question should be approached by first considering the scope and effect of section 43(1).

21. In relation to supplies to which section 43(1) applies, that subsection has two effects which are relevant to this appeal. First, under the opening words of the subsection (the "Assumption"), any business carried on by a member of the VAT group shall be treated as carried on by the representative member (in this case, Prudential). Second, under section 43(1)(a) (the "Disregard"), any supply of goods or services by one member of the group to another member "shall be disregarded".

22. Ms Yang, for Prudential, presented two alternative arguments. Broadly, the first was that as a result of the Disregard there was no supply to which Regulation 90 could attach, and the second was that, if this was wrong, then as a result of the Assumption SCL carried on no business and made no supplies for VAT purposes at the time of the relevant transaction. The consequence of either argument being correct would be that no VAT was due on the relevant fees.

23. Looking first at the Disregard, it applies, and only applies, "where…any bodies corporate are treated as members of a group", and in that situation to "any supply of goods or services by a member of the group to another member of the group". This wording is effectively imposing a temporal limitation. If one or both parties are not members of the relevant VAT group at the time of the supply of goods or services, then the Disregard does not and cannot apply. It is therefore critical to establish *when the relevant supply took place*. Having answered that question, did it take place *at a time when both parties to the supply were members of the same VAT group*?

24. It is necessary, then, at the first stage to find the date of the relevant supply in this appeal. The parties have addressed the matter on the basis that SCL rendered the investment management services for which the performance fees were payable (the "Services") while SCL was a member of the same VAT group as Prudential (the "Group").

25. Proceeding on that basis, one might think that the supply therefore took place while SCL was a member of the Group. However, the legislature has intervened. In the PVD and in the VATA 1994 neither the word "supply" nor the time of supply are abstract or undefined expressions.

26. "Supply" is primarily defined in VATA 1994 in section 5. It includes all forms of supply, but not anything done otherwise than for a consideration. Anything which is not a supply of goods but is done for a consideration is a supply of services.

27. The time at which a supply takes place is governed by section 6 VATA 1994 and by regulations made pursuant to section 6(14). Specifically, the legislature has intervened by making such a regulation in Regulation 90. It is common ground that the Services fell within the category of services identified in Regulation 90. It follows that the supply of the Services was treated as taking place on each occasion when SCL rendered a VAT invoice to Prudential in respect of such of the services as fell within Regulation 90. The invoices for such services were rendered in 2015 and 2016. As such, those supplies were treated as taking place at a time when SCL was no longer a member of the Group.

28. There is no qualification, limitation or exemption contained in either section 6 or Regulation 90 (or the equivalent provisions in the PVD), either relating to section 43 or otherwise, which would be applicable in the present case to alter that conclusion.

29. Returning to section 43(1), we identified two questions which must first be answered in order to determine whether the Disregard in section 43(1) applies to a supply. These were (1) when the relevant supply took place, and (2) whether *at that time* the parties were both members of the same VAT group. As to question (1), the position must be determined by Regulation 90. There is nothing in section 43 which disapplies or limits Regulation 90 or section 6. It follows that *at the time of the supply* SCL was not a member of the Group. As a result, the Disregard did not apply.

30. This result can only be avoided by treating the reference to a supply of services in Section 43(1)(a) as meaning something different to the references to a supply of services in Regulation 90. That is not a tenable reading of section 43(1)(a). While Ms Yang in her oral submissions referred to the supply of services as a "transaction", that rewrites the wording of the statute. Once considered as a supply—which is the categorisation relevant for the PVD and VATA 1994—that necessarily engages Regulation 90. We do not consider that Section 43(1)(a) can permissibly be rewritten as a reference to a transaction in relation to the Services, or some similar commercial expression.

31. Ms Yang's alternative argument is that if the Disregard did not apply, in any event there was no VAT liability, because by virtue of the Assumption SCL made no supplies and carried on no business in relation to the Services. She argued that the only supplies were treated as made by Prudential, and the only business was treated as carried on by Prudential. As a result, SCL was not liable to VAT in respect of the Services.

32. The alternative argument fails because it rests on the proposition that the Assumption can apply in circumstances where the relevant supply of services took place at a time when the person supplying those services was not a member of the relevant VAT group. Properly understood, the Assumption is argued by Ms Yang to apply because at some prior time the parties had been in the same VAT group. That would be a remarkable result. Once Regulation 90 has applied to treat the Services as supplied in 2015 and 2016, is VAT nevertheless avoided because prior to November 2007 the parties were in a VAT group? Such a result would entail treating SCL as supplying the Services for the purposes of Regulation 90 and the Disregard, but Prudential (or perhaps no-one) as supplying the Services for the purposes of the Assumption. Under that approach, the Services would effectively be treated as supplied at two separate times; once in 2015/16 and once at some time prior to November 2007. That is in our opinion an impossible result. For VAT purposes, and for all VAT purposes relevant to this appeal, the Services must be treated as having been supplied by SCL in 2015/16. In that event, section 43(1) (including the Assumption) is not engaged at all, because *at the time of the supply* the companies were not in the same VAT group.

33. The assumption in the opening words of section 43(1) that any business carried on by any group member is carried on by the representative member applies only "where…any bodies corporate are treated as members of a group", in relation to supplies taking place while they are members of the same VAT group. It does not have the effect that in respect of supplies taking place at any time after the supplier has left the group, without time limit, no VAT can arise because during the period of group membership the business was treated as carried on by the representative member.

34. As regards the argument that if the Disregard did not apply, the supply of Services would be treated under the Assumption as made by Prudential (as the representative member), we take this to be a reference to section 43(1)(b). As such, it combines elements of both of Ms Yang's arguments. However, that provision is dealing with supplies made by or to members of

a VAT group to or by a person outside the VAT group at the time of the supply. As we have set out in relation to the Disregard argument, the supply of the Services by SCL was not a supply by or to a member of the group at all.

35. So much for the legislation. We turn now to the key cases, to determine what light they shed on the construction of the statutory provisions which we have reached, and whether they require that construction to be modified.

#### RELEVANT CASE LAW: THE FOUR KEY DECISIONS

36. Before the FTT, and in this appeal, each party made extensive submissions in relation to certain authorities. As we will see below, the FTT reached its decision in large part by reference to its analysis of those authorities. However, before we come to our discussion of the authorities, we emphasise again that none of them deals with the precise issue in this appeal, namely the interaction of the time of supply rules and section 43.

37. Before we summarise the submissions of the parties on the authorities and the reasoning of the FTT on the authorities, it is convenient to set the scene with a summary of the four key decisions, in which each party claimed to find support for their positions. They are as follows:

(1) *B J Rice & Associates v Customs and Excise Commissioners* [1996] STC 581 (**"***B J Rice***"**).

(2) *Customs and Excise Commissioners* v *Thorn Materials Supply Ltd & Anor* [1998] 1 WLR 1106 ("*Thorn Materials*").

(3) *Svenska International plc v Commissioners of Customs & Excise* [1999] 1 WLR 769 ("*Svenska"*).

(4) *Royal & Sun Alliance Insurance Group plc v CCE* [2003] STC 832 ("*RSA*").

38. We will consider the cases in this order, concentrating on aspects relevant to the issue in this appeal. We will then summarise the FTT's decision and the submissions of the parties before setting out our conclusions.

### *BJ Rice*

39. Since this 1996 decision of the Court of Appeal appears to form a material part of the reasons for the FTT's decision, it is necessary to consider it in some detail.

