Neutral Citation: **[2024] UKUT 00162 (TCC)**

Case Number: UT/2023/000009

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

VAT - exemption – Article 132(1)(b) VAT directive – provision of healthcare in prisons - whether FTT erred in holding supplies of drugs and contraceptives were not separate taxable supplies – no – appeal dismissed

Heard on: 20 and 21 March 2024
Judgment date: 6 June 2024

Before

MR JUSTICE ZACAROLI
JUDGE SWAMI RAGHAVAN

Between

SPECTRUM COMMUNITY HEALTH CIC

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Melanie Hall KC and Ciar McAndrew, Counsel, instructed by RSM UK Tax and Accounting Limited

For the Respondents: James Henderson and Stephen Donnelly, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The appellant, Spectrum Community Healthcare CIC ("Spectrum") provides, or sub-contracts provision of, various healthcare services in prisons in England pursuant to a contract with NHS England ("NHSE"). This appeal concerns the VAT treatment of those.

2. It is agreed that the medical care provided to prisoners is exempt for VAT purposes. Spectrum argues however, on the basis of case-law applying the relevant medical exemptions in Article 132(1)(b) and (c) of the Principal VAT Directive ("PVD"), that its supplies of prescription drugs and non-prescribed contraceptives are separate non-exempt supplies. The turnover generated by those separate taxable supplies (which are respectively zero-rated and reduced rated) would require Spectrum to be VAT registered (with the consequence Spectrum could recover the input tax attributable to those taxable supplies; input tax that would otherwise be irrecoverable if the supplies were comprised within a single exempt supply of healthcare).

3. In agreement with HMRC, the FTT decided that Spectrum made a single exempt composite supply of "primary healthcare or health and social care", components of which included the provision of drugs and contraceptives, which fell within the exemption in Article 132(1)(c) of the PVD.

4. With the permission of the FTT, Spectrum appeals to the Upper Tribunal on a number of grounds. To understand those and the relevant parts of the FTT Decision it is convenient to start with the legal framework to VAT and the relevant European and domestic jurisprudence.

LAW

5. Article 1 of the PVD establishes a common system of VAT, the principle of which entails a general tax on consumption applied to goods and services however many transactions take place before the stage at which the tax is charged. Article 1(2) provides that:

> "on each transaction, VAT calculated on the price of the goods and services at the rate applicable to such goods or services shall be chargeable after deduction of the amount of VAT borne directly by the various cost components."

6. Article 2 specifies the transactions that are subject to VAT which include Article 1(a), the supply of goods, and Article 1(c), the supply of services.

7. There is no dispute that it follows from the second subparagraph of Article 1(2) of the PVD and Article 2 that each supply must be regarded as separate and distinct. As explained by the CJEU in *Frenetikexito – Unipessoal Lda v Autoridade Tributária e Aduaneira* (Case C-581/19) ("*Frenetikexito"*) this is subject to three well established exceptions which arise where:

> (1) One or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element. *(Card Protection Plan Ltd v Customs and Excise Comrs* (Case-349/96) ("*CPP*");
>
> (2) Two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split (*Levob Verzekeringen and OV Bank v Staatssecretaris van Financien* (Case C-41/04) ("*Levob")*; or
>
> (3) The relevant provision of the PVD provides for "closely related activities" to share the exemption of an exempt supply.

8. Article 132 PVD includes the following relevant exemptions:

> "**Exemptions for certain activities in the public interest**

> Article 132
>
> 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; …"

9. The medical exemption provisions are transposed into domestic law through the provisions of Group 7 Schedule 9 Value Added Tax Act 1994 (subparagraph 132(1)(b) corresponds to Item 4 of Group 7, and sub-paragraph 132(1)(c) corresponds to Item 1 of Group 7). In this appeal, nothing turns on the way the UK transposed the Directive. While the arguments before the FTT and the parties' written pleadings referred to Item 1 and Item 4, we refer for simplicity and consistency to the b) and c) exemptions of Article 132(1).