40. Mr Rice carried on a consultancy business. He made supplies of continuous services which fell within a predecessor to Regulation 90. Before the date when the business had registered for VAT, he invoiced a client for £150 in respect of services which he had supplied. The client did not pay the invoice for almost five years, by which time the business had registered for VAT. HMRC assessed Mr Rice to VAT on the payment, on the basis that the time of supply was when payment was received, and at that time he was a taxable person for VAT purposes. Mr Rice appealed, arguing that the predecessors to section 6 and Regulation 90 were concerned primarily with accounting for and payment of VAT, and the supply was not liable to VAT because it was not a taxable supply by a taxable person. The VAT Tribunal and the High Court dismissed Mr Rice's appeal against HMRC's assessment, and he appealed to the Court of Appeal.

41. The Court of Appeal held by a majority (Sir Ralph Gibson dissenting) that "common sense and justice" pointed to the conclusion that a chargeable transaction had to be determined when the supply was actually made, and while the rules on time of supply determined the amount to be charged and the time when the charge took effect, they could not operate to create a charge to VAT.

42. Staughton LJ and Ward LJ issued separate judgments. Staughton LJ broke down the necessary elements of a charge to VAT as follows, at page 583:

> Section 2(1) of the 1983 Act provides:
>
> 'Tax shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.'
>
> It is said, as far as I can see correctly, that there are four elements in that subsection: there must be—(1) a supply of goods or services in the United Kingdom, (2) which is a taxable supply (in other words, not exempt), (3) by a taxable person (someone who is or ought to be registered for VAT), (4) in the course or furtherance of any business carried on by him. It is not disputed that elements (1), (2) and (4) were fulfilled when Mr Rice did work for Mr Partridge at some time before 21 October 1986. But element (3) was not.

43. Staughton LJ set out HMRC's contention that element (3) was satisfied, because the time of supply rules treated the supply as made when payment was received. If that was right, he said, "it produces an unjust result", because either Mr Rice or the customer would have to pay the VAT five years after the services were actually provided. He identified the issue to be determined as whether the time of supply rule "fixes the time for deciding the question whether a supplier is a taxable person". He considered that in general:

> …the existence of a chargeable transaction has to be determined at a time when the supply is actually made. Common sense and justice point to that result; ss 4 and 5 remain to determine the amount to be charged and the time when the charge takes effect. To impose a tax on Mr Rice in respect of a supply which was not taxable at the time when it was made seems to me perilously close to retrospective taxation…[1]

44. Ward LJ reached the same conclusion, describing the consequences of HMRC's interpretation on the facts as "surprising and offensive to common sense"[2]. He stated that those were consequences "against which I set my face"[3]. However, he developed his reasoning in greater detail than Staughton LJ. His conclusion was that the predecessor to Regulation 90 did not apply to determine liability to VAT, but solely to determine when, not whether, VAT was to be charged. He described the provisions determining the time of supply as follows, at page 590:

> They are obvious bookkeeping sections. For bookkeeping purposes the time of performance of the service can be supplanted by the time of payment or the time of issuing a tax invoice if that happens before performance…or the date of the tax invoice if it is issued 14 days after performance…or within such other period…or event…as the commissioners may direct. For continuous supplies of services under s 5(9) and reg 23, it is by definition necessary to have an accounting device to fix a point in time in the continuum.

[1] Page 585 at *h*.
[2] Page 586 at *e*.
[3] Page 591 at *c*.

> In my judgment, ss 1 and 2 determine whether a liability for tax arises and ss 4 and 5, presupposing that there is a liability, determine when, but not whether, the tax is to be charged. The fictions for determining the time of supply for accounting purposes do not in my judgment govern the ordinary meaning of the language in ss 1 and 2 which make supply by a taxable person a prerequisite of liability.

45. Both Staughton LJ and Ward LJ stated that they found support for their conclusions in a decision of the VAT Tribunal, *Broadwell Land plc v Customs and Excise Commissioners* [1993] VATTR 346. Curiously, the VAT Tribunal in that case was the same (Sir Stephen Oliver QC) as that which had dismissed Mr Rice's appeal.

46. Sir Ralph Gibson dissented, holding that the VAT Tribunal and High Court had been right. He stated as follows (at page 591 *e*):

> The unjustness of that result, or the absurdity of it, as my Lords regard it, does not seem to me to be of such an order that the court should depart from what appears to me to be the plain meaning of the provisions of this Act.

47. He also concluded that there was nothing in the decision in *Broadwell Land* to support the view of the majority: page 592 *c*.

***Thorn Materials***

48. Thorn Materials agreed to supply goods on terms that 90% of the price was due immediately and 10% on delivery at a later date. Seller and buyer ("Home") were in the same VAT group at the time of contract but not at the time of delivery. HMRC applied VAT to the whole supply. Thorn appealed, arguing that 90% of the supply was to be treated as taking place during group membership and therefore fell to be disregarded for VAT. The House of Lords held by a majority (Lord Hoffmann dissenting) that although the VAT grouping rules required 90% of the supply to be disregarded, VAT grouping was not designed to confer exemption from tax, and the delivery constituted a supply attracting VAT on 100% of the consideration.

49. The judgment of three members of the House of Lords was delivered by Lord Nolan, Lord Clyde delivering a separate judgment. Lord Nolan noted that the transactions were designed for the purpose of avoiding VAT. However, the decision was reached purely on the basis of the construction of the relevant provisions[4]. Thorn argued that the time of supply rules applied to the payment of 90% of the price, to treat the supply as arising when the invoice was issued for that amount, and at that time the parties were members of a VAT group, so that that supply was to be disregarded. HMRC argued that the supply taking place when the parties were grouped had to be disregarded under the grouping rules, with the result that it was not a supply for the purposes of a charge to VAT at all. This meant that the only relevant supply for VAT purposes took place on delivery, when the parties were no longer grouped. The value of that supply, said HMRC, was to be taken as 100% of the price.

50. Lord Nolan stated as follows, at pages 1112-1113:

> That leaves open the question of what is meant by the requirement in section [43] that a supply by one member of a group to another must be disregarded. I accept Mr. Prosser's [counsel for Thorn] submission that it does not mean that the separate existence of the appellants and Home is to be denied or that the sale agreement and the prepayment are to be treated as not having taken

[4] *Thorn Materials* at 1109.

> place. What it does mean is that the 90 per cent. supply to which these facts gave rise must be disregarded or…ignored, for tax purposes.
>
> In saying this I, also accept Mr. Prosser's further submissions that the time of supply rules, including section 5(1), must be applied to determine whether and if so when a supply between members of the same group took place. It is essential to apply the time of supply rules in order to determine whether the supply took place while the group relationship still existed. Unless a supply during the period of the relationship is identified as having taken place there is nothing upon which section [43] can bite. One can hardly disregard something which did not happen.

51. Lord Nolan did not, however, consider that it followed from this that the supply of goods during group membership was "permanently excluded from the charge to VAT" as a result of what is now section 43. The delivery of the goods constituted a transfer of the whole property in the goods, and was a supply taxable on the amount of the consideration "whether already paid or still payable"[5].