10. Generally, a single supply will have a single tax treatment: *Stadion Amsterdam CV* (Case C-463/16). That case concerned a stadium tour where, to visit the museum in the stadium, one had to participate in the stadium tour. The referring court asked whether, where there was a single supply but there were different VAT rates, and if the fee could be split in correct proportion to the different elements, different VAT rates should be applied to those elements. The CJEU answered no: that approach would run counter to the case-law pursuant to which the elements were considered to be a single supply. It held at [26]:

> "…it follows from the characterisation of an operation comprising several elements as a single supply that that operation will be subject to one and the same rate of VAT…".

11. That was the case even if it was possible to identify the price corresponding to each distinct element forming part of the single supply ([27]).

12. As to which elements of a complex single supply dictate the classification of the supply (for instance, as regards tax rate, whether the rate is exempt, standard rated, reduced-rate or zero-rated) the Court of Appeal in *HMRC v Gray and Farrar International* [2023] EWCA Civ 121 ("*Gray and Farrar"*) clarified that the primary test, in accordance with the CJEU's decision in *Město Žamberk v Finanční ředitelství Hradci Králové* (Case C-18/12) ("*Město*") is to determine the predominant element. There is no dispute that, in general terms, the effect of a complex single supply bearing the single tax treatment of the predominant element means that there will be elements within the supply, which, if they had been viewed separately, would have been classified differently. As Mr Henderson, who appeared for HMRC, pointed out, that is implicit in the test of predominance.

13. The core issue in this case is whether a different analysis arises in respect of the c) exemption in Article 132 (as that provision has been interpreted *European Commission v UK* (Case 353/85) ("*EC v UK*") and *Finanzamt Dortmund-West v Klinikum Dortmund gGmbH* (Case C-366/12) ("*Klinikum*")). Spectrum's case, which the FTT rejected, is that those authorities mean the supplies of drugs and contraceptives here can never be part of a composite single supply under the *CPP/Levob* principles. The supplies must be regarded as separate supplies.

14. Given the centrality of *EC v UK* and *Klinikum* to Spectrum's case and the role it played in the FTT Decision it is convenient to outline those cases at the outset.

EC v UK

15. The case concerned infraction proceedings in relation to the UK legislation's compatibility with Article 13A(1)(c) of EC Council Directive 77/388 (the "Sixth Directive", the predecessor to PVD Article 132(1) (c)). The UK legislation exempted supplies of goods when supplied "in connection with" the supply of services by members of the medical and paramedical professions, for instance in relation to the supply of corrective spectacles by approved opticians after they had carried out eyesight tests. The Commission considered the UK legislation to be in breach, as the exemption in c) did not extend to goods (other than the minor supply of goods which were indissociable from the service provided).

16. The European Court rejected the UK's argument that the parallel between exemption b) (which did cover goods) and exemption c) meant goods supplied in connection with hospital care under b) were to be treated the same way as goods supplied in connection with medical care under c). The Court contrasted b) which "encompass[ed] 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" with c) where "the services involved are 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". The Court considered (at [33] and [34]) that:

> "…In those circumstances, apart from minor provisions of goods which are strictly necessary at the time when the care is provided, the supply of medicines and other goods, such as corrective spectacles provided by a doctor or by other authorised persons, is physically and economically dissociable from the provision of the service.
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> 34. It follows that the exemption from tax of goods supplied in connection with the medical care referred to in indent (c) cannot be justified by indent (b) as the United Kingdom maintains."

Klinikum

17. The facts concerned whether anti-cancer drugs that were prescribed by doctors working independently in a hospital setting were exempt under Article 13A(1)(c).

18. The Advocate General's reasoning proceeded, in summary, as follows:

(1) The words "closely-related activities" in exemption b) covered goods as well as services.

(2) Medical care and related activities under exemption b) did not have to be undertaken by the same person.

(3) Activities that were "closely-related" could not be exempt if the care to which they were closely related was under exemption c) rather than exemption b) ([40]).

(4) The relevant care in *Klinikum* could not fall under exemption b) because it was not provided on the premises of the relevant body and it was not also provided *by* that body or establishment (as required by that provision) ([33]). The Advocate General therefore proceeded on the basis the care provided by doctors was exempt pursuant to exemption c).

(5) The Advocate General highlighted the absence of the words "closely related activities" in 13A(1)(c), which exemption did not "extend beyond the provision of the care itself". She went on to explain *EC v UK* as follows:

> "37. In that regard, the court declared in *Commission v UK* that, 'apart from minor provisions of goods which are strictly necessary at the time when the care is provided, the supply of medicines and other goods, such as corrective spectacles prescribed by a doctor or by other authorised persons, is physically and economically dissociable from the provision of the service'.
>
> 38. That case was concerned particularly with the supply of prescribed spectacles, and the court regarded the supply of prescribed medicines in the same light. In the circumstances considered, the acts of diagnosis (together with any minor and strictly necessary supplies of goods—such as, perhaps, the administration of eye-drops to enlarge the pupils) and prescription form a single supply falling within the exemption in art 13A(1)(c) of the Sixth Directive. The same would presumably apply to the supply of any items—such as, for example, ointments or bandages—essential to any actual treatment performed by the practitioner in the course of a consultation. By contrast, the supply by an optician or pharmacist of any items prescribed by the practitioner is a separate supply which does not fall within that exemption."

(6) Although the supply of prescribed drugs in the course of medical care could not fall under exemption b) if the care to which it was closely related was under c), that did not mean the drug supply could not be exempted under c) itself. At [41] AG Sharpston explained:

> "However, it might not necessarily follow that, in the specific circumstances of the main proceedings, the supply of the drugs cannot be exempted under art 13A(1)(c) itself. The supply could perhaps be regarded not as a 'closely related activity' but as a supply 'which is strictly necessary at the time when the care is provided' and not 'physically and economically dissociable from the provision of the service', to use the court's words in *European Commission v UK*."

19. At [42] the Advocate General continued "A variant of that possibility" might be a "single indivisible economic supply, which it would be artificial to split" (or "as ancillary to the principal service" footnoting the case-law referred to in *Město* [28] which in turn included references to *Levob* and *CPP*).

20. The Advocate General went on to say that evaluation of these "possibilities" needed more information noting the necessary findings of fact were for the national court (although some answers had been provided in the hearing). The matters to be considered included: i) the precise nature of the medical care provided; ii) the identity of the provider; iii) whether the care could be provided without the supply of the drugs; and iv) the identity of the person to whom the right to dispose of the drugs as owner was transferred (in other words the recipient of the supply). The Advocate General found it clear that:

> "46.…there is a therapeutic continuum, which encompasses both 'the provision of medical care in the exercise of the medical and paramedical professions' and a supply of drugs. It is also clear that, without the supply of the drugs, the medical care itself would serve no purpose; that supply is, therefore, 'strictly necessary at the time when the care is provided'."

21. But at [47] the Advocate General found "it difficult to consider" the drugs were not "physically and economically dissociable" from the medical care or that they formed a *Levob* single supply. The Advocate General continued at [48]:

> "…In that regard, it is necessary to consider by whom, and to whom, the supply of drugs is made. That question was addressed at the hearing and, although it was acknowledged that payment was made in almost every case by a private or public health insurance body, it seemed to be agreed that the