52. Lord Hoffmann dissented from the majority, deciding that there were two supplies, one of which fell to be disregarded entirely for VAT purposes and one of which (on delivery) was a supply only as to 10% of the consideration. Lord Hoffmann also rejected HMRC's arguments as to the very broad effect of the grouping rules. Importantly, however, he endorsed the view of the majority that the time of supply rules must first be applied to determine whether a supply falls within the grouping provisions. He criticised the Court of Appeal's approach to the contrary, and also referred to *BJ Rice*, stating (at pages 1118-1119):

> The Court of Appeal…concentrated upon the "disregard" in paragraph (a ). Schiemann L.J. said that it was "schizophrenic" to use the time of supply rules in order to discover what supply was required by section [43] to be disregarded and what was not. Mummery L.J. said, to similar effect, that section 5(1) could only apply if there was a "person making the supply" and therefore could not apply if the supply was required by paragraph (a )to be disregarded.
>
> I respectfully think that this reasoning is fallacious. Paragraph (a ) requires one to identify a supply which has occurred while the parties were members of the same group. There is in my view no way in which one can identify such a supply except by application of the time of supply rules in sections 4 and 5. There is in the judgment of Beldam L.J. a suggestion that the time of supply rules presuppose that the supply is taxable and therefore cannot apply to a supply which must be disregarded. This in my view is logically impossible and the commissioners did not support it. As I explained earlier, the question of whether a supply is taxable often depends upon the time at which it is treated as having taken place. Thus the question of taxability must be determined by applying the time of supply rules. The only alternative is to use some kind of meta-rules, derived from fairness, common sense and other such concepts lodged in the judicial bosom. This seems to have been the technique used by a majority of the Court of Appeal in *B.J. Rice & Associates v. Customs and Excise Commissioners* [1996] S.T.C. 581. In that case the meta-rules led to the transaction being treated as having occurred at a time when it was not taxable. On the other hand, if the court had concluded that it happened at a time when it was taxable, they would presumably then have applied the time of supply rules, which may have treated it as having occurred at some other time. This cannot be right. The time of supply rules are in my view the only

[5] *Thorn Materials* at 1113.

> criteria for deciding whether the transaction is to be treated as having occurred at a time when it was taxable.

***Svenska***

53. In *Svenska*, the taxpayer was a UK subsidiary of a Swedish bank. The subsidiary provided management services to a London branch of the bank. Initially, the branch was not registered for VAT. Subsequently, the subsidiary and the branch were brought within a VAT group, with the subsidiary as the representative member. Previously, the subsidiary had issued no invoice and the branch had made no payment for the services that the subsidiary had provided to the branch. It was only after they were within a group for VAT purposes that the subsidiary issued an invoice to the branch for its services.

54. The services which the subsidiary had provided to the branch were potentially liable to VAT, but as they were only invoiced after the group was established, the supply fell to be disregarded under the grouping rules. The issue in *Svenska*, however, related to the right to deduct the input tax which the subsidiary had incurred on goods and services used in providing services to the branch. In periods prior to the VAT grouping, the subsidiary had recovered input tax in full. The London branch, however, had suffered no VAT for those periods because it had not been invoiced for those services. The issue that had to be resolved was described by Lord Hope at page 777H:

> It was submitted by [counsel for the taxpayer] that the services which Svenska supplied to the London Branch were taxable supplies when they were made within the meaning of section 2(1) of the Act, and that what regulation 23 was concerned with was the time of supply not whether the supplies were taxable. He said that the fact that they were taxable supplies was not to be confused with the point in time at which the value added tax became chargeable. But we are concerned in this case with the question whether an adjustment falls to be made under regulation 34 to the credits which Svenska received by way of input tax.

55. The subsidiary argued that, in the language of the PVD, Regulation 90 related only to when VAT became "chargeable" and not when a "chargeable event" occurred. On this interpretation, Regulation 90 did not prevent the services in fact supplied to the London branch before it joined the VAT group from being treated as taxable supplies taking place before the branch joined the group. The House of Lords (Lord Lloyd of Berwick dissenting) rejected that argument. Lord Hutton stated, at page 783:

> My Lords, I am unable to accept those submissions. In my opinion [the time of supply rules] make it clear that where there is a continuous supply of services, no supply shall be treated as having been made until there has been a payment or a tax invoice has been issued.

56. Lord Hutton then distinguished the situation in *Svenska* from that in *Thorn Materials*, and rejected the taxpayer's proposition that "actual supplies" could be treated as supplies for VAT purposes (at page 784):

> In my opinion Svenska cannot derive assistance from that decision. In the *Thorn* case section [43] required the supply which was to be treated as taking place at the time of the payment of 90 per cent. of the price to be disregarded. Therefore there was a supply which took place in the normal way at the time of delivery of the motor cars…But in the present case Svenska cannot argue that as after 1 August 1991 the supplies provided by it to the London branch are to be disregarded pursuant to section [43]

> because they were members of the same group, the consequence must be that the "actual supplies" provided by Svenska to the London branch prior to 1 August 1991 can be regarded as supplies for VAT purposes. The reason why Svenska cannot advance this as a valid argument is because the effect of regulation 23(1) is that those "actual supplies" cannot be treated as supplies for VAT purposes. In short, the distinction between the present case and the *Thorn* case is that in the latter the Act and the Regulations of 1985 permitted the delivery of the motor cars to be treated as a supply, whereas in the present case regulation 23(1) prohibits the "actual supplies" provided by Svenska to the London branch between 1987 and 1 August 1991 being treated as supplies because prior to the latter date no payment had been received and no tax invoice had been issued. Accordingly the present case has to be approached on the basis that, no matter that in fact Svenska supplied services to the London branch prior to 1 August 1991, as a matter of the law governing VAT no supplies were made during the period [before the branch joined the Svenska VAT group].

***RSA***

57. IN *RSA*, the issue was the recovery of input tax for VAT purposes on property rental payments. The facts were complicated and the *ratio* of the decision of the House of Lords is of limited relevance to the issue in this appeal. By a majority of three to two, the House of Lords reversed the decision of the Court of Appeal and held that Regulation 90, in conjunction with the special rules for leases, had the effect that in relation to a continuous supply of goods or services each invoiced supply was to be treated as a separate supply for VAT purposes.

58. The relevance of the decision to this appeal lies primarily in the comments made in the Court of Appeal and House of Lords regarding *BJ Rice*. In the Court of Appeal ([2001] STC 1476) Arden LJ gave a lengthy dissenting judgement. This criticised the decision of Park J in the High Court, which had been reached partly in reliance on *BJ Rice*. Arden LJ commented as follows, at [48]:

> …it seems to me in principle that in determining whether tax on a supply is available for deduction against tax for which the trader must account one must, in the context of periodic payments, continue to apply the time of supply rules. There is nothing in the regulations or in the Sixth Directive to which our attention has been drawn which indicates that there is a distinction to be drawn here. Nor does the case of *B J Rice & Associates v Customs and Excise Comrs* [1996] STC 581, a decision of this court, on which the judge relied (see [2000] STC 933 at 947, para 50) require this distinction to be made: in that case very different considerations arose because the issue was whether the time of supply rules could result in the imposition of a liability to account for VAT on a person who was not a taxable person at the time he supplied and raised an invoice for the services in question (and in so far as the case is thought to establish any wider restriction on the time of supply rules, see per Lord Hoffmann, dissenting, in *Customs and Excise Comrs v Thorn Material Supply Ltd* [1998] STC 725 at 738, [1998] 1 WLR 1106 at 1119).

59. In the House of Lords, Lord Walker stated, at [83]:

> In my opinion Arden LJ was correct in her analysis and conclusion as to the scope of s 6(14) and reg 85. That does not necessarily involve saying that *B J Rice & Associates v Customs and Excise Comrs* was wrongly decided, as it was concerned with a different factual situation (an invoice sent to a client before the consultant was registered for VAT). On this point I cannot usefully

> add more to the observations of my noble and learned friend Lord Hoffmann, whose opinion I have had the advantage of reading in draft.

60. Although Lord Walker referred to the observations of Lord Hoffmann, his judgment in *RSA* makes no mention of *BJ Rice*.

**THE FTT'S DECISION**

61. Now that we have summarised the relevant aspects of the four key authorities relied on by the parties, it is possible to describe and understand the discussion and reasoning in the FTT's decision, which we now summarise. References below to paragraphs in the form [x] are, unless indicated otherwise, to paragraphs of the Decision.