> 'right to dispose of [the drugs] as owner' is acquired by the patient. Neither the doctor nor the health insurance body may dictate to the patient whether to accept administration of the drugs or not. That makes it impossible to consider that the doctor passes on the supply of the drugs to the patient, as part and parcel of the medical care provided. It therefore seems necessary to proceed on the basis that the patient receives more than one supply: medical care from the doctor and healthcare staff; drugs from the hospital pharmacy.
>
> 49. Where separate supplies are made by separate persons, it seems inevitable that those supplies cannot 'form, objectively, a single, indivisible economic supply, which it would be artificial to split' or be 'physically and economically dissociable'. They may be (indeed, it appears that they are) 'closely related' and such a close relationship will qualify a supply of drugs to be exempted when the related provision of medical care is exempted under art 13A(1)(b) of the Sixth Directive, but not when it is exempted under art 13A(1)(c). In that regard, the separation between the person supplying the drugs and the person providing the medical care must in my view preclude the two from being regarded together as a single supply, regardless of the fact that neither supply can serve any useful purpose without the other—in contrast to, for example, the situation examined in *Deutsche Bank*, where two comparably interlinked supplies were made by the same taxable person."

22. The Advocate General thus rejected the possibility that there was a single supply, whether on a *Levob* or a *CPP* basis. This was not possible where two elements of the supply were supplied by different people.

23. The CJEU in *Klinikum* also noted the absence of reference to closely linked activities in the wording in exemption c). In relation to exemption c) the Court referred to *EC v UK* holding for the proposition that, apart from the minor provisions of goods (strictly necessary at the time when care was provided), the supply of drugs and other goods was physically and economically dissociable from the provision of the service and therefore could not be exempted. Regarding "strictly necessary at the time…" the court noted the Advocate General's observations that the drugs supplied were part of a therapeutic continuum and that the drugs were essential at the time of providing outpatient treatment of cancer. The Court also noted the treatment steps, although interrelated, were individually distinct, and that as the Advocate General had pointed out (at [48] and [49] of her opinion – see [21] above) the patient appeared to receive more than one supply namely medical care from the doctor and healthcare staff and drugs from the hospital pharmacy managed by Klinikum Dortmund (which prevented their being considered indissociable, physically and economically) ([36]). However, it was for the referring court to make the necessary findings ([37]). The Court thus left open the possibility the drugs could on the facts be indissociable but, subject to that, the Court considered the drugs were *not* exempt. The Court also considered that support for that conclusion was also derived from the fact drugs were subject to a separate VAT scheme (in Annex H to the Sixth Directive) ([39]).

Spectrum's case on *EC v UK* and *Klinikum*

24. Having outlined the above authorities, we summarise here the core propositions Spectrum sought to derive from them. Ms Hall KC argued that the cases show:

> (1) Goods can <u>only</u> fall within the c) exemption if they are "physically and economically indissociable". (There is no dispute that the case-law provides for such exception - for example a bandage or eye-drops applied in the course of treatment. HMRC do not however seek to argue the drugs and sexual health products here fall into that exception.)
>
> (2) The above rule (generally) cannot be overridden by a single supply *CPP/Levob* analysis thereby expanding the scope of exemption c).

(3) Because of the inherently limited nature of exemption c) (its limitation to medical consultations carried out by certified practitioners within the confines of the confidential patient/practitioner relationship), medical care under exemption c) could *never* (in the circumstances of this case) be the predominant part of a single composite supply so as to make that supply exempt. (Ms Hall acknowledges this proposition is fact dependent. She accepts there could be circumstances where the medical care element would predominate giving the example of a medical consultation provided online where the service of accessing the online platform was provided in addition to the medical care).

(4) Medical care under exemption c) must be narrower than under exemption b) and things "closely-related" to b) (to avoid undermining the fact that "closely-related" words do not appear in c).

FTT DECISION

25. Over the course of the three-day hearing which took place before it, the FTT received evidence from Spectrum's Chief Executive, Chief Pharmacist and Operational Manager for Health and Justice Services, and its Director of Finance, accepting all of those witnesses' evidence of fact. It also received a significant volume of documentary evidence. None of the FTT's underlying findings of fact is in dispute and in this section we aim to outline enough of the FTT decision to enable an understanding of the grounds Spectrum raises before us.

26. The FTT explained Spectrum was a community interest company and that NHSE was an independent body responsible for overseeing and commissioning healthcare including in prisons by entering into contracts with providers such as Spectrum (FTT [8]-[10] and [13] to [15]). The FTT then described (at FTT [16]) how Spectrum:

> "…supplies NHSE with primary healthcare services in 13 prisons in England. The services include GP, nursing, pharmacy, physiotherapy, substance misuse, mental health, dentistry and optometry services. The aim is that prison primary healthcare should resemble primary healthcare in the community as closely as possible. To that end, nurses conduct clinics and GPs conduct regular surgeries in the prison and the prison pharmacy operates in a similar way to a community pharmacy…"

27. As regards NHSE, the FTT explained at FTT [17] how:

> "Typically, NHSE requires providers to provide a full range of primary healthcare related services in prisons under the relevant contract….NHSE holds a contract with a single lead (or apex) provider, such as Spectrum, who in turn either directly provides care and/or sub-contracts parts of the care, eg pharmaceutical services, to other specialist providers (under certain conditions). The lead provider will ensure that all services within the prison operate in an integrated way and will be accountable not only for the services provided directly but also for the functioning of the healthcare services as a whole. All current contracts between NHSE and Spectrum are apex contracts and Spectrum is the lead provider. Spectrum provides some services itself and sub-contracts the provision of the remainder."

28. The FTT went on to make findings regarding the procurement and bidding process, detailing the invitations to tender, service specifications, including extracts relating to particular prisons. The specification included reference to medical services being "delivered as part of an Integrated Primary Care Service…" (FTT [27]) and to the provider ensuring "…that prisoners receive high level primary care services by providing an Integrated Care Service that is equivalent to that provided to the local community within the constraints of the environment." The FTT set out details of the contract Spectrum entered into with NHSE in

relation to another particular prison describing: the headings of the various services to be provided and how each heading was linked to detailed specifications (FTT [29] [30]); payments to be made (a single amount in respect of the expected annual contract value for providing all the services commissioned under the contract) (FTT [32]) and FTT [46]); and sub-contracting of certain services (FTT [33] and [34]). It described the provision of services such as nursing, doctor surgeries and pharmacy and sexual health services noting that the services provided in the different prisons were essentially the same (FTT [37] to [45]).

29. The FTT identified the issues for it to determine as being whether Spectrum made a single composite supply or multiple separate supplies and the VAT status of such composite supply or multiple separate supplies.

30. On the single vs. multiple supply issue, the FTT examined the case-law, including *CPP* and *Levob*. It noted that in accordance with that case-law, a number of points had to be considered from the perspective of a typical consumer (in particular the indivisibility and indispensability of the services). It rejected, however, Spectrum's argument that the prisoners were the relevant typical consumers. It noted that, in line with various Supreme Court authorities (*Secret Hotels2 Ltd v HMRC* [2014] UKSC 16, *WHA Ltd v HMRC* [2013] UKSC 24, *HMRC v Airtours Holidays Transport Ltd* [2016] UKSC 21), the identification of *who* made and received a supply involved a two-stage process: first, looking at the contractual position and, second, considering whether that was consistent with economic and commercial reality. Applying that approach, it considered NHSE was the recipient of the supplies and therefore the consumer whose perspective was relevant.

31. Applying those principles, the FTT concluded that NHSE received from Spectrum under each contract a single composite supply of "primary healthcare or health and social care in the specified prison or prisons". It considered "it would be artificial to split that supply into separate supplies of the individual elements that comprise the integrated healthcare or health and social care service."