62. The FTT helpfully set the scene at [2]:

> There is no disagreement on the facts. The issue is a pure point of law: briefly, whether the payments for SCL's services are outside the scope of charge because it rendered its services to the Appellant while it was a member of the Appellant's VAT group (the Appellant's position), or whether the payments are within the charge to VAT because they were invoiced and paid after SCL had ceased to be a member of the Appellant's VAT group (HMRC's position).

63. Having summarised the facts and legislation, the FTT set out the contentions of the parties. Ms Yang and Mr Mantle also appeared for Prudential and HMRC before the FTT. Prudential did not dispute that SCL's services were for supplied "for a consideration the whole or part of which is determined or payable periodically or from time to time" within Regulation 90. However, Prudential argued that "section 43 has a fundamental effect on the analysis, namely that there is no supply to which the time of supply rules can apply". Section 43, said Prudential, requires one to disregard for tax purposes transactions taking place between Prudential and SCL during the time that they were both members of the same VAT group, with the result that there was no supply (in the language of VATA 1994) or chargeable event (in the language of the PVD). In the absence of such a supply, the timing provision in Regulation 90, which is premised on services being "supplied", simply does not come into play, said Ms Yang. HMRC submitted that VAT was due because, applying the rules for the time of continuous supplies of services, SCL's services must be treated as being separately and successively supplied each time that SCL received a payment or issued a VAT invoice relating to those services. At those dates, Prudential and SCL were not members of the same VAT group. The FTT stated at [33]:

> …as HMRC note, the issue is whether SCL's services should be disregarded *entirely* as a result of section 43(1) VATA. The Appellant says that that is the effect of section 43. HMRC, on the other hand, say essentially that they are only disregarded to the extent that SCL's services are treated as supplied while SCL is a member of the Appellant's VAT group: in other words, applying section 43 in conjunction with the time of supply rules of section 6 VATA and Regulation 90.

64. Having considered the key authorities relied on by the parties (summarised above), the FTT briefly considered the EU principle of fiscal neutrality (which we discuss below) but did not find it of any great assistance in determining the issue.

65. It is helpful to set out the FTT's reasoning and conclusion in full:

> 70. To my mind the authorities to which I have referred clearly establish that the time of supply rules - in this case Regulation 90 - are applied to determine

when a supply of services should be treated as taking place, including for determining whether the supply is between two members of a VAT group. On that basis, SCL's actual supply of investment management services to the Appellant are treated as supplied when they were invoiced, at which time the Appellant and SCL were not members of a VAT group. On that basis, therefore, those supplies do not fall to be disregarded.

71. That might suggest that I should conclude the appeal in favour of HMRC. However, as I have noted, while it was a member of the Appellant's VAT group, SCL's business was treated as being carried on by the Appellant. As Lord Nolan recognised in *Thorn Materials*, on 9 November 2007 SCL emerged blinking into the sunlight of the 'real' world from the dark subterrains of the VAT group world, to start life as a separate taxable person, carrying on its own business for VAT purposes. Prior to that event, in the VAT world, SCL had no business and made no supplies. And yet the operation in the VAT world, rather than the real world, of Regulation 90 is said to suffice to satisfy all the elements of the charge to tax identified by section 4 VATA. In other words, it seems to me that one must take SCL's real world supplies - the investment management services that it provided to the Appellant as a group member - and in the VAT world treat them as being supplied when they were invoiced.

72. I have two difficulties with that approach: first, it mixes the real world with the VAT world to create a tax charge. In the tax world that might not be such an unusual result and if it is in fact what the legislation provides for, I must respect it. On the other hand, to lift supplies out of the VAT group world only to place them in an alternative VAT time of supply world must give pause for thought. I do not detect such a mixed approach in the authorities to which I have referred in order to impose tax or to deny input tax credit. In the real world, SCL only ever supplied investment management services as a member of the Appellant's VAT group. Regulation 90 may be intended to treat that supply as made when the performance fees are invoiced, but does it go so far as to direct that in its VAT time of supply world, what were group services are not group services and that those services are supplied in the course or furtherance of a business that in the VAT group world was not being carried on?

73. One might possibly be persuaded that this is the effect of Regulation 90 and that when section 6(1) VATA and Regulation 90 refer to "a supply of goods or services" and to "services being supplied for a period for a consideration", they are extracting real world services from the VAT group world in which they exist and treating them as supplied at a later time in the VAT time of supply world, so as to create a liability to tax. None of the various authorities to which I have referred, however, are direct authority for that result, and two of them - *Svenska* and *RSA* - concern the rules governing entitlement to input tax credit, which can raise different considerations. More to the point, however, I have been unable to see what feature distinguishes the Appellant's case from that of the taxpayer in *B J Rice*.

74. Certainly, *B J Rice* did not involve the VAT group rules. However, the character of the supply in that case was a taxable supply made in the course or furtherance of the taxpayer's business. The only missing element for liability was that that the taxpayer was not registered or liable to be registered when the supply was originally made. If, in the Appellant's case, Regulation 90 operates to lift its services out of the VAT group world and, for the purposes of charging tax, place them in the situation that exists in the Regulation 90

> time of supply world, then I am unable to see why there was no charge to tax in *B J Rice*.
>
> 75. The fact that the taxpayer in *B J Rice* was not within the scope of the tax at the time of the original supply (and its invoicing) might perhaps be suggested as a distinguishing feature. The same, however, must surely be the case for SCL. SCL was a member of the Appellant's VAT group throughout the time when it actually rendered the investment management services in question. Section 43(1) VATA clearly states that throughout that time any business carried on by a member of the group is to be treated as carried on by the representative member. This direction is not tied to any of the time of supply rules and would seem to place SCL in a similar position to that of the taxpayer in *B J Rice*.
>
> 76. Otherwise, Lord Hoffmann's remarks in *Thorn Materials* are insufficient for me to distinguish *B J Rice* and neither Arden LJ nor Lord Walker in RSA suggested that *B J Rice* was wrongly decided. If there is a point of distinction - and I have not been convinced by HMRC's arguments in this appeal that there is one - I think it must be for a higher Tribunal or Court to find it.
>
> 77. Accordingly, I decide this appeal in favour of the Appellant.

**ARGUMENTS OF THE PARTIES**

## HMRC

66. HMRC contend that Regulation 90 must first be applied to ascertain the time of supply of the Services. This includes for the purpose of deciding whether the supply was made at a time when the supplier and the recipient of the services were members of the same VAT group.

67. HMRC say that this approach is supported by binding House of Lords authority, namely *Thorn Materials* and *Svenska*. The FTT, they say, failed properly to understand and apply those authorities. Even if we find that they are not strictly binding on this point, Mr Mantle says that they are closely analogous and their reasoning on the mandatory application of the time of supply rules and their interaction with section 43(1) is highly persuasive and should be followed by this Tribunal. This approach also produces legal certainty and a consistent approach to section 43(1).

68. The FTT also erred in law, say HMRC, by determining the time of supply of the Services by reference to when they were "actually rendered"; this was the kind of "meta-rule" criticised by Lord Hoffmann.

69. Mr Mantle argues that the FTT further erred in law in concluding that it was bound to allow Prudential's appeal by reason of the decision in *BJ Rice*. That case did not involve the issue in this appeal, being the interaction between Regulation 90 and section 43(1). *BJ Rice* can be distinguished on several grounds, and should, following judicial comment, be restricted to its facts.

70. Aside from these material errors of law, HMRC reject the FTT's criticism that HMRC's approach "mixes the real world with the VAT world to create a charge". They say that that is a necessary corollary of the impact of time of supply rules.