32. The FTT then proceeded to consider how that single supply should be classified and treated for VAT purposes. At FTT [70] it noted that "…both parties accept that if Spectrum makes a single composite supply then that supply is exempt as a supply of medical care". The disagreement was over whether the supply was exempt under exemption b) (HMRC's view) or under exemption c) (Spectrum's view). The FTT rejected HMRC's case, because Spectrum was not a duly recognised establishment similar to a hospital or centre for medical treatment or diagnosis. However, it also rejected Spectrum's case based on *EC v UK* that exemption c) did not include drugs or contraceptives which were physically and economically dissociable and that per *Klinikum* the drugs need to be on a "therapeutic continuum". The FTT held that the CJEU in *EC v UK* did **not** (as Spectrum had argued it did) decide that supplies of drugs/ goods other than minor ones strictly necessary for and not physically and economically dissociable could never be elements in single supply. It explained that here, in contrast to *EC v UK* and *Klinikum*, there was a single composite supply. The FTT accordingly concluded that no part of the supply was to be taxed differently and that there was accordingly no separate taxable supply of drugs or contraceptives.

33. We summarise the further detail of the FTT's reasoning as necessary when discussing the relevant ground of appeal.

GROUNDS OF APPEAL

34. Spectrum raise the following grounds of appeal which we will address in turn:

(1) **Ground 1**: the FTT erred in deciding to resolve the issue of whether Spectrum made multiple supplies (under *CPP/Levob*) before reaching a decision on the contested scope of Article 132(1)(c) of the PVD.

(2) **Ground 2**: the FTT erred in finding that *EC v UK* and *Klinikum* did not decide that supplies of drugs or goods (other than minor supplies strictly necessary for and not physically and economically dissociable from medical care) could *never* be elements in a single supply of medical care.

(3) **Ground 3**: the FTT wrongly resolved the single/multiple supply issue by reference to the perspective of NHSE on the basis that NHSE was the contractual recipient of Spectrum's supplies. The FTT ought to have taken the patient's perspective.

(4) **Ground 4**: the FTT made an *Edwards v Bairstow* error of law– the *only* conclusion open to the FTT on the evidence was that Spectrum made multiple supplies including supply of medical care and supply of prescribed drugs and contraceptives.

Ground 1 – the FTT erred in taking the issues in the wrong order

35. Under this ground Spectrum argues the FTT was wrong not to first deal with the issue of how *EC v UK* should be interpreted (which, in Spectrum's view effectively constrained the applicability of the single/multiple principles under *CPP /Levob*) before addressing the question of whether, on the facts of Spectrum's case, there was a single or multiple supply. Spectrum submits this led to circular reasoning: the FTT used the fact there was a single supply in Spectrum's case as a key point of distinction between Spectrum's case and *Klinikum* when the *EC v UK* interpretation issue (which the FTT dealt with second) affected the very issue of whether there could be a single composite exempt supply in the first place.

36. Ms Hall, rightly in our view, did not press this ground in her oral submissions. She focussed instead on the FTT's errors of interpretation under Ground 2 below. We agree with Mr Henderson that there was no error of law in the order in which the FTT chose to deal with the issues. On the contrary, the FTT's approach represented the orthodox view under the case-law: as the CJEU explained in *Město* at [27]:

> "According to the court's case law, where a transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine, firstly, if there are two or more distinct supplies or one single supply and, secondly, whether, in the latter case, the single supply falls within the exemption in question…"

37. As Mr Henderson pointed out, (while there is no inflexible rule as to the order in which a tribunal addresses these matters) it makes logical sense to reach a view on whether there is a single or multiple supply before one then characterises that single or those multiple supplies to assess, for example, whether they fall within a particular exemption. The risk otherwise is that the court or tribunal will end up characterising something which turns out not to be a supply but a component of one.

38. There was also no concern that by ordering the issues as it did the FTT's reasoning became circular. The circularity Spectrum alleges only arose on the assumption that the FTT ought to have decided the scope of *EC v UK* in Spectrum's favour. As we explain below however in our discussion of Ground 2, that assumption is incorrect.

39. That discussion also makes it clear that the FTT did not, as Spectrum submitted, sidestep the core question of whether (on the facts of this case) it is possible for a *CPP* or *Levob* analysis to expand the limitations of scope imposed by *EC v UK* on the scope of exemption c).