## Prudential

71. Ms Yang said that the FTT reached the right result. It correctly concluded that even if, contrary to Prudential's case, Regulation 90 could be applied to the supply of the Services, as a result of section 43(1) the resulting supplies could only have been made in the course or furtherance of a business carried on by Prudential, not SCL.

72. The FTT was also right, argued Ms Yang, to consider itself bound by *BJ Rice*, which remains good law. *BJ Rice* is directly applicable and is binding authority that the presence or absence of the four factors identified in that case as necessary for a VAT charge must be determined when the relevant real-world transaction is carried out.

73. Ms Yang also submitted the following additional reasons why HMRC's appeal should be dismissed:

> (1) HMRC's approach is inconsistent with the purpose and effect of section 43(1), which is to ignore all intra-group transactions: *Taylor Clark Leisure plc v HMRC* [2018] UKSC 35 ("*Taylor Clark*"), and *Lloyds Banking Group plc v HMRC* [2019] EWCA Civ 485 ("*Lloyds Banking*").
>
> (2) HMRC's position breaches the EU law principle of fiscal neutrality. This precludes differential treatment of similar transactions for VAT purposes.
>
> (3) Only Prudential's position is consistent with the aim of Article 11 of the PVD, as shown in the relevant European and domestic case law.
>
> (4) The problems created by HMRC's approach could be seen by applying it in the context of section 47 VATA 1994 (supplies involving agents).

### DISCUSSION: RELEVANT CASE LAW

74. We begin by considering the relevance of the four key authorities to the construction of the legislation which we set out above, before we turn to Ms Yang's alternative reasons for supporting the FTT's conclusion.

75. As we have said, none of the authorities deals with the interaction of Regulation 90 and section 43(1).

76. The decision which clearly carried most weight in the FTT's reasoning was *BJ Rice*. The FTT ultimately decided that it was "unable to see what feature distinguishes the Appellant's case from that of the taxpayer in *BJ Rice*", and that it could find no "point of distinction" between the two cases. The FTT did not consider that it mattered that *BJ Rice* was not concerned with the VAT grouping rules. Noting that the taxpayer in *BJ Rice* was not within the scope of VAT at all at the time of the "actual" supply, the FTT considered that "the same… must surely be the case for SCL". The comments in *Thorn Materials* and *RSA* regarding *BJ Rice* were insufficient, said the FTT, to distinguish *BJ Rice*.

77. We consider that the FTT was in error in reaching these conclusions.

78. It was a clear point of distinction, in relation to the present case, that the taxpayer in *BJ Rice* was not a taxable person because he was not registered for VAT when he rendered the services and invoiced them. The issue of principle before the Court of Appeal was therefore

whether a person *entirely outside the scope of VAT* could become liable to VAT at a later date by virtue of the time of supply rules. We consider that the FTT was wrong to say that the same must surely be the case for SCL. Section 43(1) sets out a specific but limited set of assumptions and disregards for supplies between members of a group, but they do not create a position where SCL is not a taxable person and is entirely outside the scope of VAT. As Lord Hoffmann explained in *Thorn Materials*, the grouping rule "does not say that everything which happens between group companies shall be disregarded". Moreover, as he observed at 1117D:

> …section [43] does not say that the members of the group shall be treated as one person. Instead, it contains certain specific deeming provisions and disregards.

79. So, what the Court of Appeal decided in *BJ Rice*, and the only issue which they had to decide, was that the time of supply rules did not fix the time for determining whether a person was a taxable person for VAT purposes. That is a different question to the question in this appeal. Mr Rice, unlike SCL, did not have to rely on any assumption or disregard to maintain his argument that he was not a taxable person at the time when he rendered the services. There was no interaction, or conflict to be resolved, between two competing statutory provisions.

80. Perhaps the high water mark of Prudential's case based on *BJ Rice* is this. The Court of Appeal in *BJ Rice* decided that (1) it was necessary to determine whether Mr Rice was a taxable person at the time when the supply was "actually made", and (2) the time of supply rules were "obvious bookkeeping sections" which could alter the time of a supply but not whether it was made by a taxable person. If that basic approach were to be extended and carried across to the situation in the current appeal, then it would call into question the construction of the statutory provisions which we set out above.

81. So, the real question in this appeal is whether the approach of the majority of the Court of Appeal in *BJ Rice* should be extended and carried across in relation to a different legal situation and a different factual matrix, so as to look solely at when the supply of Services was "actually made", and treat the time of supply rules as having no effect on the VAT position.

82. It is clear that it would not be appropriate or justified to do so, for three reasons.

83. First, the facts in *BJ Rice* were highly unusual, and, importantly, the majority went out of their way to express concerns about the many injustices which they considered would be caused to Mr Rice by HMRC's position (which concerns Sir Ralph Gibson concluded in his dissenting judgment were "not…of such an order that the court should depart from…the plain meaning of the provisions"). We also note in passing (as did Arden LJ in *RSA*) that Mr Rice had even issued an invoice at the time when the services were rendered, albeit that it could not constitute a VAT invoice because he was not then a taxable person.

84. Second, in the decision of the House of Lords in *Thorn Materials*, Lord Hoffmann referred with evident disapproval to the use, as an alternative to the time of supply rules, of "some kind of meta-rules, derived from fairness, common sense and other such concepts lodged in the judicial bosom". He stated that this was the technique apparently used by the majority of the Court of Appeal in *BJ Rice*. He said that such an approach "cannot be right". In *RSA*, Arden LJ in the Court of Appeal referred with approval to Lord Hoffmann's comments "in so far as [*BJ Rice*] is thought to establish any wider restriction on the time of supply rules" than that imposed in *BJ Rice* itself. That is a clear counsel to exercise caution in extending the application of the approach in *BJ Rice*.

85. Ms Yang points out that these were both dissenting judgments. That is so, but Lord Hoffmann was in fact at one with the majority in deciding that the time of supply rules must first be applied to determine when a supply takes place, his dissent being limited to the consequences of that approach for the VAT payable on delivery. In the House of Lords in *RSA* Lord Walker expressly approved the analysis and conclusion of Arden LJ. Ms Yang said that there is no indication in any of the judicial comments that *BJ Rice* was not binding. However, that is not the same question as whether the judicial comments indicate that the underlying approach in *BJ Rice* should be more widely applied. Lord Walker gave a similar steer to Lord Hoffmann and Arden LJ when he stated (emphasis added to original):

> That does not **necessarily** involve saying that *B J Rice & Associates v Customs and Excise Comrs* was wrongly decided, as it was **concerned with a different factual situation** (an invoice sent to a client before the consultant was registered for VAT).

86. Ms Yang also pointed out that *BJ Rice* was cited to the House of Lords in *Svenska* but not referred to in the decision. We do not think that anything can be drawn from that for either party.

87. Third, and most importantly, extending the approach adopted in *BJ Rice* more generally would be in conflict with the majority decisions of the House of Lords in *Thorn Materials* and *Svenska*, to which we now turn.

88. In *Thorn Materials*, Lord Nolan accepted that the time of supply rules must be applied to determine "whether and if so when" a supply between members of a group took place. He described such an approach as "essential", stating that unless a supply during the group relationship is identified, there is nothing on which section 43(1) can bite. Lord Hoffmann, although dissenting on the consequences of such treatment, agreed with this, stating that there was no way in which one could identify whether a supply has occurred while the parties were members of the same VAT group except by the application of the time of supply rules.