Ground 2 – the *EC v UK* error

40. Under this ground Spectrum argues the FTT was wrong to hold that *EC v UK* did not, as Spectrum argued, establish that supplies of drugs and goods, (other than those within the exception for physically and economically indissociable goods) could never be elements of a single supply of medical care. In other words, according to Spectrum, the FTT should have held that *EC v UK* did decide that such supplies of drugs and other goods could never be elements in single supply of medical care for the purpose of the medical care under exemption c).

41. HMRC's case is that the provision of drugs and contraceptives was exempt because these were part of a composite supply under *Levob* principles. They contend that nothing in *EC v UK* or *Klinikum* altered that analysis. (HMRC do not suggest that the drugs and contraceptives fell into the *EC v UK* exception for physically and economically indissociable goods.)

FTT's treatment of EC v UK and Klinikum

42. In rejecting Spectrum's argument, the FTT considered that both *EC v UK* and *Klinikum* could be distinguished from the facts of this case and that, viewed correctly, neither case supported Spectrum's submissions (FTT [105]). The FTT also noted that *EC v UK* predated *CPP* and *Levob*, where the principles regarding identification of single complex supplies had been set out. Accordingly, in *EC v UK* there had been no discussion of whether a single supply was being made. The FTT observed that the Advocate General in *Klinikum* considered that notwithstanding *EC v UK* it was still possible to have a single supply analysis (describing *Levob* and *CPP* as a variant of the physically and economically indissociable test in *EC v UK*) (FTT [106]).

43. The FTT also noted that in *Klinikum* (as made clear by [48]-[49] of the Advocate General's opinion) there was more than one supply. The fact separate supplies were being made by separate persons precluded the two from constituting a single supply (they could be "closely related" but that only applied to exemption b) cases not exemption c)). The FTT also considered the CJEU had approved the Advocate General's analysis that there was more than one supply contrasting the separate supplies in *Klinikum* with the composite supply, in this case, of medical care provision and drugs and contraceptives (FTT [111]).

Spectrum's submissions

44. Spectrum's core proposition, made in reliance on [33] of the Court's judgment in *EC v UK* is that, apart from the minor provision of goods, the supply of medicines and other goods prescribed by a doctor or by other authorised persons is physically and economically dissociable from the provision of the service. In its submission, *EC v UK* and *Klinikum* are not restricted to their facts but establish generally applicable principles on the scope of exemption c) and which result in there being a bespoke treatment as far as exemption c) is concerned.

45. Spectrum disputes the FTT's analysis of the Advocate General's opinion and of the CJEU's decision. It contends that: (1) the FTT was wrong to describe the Advocate General in *Klinikum* as saying that *Levob* and *CPP* constituted a variant on the test in *EC v UK* of strict necessity and physical and economic indissociability; (2) the FTT overlooked the speculative and tentative nature of the language the Advocate General used in her opinion when raising the possibility of a *Levob* or *CPP* route to exemption for the provision of drugs; and (3) it did not necessarily follow from the Advocate General's or the Court's reasoning that either of them accepted the proposition that a transaction which failed the "*EC v UK* test" (that goods, unless physically and economically indissociable, could never fall within c)) could nevertheless be exempted under exemption c) because the provision of drugs was encompassed within a single composite supply under *CPP* or *Levob* principles.

46. Allied to this submission, Spectrum emphasises the narrow scope of exemption c) compared with exemption b). Exemption c) is limited in terms of when, where and by whom the service is provided (namely a confidential consultation by a certified medical practitioner in a consulting room). In contrast, a breadth of possibilities is envisaged by exemption b), encompassing the much wider range of activity that could take place in a hospital setting. Moreover, exemption b) covered activities which were "closely-related" whereas exemption c) did not. Against that backdrop, Ms Hall argued that the FTT's conclusion that the drugs and contraceptives were exempt indicated that something had gone wrong in its analysis: it had the impermissible effect of allowing goods that would not even have been within with the wider scope of exemption b) to come within the narrower exemption of c).