89. The FTT decided (at [70]) that on the basis of this approach the supplies in this appeal would not fall to be disregarded under section 43(1). However, it then continued by reaching the contrary conclusion, apparently on the bases that (i) the VAT treatment in what the FTT called "the VAT group world" precluded the operation of Regulation 90, (ii) none of the cases was direct authority for HMRC's position, and (iii) the taxpayer's position was on all fours with *BJ Rice*.

90. The FTT was correct to note that *Thorn Materials* is not direct binding authority in relation to the issue in this appeal. It was common ground in that case that on delivery of the goods a chargeable event occurred for VAT purposes, although the parties disagreed as to the consequences, whereas in this appeal Prudential's case is that there was never any chargeable event in relation to the Services. However, it is very strong persuasive authority that the time of supply rules must first be applied in order to determine whether a supply falls within section 43(1). It therefore offers strong support for our construction of the statutory provisions.

91. Ms Yang sought to draw support for Prudential's position from *Thorn Materials*. She pointed to the FTT's observations at [46] regarding Lord Nolan's comments (at 1112C-E) in respect of the position where there is a prepayment for goods followed by a transfer of ownership of those goods within a VAT group, when any VAT paid would fall to be refunded. The FTT considered (at [46]) that this "appears to be a close analogy to the Appellant's situation". The FTT continued:

> In Lord Nolan's illustration, there is still an actual supply of goods in the real world but, as he notes, section 43 operates to ensure there is no chargeable event by reference to which tax can be charged. Similarly, in SCL's case there was no chargeable event at the time the actual supply was made. If the time of supply rules are inadequate to bring forward a future intra-group supply of goods to a time at which group membership did not exist, it is difficult to see why the same time of supply rules should be effective to attribute a past intra-group supply of services to a later payment of the consideration for those services.

92. We do not agree. We consider that the FTT was wrong simply to read across Lord Nolan's example to a supply of continuous services, because the very question at issue in the appeal was whether the time of supply rules operated to shift the time of supply away from the time of the "real world" supply, as the FTT called it. The conclusion which the FTT sought to read across was also inconsistent with the clear statements of Lord Nolan, which we set out at paragraph 50 above, regarding the necessity of first applying the time of supply rules to determine whether a supply was a group supply. The FTT failed to refer to or consider this key passage in the Decision. It thereby fell into error in determining the relevance and importance of the judgments in *Thorn Materials* to the issue in the appeal. That lay not in what might be extrapolated from Lord Nolan's example, but in the pronouncements regarding the application of the time of supply rules in the context of section 43(1) and in Lord Hoffman's criticisms of the approach adopted by the Court of Appeal in *BJ Rice*.

93. Turning to *Svenska*, as noted in the passages set out above, the issue was different to that in *Thorn Materials*, because the dispute was not about the effect of what was agreed to be a supply, but rather whether "actual supplies" were supplies for the purposes of reclaiming input tax when they fell within (the predecessor to) section 43. Svenska sought to argue that the grouping rule did not operate to prevent the court from finding that Svenska had made "actual supplies" to its London subsidiary prior to 1 August 1991, even though prior to that date no payment had been received or invoice issued. As set out at paragraph 56 above, Lord Hutton rejected that submission.

94. Ms Yang points out, in seeking to distinguish *Svenska*, that (1) it was common ground in *Svenska* that the effect of the time of supply rules was to fix the date of supply of services rendered prior to 1 August 1991 as being the time in 1992 when an invoice was issued for those services and (2) the extent of the application of the time of supply rules was common ground. The latter point is in our view misleading; the extent of their application was very much in dispute, as is clear from Lord Hutton's judgment. In any event, while *Svenska* is, as we have said, not binding authority on the issue in this appeal, the differences between *Svenska* and this appeal do not mean that the reasons given by Lord Hutton for his conclusions do not support HMRC's position, and our construction of the legislation. Those reasons also provide no support for following the approach taken in *BJ Rice* of looking at the time of "actual supplies" as being determinative (although we accept that that decision was not mentioned by the House of Lords). Indeed, if Lord Hutton's reasoning is applied in the present case, it would produce the result that the supply of the Services must, for all relevant purposes, be treated as occurring when the Services were invoiced, in 2015/16. That reasoning is not consistent with Ms Yang's arguments either as to the effect of the Disregard or as to the effect of the Assumption.

95. The FTT described *Svenska* and set out extracts from it, but the only specific reference to *Svenska* in its reasoning was at [73], when it stated that *Svenska* and *RSA* "concern the rules governing entitlement to input tax credit, which can raise different considerations". That is correct so far as it goes, but misses the point. In the absence of direct binding authority, the

relevant question for the FTT was whether what was said by their Lordships in *Svenska* as to the operation and effect of the time of supply rules, albeit in the context of a different issue, supported one party's construction of section 43(1) and Regulation 90 or the other's. There is no doubt that what was said supported HMRC's construction, although not so explicitly as the statements we have discussed in *Thorn Materials*. The fact that input tax credits "can raise different considerations" is not of itself a good reason for discounting or ignoring the comments made by their lordships, in the absence of an indication from the House of Lords that those comments were explicitly or implicitly restricted to a situation where the time of supply question was relevant to an input tax credit recovery.

96. *RSA* also concerned a different VAT question to that in this appeal, and, as we have said, its relevance lies in the steer which it gives that the approach in *BJ Rice* should not be extended to other factual situations where the time of supply is in issue. Ms Yang argued that Arden LJ's criticisms of Park J's reliance on *BJ Rice* were limited to the relevance of *BJ Rice* to the specific issue of whether a single supply of a lease could be converted into a series of successive supplies. She further argued that Lord Walker "gives no indication that, in his view, *BJ Rice* remains anything but good law". As explained above, we do not agree. The criticisms and caveats of Lord Hoffmann and Arden LJ were expressed in general terms, and when the House of Lords says that a controversial decision of an inferior court was not "necessarily" wrongly decided as it concerned different facts, that is a clear note of caution.

97. We now consider Ms Yang's alternative reasons for supporting the FTT's conclusions.

#### PRUDENTIAL'S ALTERNATIVE REASONS FOR REJECTING HMRC'S APPEAL

### Purpose of section 43(1)

98. Ms Yang said that binding authority establishes that the purposes of section 43 include (1) ignoring intra-group transactions (2) disregarding intra-group supplies in relation to liability for VAT, and (3) treating the representative member as if it were carrying on all of the businesses of the other members as well as its own: *Taylor Clark*. Thus, she argued, the provision of investment management services between SCL and Prudential during the group period must be disregarded or ignored consistently with those purposes.

99. Ms Yang also relied on the judgment of Rose LJ (as she then was) in *Lloyds Banking*. The issue in that case was which company was entitled to claim a refund in respect of VAT which had been overpaid by the representative member of a VAT group that had been dissolved. Ms Yang referred to statements by Rose LJ relating to the effect of VAT grouping as established by EU authorities, including that "a VAT group's internal transactions do not exist for VAT purposes". Rose LJ stated that the principle of legal certainty militated against a regime whereby a supply originally treated as made by the single taxable person could be affected by a later event such as a change in group membership or the group being dissolved. Ms Yang said that HMRC's position clearly ran contrary to the principles identified in Rose LJ's judgment by imposing a VAT charge on a "real-world supplier" leaving the VAT group.

100. We do not consider that this argument does anything to advance Prudential's case. The statements to which we were referred in *Taylor Clark* and *Lloyds Banking* all describe, in uncontroversial terms, the *consequences* of VAT grouping. However, the issue in this appeal is *whether* the relevant supply of Services was a group supply in the first place. We have concluded that it was not, because it was treated as taking place by Regulation 90 at a date long after group membership had ceased. So, while Rose LJ does refer to departure from a VAT group not "unwinding" a supply originally treated as made within the group, that entirely begs

the question of when, and therefore whether, there was a group supply in the first place. The place of supply rules do not retrospectively replace or "unwind" one VAT point with another in relation to continuous services as defined. Rather, they fix the time of supply as the date of payment or issue of an invoice. If that date so fixed takes place at a time when the companies are in the same VAT group, then section 43(1) would apply, with the consequences described by Rose LJ. However, that was not the situation in this appeal.

**Fiscal neutrality**

101. Ms Yang renewed the argument made before the FTT that HMRC's position breached the EU law principle of fiscal neutrality. In her oral submissions, Ms Yang referred variously to the principles of fiscal neutrality and legal certainty.

102. The principle of fiscal neutrality precludes treating similar goods and similar economic transactions, which are thus in competition with each other, differently for VAT purposes.

103. Ms Yang's argument is that, on HMRC's case, the Services were liable to VAT, but "no VAT liability could arise where one division of a company provides investment management services to another division of the same company that sells insurance and, following a demerger, two successor companies emerge where one benefits from returns on the investments in return for making proportionate payments to the other". Thus, Ms Yang says, the principle of fiscal neutrality is undermined on HMRC's case by imposing negative consequences in terms of VAT liability for a group rather than a single-entity structure.

104. We have no hesitation in rejecting this argument. The comparator "similar economic transaction" on which Ms Yang relies is wholly inapt. There is a fundamental difference, in legal, tax and economic terms, between a company with single legal personality which has divisions and two companies with separate legal personality[6]. Nor is there any breach of the principle of fiscal neutrality if, in compliance with Article 11, a Member State permits two entities to be members of the same VAT group and to cease to be so. It was not argued by either party that section 43(1) or Regulation 90 are not complaint with the PVD. Ms Yang's real argument is that section 43(1) should be given the statutory construction for which Prudential contend, but there is nothing in the principle of fiscal neutrality which supports that argument. Article 11 is permissive rather than prescriptive, and Member States have chosen to implement it in a myriad of ways and subject to various conditions. Nor is it the case that HMRC's construction imposes negative consequences in terms of VAT for a group rather than a single entity structure; two entities may benefit from section 43(1) in respect of supplies taking place while they are members of the group, and as regards supplies taking place after the supplier has left the group, the supplier will be treated in the same way as other suppliers in relation to Regulation 90.

105. So far as legal certainty is concerned, being the requirement that the law is clear and unambiguous and its implications foreseeable, HMRC's construction of the time of supply rules satisfies that principle. A company providing continuous services would, if properly advised, be aware that if those services were rendered while within a group but invoiced after the company had left the group, the law would clearly have the result that VAT would be due. We suspect that Ms Yang's underlying argument is really an echo of the concerns expressed by the Court of Appeal in *BJ Rice* that the time of supply rules could impose VAT retrospectively. However, the UK's time of supply rules are not argued by Prudential to be

[6] Although we do not rely on it in reaching our decision, we also agree with the FTT's observation, at [69], that performance fees are unlikely to arise between divisions of a single entity.

incompatible or inconsistent with the PVD[7], and their operation in this case in fact postponed VAT until long after the investment management services were rendered.

**Article 11**

106. Ms Yang referred to various EU authorities regarding the purpose and effect of Article 11. She argued that Prudential's position, unlike that of HMRC, was firmly aligned with the aim of Article 11, which she described in oral submissions as being that "arrangements that have happened within a VAT group have no consequence".

107. The objectives of Article 11 were identified by the CJEU in *European Commission v Ireland* (Case C-85/11) in the following terms:

> 47. As regards… the objectives pursued by Article 11 of the VAT Directive, it is apparent from the Explanatory Memorandum to the proposal which resulted in the adoption of the Sixth Directive (COM(73) 950) that, by adopting the second subparagraph of Article 4(4) of the Sixth Directive, which was replaced by Article 11 of the VAT Directive, the European Union legislature intended, either in the interests of simplifying administration or with a view to combating abuses such as, for example, the splitting-up of one undertaking among several taxable persons so that each might benefit from a special scheme, to ensure that Member States would not be obliged to treat as taxable persons those whose 'independence' is purely a legal technicality.

108. We see nothing in these objectives which supports the position of either party in relation to the issue in this appeal. Insofar as Ms Yang referred to EU authorities regarding the effect of Article 11, as we have said above, the issue in this appeal is not the consequences of section 43(1) where it applies but whether section 43(1) applies to the supply of Services in the first place. Article 11 is permissive in nature, and creates no directly enforceable rights in the United Kingdom: *Beteiligungsgellschaft Larentia + Minerva mbH & Co. KG v Finanzamt Nordenham* (C-108/14 and C-109/14) ("*Larentia*"). It is for Member States to specify in their domestic legislation precisely what "close links" are necessary between two persons in order for them to be treated as a single taxable person: *Larentia* at [50]. In our opinion Article 11 sheds no particular light on the issue in this appeal.

**Section 47 VATA 1994**

109. We can deal with this point briefly. Ms Yang argued that the rules which deem there to be or not be a supply must logically precede any rules that deem the supply to have been made at a particular time. In a footnote to her skeleton argument, which she touched on in oral submissions, Ms Yang referred to section 47 VATA 1994, which deals with certain supplies regarding agents, and asserted that where supplies are made through an agent section 47 must be applied first to determine whether there is a deemed supply before any time of supply rules are considered.

110. We express no view on that assertion. The issue in this appeal is not whether time of supply rules must always be applied before any other provisions of the VAT legislation. Section

[7] The time of supply rules which are permitted by Article 66 of the PVD are expressed as a derogation from all of Articles 63, 64 and 65, so we do not accept that Regulation 90 should, by virtue of Article 63, be read such that in the present case a "chargeable event" must be treated as occurring during the period of membership of the VAT group.

47 is not relevant to the issue in this appeal, which is the interaction between section 43(1) and Regulation 90.

**CONCLUSIONS**

111. Approaching the issue as a matter of the statutory construction of section 43(1), we have set out above our reasons for concluding that the supply of Services took place at a time when the parties were no longer members of the same VAT group. We have considered the extent to which the key authorities, none of which deals with the precise issue in this appeal, are consistent or inconsistent with that construction. As explained above, the statements made by the House of Lords in *Thorn Materials* and *Svenska* strongly support our conclusion on the construction of the legislation that the time of supply rules must first be applied to determine whether a particular supply falls within section 43(1). If the approach of the Court of Appeal in *BJ Rice* to a materially different issue (whether the time of supply rules could operate to make a person entirely outside the scope of VAT liable to VAT at a later date) were to be extended to the situation in this appeal, then that would call our construction into question. However, for the reasons we have given we are clear that it would not be appropriate or correct so to extend *BJ Rice*.

112. We have explained why we do not accept any of Ms Yang's alternative reasons for upholding the FTT's decision.

113. Returning to that decision, the FTT's essential reasoning is at [70]-[76], set out at paragraph 65 above, and can be summarised as follows:

(1) The FTT began, at [70], with the correct analysis.

(2) It then introduced a distinction between "the real world" and "the VAT group world", and considered whether "one must take SCL's real world supplies…and in the VAT world treat them as being supplied when they were invoiced". The FTT said that it had two difficulties with that approach. The first was that it "mixes the real world with the VAT world to create a tax charge". The second difficulty was not stated explicitly by the FTT, but it may be the statement at [73] that none of the authorities was direct authority for that result, and two of them, *Svenska* and *RSA*, concerned input tax credits.

(3) The FTT then placed most weight on *BJ Rice*, stating "[m]ore to the point…I have been unable to see what feature distinguishes the Appellant's case from that of the taxpayer in *BJ Rice*". The FTT acknowledged (at [75]) that Mr Rice was not within the scope of VAT at the time of the original supply and invoicing, but stated that "the same…must surely be the case for SCL". The FTT considered that this was the necessary effect of section 43(1), because at the time when SCL "actually rendered the investment management services", section 43(1) meant that any business carried on by a member of the group was to be treated as carried on by Prudential. That direction, said the FTT, "is not tied to any of the time of supply rules and would seem to place SCL in a similar position to [Mr Rice]."

(4) The FFT concluded at [76] that Lord Hoffmann's remarks in *Thorn Materials* were insufficient to distinguish *BJ Rice* and that neither Arden LJ nor Lord Walker in *RSA* suggested that *BJ Rice* was wrongly decided.

114. In reaching its decision we conclude that the FTT made the following errors of law:

(1) The FTT correctly concluded that the Services fell to be treated as supplied when invoiced, and that as SCL was not a member of the Group at that time, the supply was not subject to the Disregard. It erred in law in not applying the same analysis and conclusion in respect of the Assumption. The Services were not assumed by virtue of section 43(1) to be supplied by Prudential because they were supplies which took place in 2015/16.

(2) The FTT expressed concern at mixing the "real world" with the "VAT world" to create a tax charge, but its own approach mixed the real world and the VAT world in order to avoid a VAT charge. It took services which in the real world were rendered by SCL in the course of its business and applied to them a "VAT world" treatment in which SCL's business was assumed to be carried on by Prudential.

(3) It was a material error of law to regard the position of SCL as being indistinguishable from that of Mr Rice. SCL was not entirely outside the scope of VAT when the Services were rendered, but rather it was subject to a specific set of assumptions and disregards. The FTT therefore erred in regarding itself as bound by *BJ Rice* to allow Prudential's appeal.

(4) Since none of the decided cases provided direct authority for the issue in the appeal, the FTT should have given weight to the comments of Lord Hoffmann, Arden LJ and Lord Walker in deciding whether to extend the approach adopted by the Court of Appeal in *BJ Rice*.

**DISPOSITION**

115. The FTT made errors of law which were clearly material, because they caused it to allow Prudential's appeal. We therefore set aside the Decision.

116. Having set the Decision aside, we may either re-make it or remit it to the FTT: section 12(2)(b) Tribunals, Courts and Enforcement Act 2007. There is no dispute as to the facts and no reason to remit the appeal to the FTT. We therefore re-make the Decision and dismiss Prudential's original appeal to the FTT against HMRC's decision that VAT is chargeable on the provision of the Services.

117. HMRC's appeal is allowed.

## Postscript

118. In accordance with the usual practice, we circulated our decision, in draft form, for the parties to have the opportunity to suggest typographical corrections. On Prudential's side the corrections were provided by Prudential's solicitors, who included with their corrections a series of assertions that we had failed accurately to record the submissions of Ms Yang in a number of paragraphs of our draft decision.

119. We do not regard any of these assertions as well-founded but, for the sake of completeness, we will, as briefly as the assertions allow, deal with these assertions. For the avoidance of doubt the paragraphs of our draft decision which were the subject of these assertions have not changed in this final version of our decision.

120. In relation of paragraph 30 of our draft decision it was asserted that we had not recorded Ms Yang's submission that *"supply"* in Section 43(1)(a) of VATA 1994 should be read as a

*"transaction"*. We were referred to paragraphs 17, 42, 46, 47, 84 and 87 of Prudential's skeleton argument. The assertion concluded in the following terms (we have added the underlining):

> *Counsel for the Respondent was not inviting the Tribunal to rewrite the wording of the statute without basis, or by reference only to a "commercial expression.*

121. We have some difficulty in understanding this assertion. In paragraph 30 of our decision we are commenting on the fact that Ms Yang, in her oral submissions, used the word *"transaction"*, when referring to the supply of the Services. Section 43(1)(a) refers to a *"supply"* of goods or services, not to a transaction. Describing a supply of services in the context of Section 43(1)(a) as a transaction seeks to re-write the statute, which is the point we are making in paragraph 30 of our decision. We are therefore commenting on the language used in Ms Yang's oral submissions. We are not dealing with an invitation by Ms Yang to rewrite the statute. Not surprisingly, Ms Yang made no such submission. Our point was that Ms Yang's reference to transaction, in her oral submissions, had the effect of seeking to rewrite the statute.

122. Turning to the specified paragraphs of Ms Yang's skeleton argument, those paragraphs make reference to various legal materials relied upon by Ms Yang in support of her submissions. We have dealt with these legal materials, and the submissions based upon them, in our decision. The specified paragraphs have nothing to do with the point we are making in paragraph 30 of our decision. Beyond this, it was not Ms Yang's written or oral submission that *"supply"* in Section 43(1)(a) means *"transaction"*. The relevant submission of Ms Yang, which for various reasons we have rejected, was that on the facts of this case and on the construction of the relevant statutory provisions for which she contended, there was no supply of the Services by SCL, upon which Regulation 90 could operate.

123. In reality, it seems to us that this assertion is seeking to re-argue the relevant parts of Prudential's case, by fixing on paragraph 30 of our decision which, as we have explained, was concerned with a different point. This is borne out by the conclusion to the assertion which we have quoted above. As the underlined sections of the conclusion make clear, we are being asked to revisit submissions of Ms Yang which we have already rejected.

124. In relation to paragraphs 31, 32 and 34 of our draft decision, Prudential's solicitors have asserted that we have failed accurately to record Ms Yang's submissions. We do not agree. These paragraphs, so far as they are recording submissions made by Ms Yang, record what those submissions were. This is confirmed by a reading of paragraphs 27 and 28 of Ms Yang's skeleton argument, which are said by Prudential's solicitors to set out some different submission. In reality, it seems to us that what is now asserted by Prudential's solicitors in relation to these parts of our decision constitutes an attempt to re-argue the relevant submissions of Ms Yang, dressed up in a different way.

125. The only point we would add to this is that Ms Yang's submissions were not confined to her skeleton argument. They included her oral submissions at the hearing itself. In arriving at our decision, we have of course taken careful account of all of Ms Yang's submissions, both written and oral.

126. Finally, it is asserted that it was no part of Prudential's case to rely upon Section 43(1)(b). It is asserted that this was made clear in paragraph 42 of Prudential's skeleton argument. Paragraph 42 of Ms Yang's skeleton argument endeavoured to bring out the following alleged inconsistency of effect:

*There is a legitimate and necessary inconsistency in the intended effects of sections 43(1)(a) and 43(1)(b) VATA 1994…*

127. We find it somewhat difficult to understand how Section 43(1)(b) can be said not to have been relied upon, in circumstances where the relevant paragraph of the skeleton argument sought to rely on Section 43(1)(b) to draw out what was said to be *"a legitimate and necessary inconsistency in the intended effects"* of the two paragraphs of Section 43(1). It may be that the point comes down to an arid debate over what is meant by the concept of reliance.

128. In any event, this is largely beside the point. In paragraph 34 of our decision we are addressing the argument (forming the basis of the FTT's decision) that if the Disregard did not apply, the supply of the Services would nevertheless be treated under the Assumption as made by Prudential. As we point out, section 43(1)(b) is not relevant in the present case because there was no supply by or to a member of the group to or from a person outside the group. The argument in paragraph 42 of Ms Yang's skeleton argument is dealt with elsewhere in our decision, specifically at paragraphs 98-100.

**MR JUSTICE EDWIN JOHNSON**
**JUDGE THOMAS SCOTT**

**Release date: 06 March 2023**