Discussion

47. The legal principles for identifying single and multiple supplies are not in dispute. In particular, Ms Hall did not take issue with the general proposition that elements that would in themselves not be exempt, would, when incorporated within a single composite supply, nevertheless be exempt. We were not referred to any authority which stated, in terms, that a *CPP* composite supply analysis (and we consider the point would apply equally to a *Levob* single composite supply) could not be used to expand the scope of an exemption.

48. Accordingly, applying these first principles there would be nothing odd about a treatment whereby standard rated medicines or reduced rated contraceptive products are, when encompassed within a single supply, treated as exempt.

49. The sole authority relied on for departing from these core principles is *EC v UK*. We do not accept that *EC v UK* supports such a departure.

50. Fundamentally, *EC v UK* said nothing about the appropriate treatment in a case where there was a single composite supply. In *Klinikum*, where *EC v UK* was considered (with the benefit of the evolving jurisprudence on single supplies) the Advocate General specifically canvassed the possibility of a single supply analysis route to exemption, albeit she acknowledged its likely inapplicability on the facts.

51. The CJEU in *Klinikum* also did not say anything to gainsay the possibility that a single supply could encompass the provision of drugs. We agree with the FTT that it arguably endorsed such approach. At [36] of its judgment (see [23] above]) the CJEU explained, by reference to [48] and [49] of the Advocate General's opinion, that the patient appeared to receive more than one supply: the first from the doctor and healthcare staff (who were acting independently), the second from the hospital pharmacy. At [48], which begins "In that regard…", the Advocate General was not just addressing the physically and economically indissociable test but also the *Levob* single supply test which she had referred to in the preceding paragraph. At [49], which the CJEU referred to, the Advocate General again discussed the *Levob* test, but its application was inevitably precluded where supplies were made by separate persons. Accordingly, while it is true the CJEU did not itself specifically mention the single supply analysis, it implicitly recognised the possibility of an exemption being achieved through a single supply analysis. On the facts it was not necessary to consider that issue in any detail, because of its inapplicability on the facts.

52. Standing back, it would be very odd if the *EC v UK* proposition regarding provision of drugs and other goods, as discussed in *Klinikum*, was intended to be an inroad into the, by then, well-established single composite supply analysis, without any specific discussion. The Advocate General not only had the *CPP/Levob* principles in mind but also no doubt had in mind the predominant element test laid down in *Město*, having footnoted it as a recent application of *Levob*. That test is itself premised on a single supply having a single tax treatment (see [12] above). If *EC v UK* were considered to have established a proposition which

prevented the drugs being exempt under c) under a single supply analysis, there would have been no point in the Advocate General mentioning the *Levob* and *CCP* routes to exemption. The CJEU might also to have been expected to voice some disapproval of such analysis rather than implicitly endorsing it as a possibility.

53. Regarding Spectrum's textual arguments on the interpretation of *EC v UK / Klinikum* these too do not disclose any error of law on the part of the FTT:

> (1) Spectrum's reliance on [37] and [38] (set out at [18(5)] above), and the lack of reference in them to *CPP/Levob* is misplaced. In this passage the Advocate General is simply summarising the reasoning in *EC v UK* (which did not address the question of single vs multiple supplies).
>
> (2) We also reject Spectrum's contention that the FTT was wrong to say that the Advocate General described *Levob* and *CPP* as a variant of *EC v UK*. The Advocate General said at [42]: "A variant of that possibility might be [*the test for Levob or CPP*]*"*. The words *"*that possibility*"* referred to the preceding paragraph which contained the exception regarding physically and economically indissociable goods in *EC v UK*.
>
> (3) Spectrum also highlights the tentative nature ("…might be…") of the language the Advocate General used in describing the *Levob /CPP* approach. That, however, reflected the lack of support for the conclusion on the facts, not a doubt as to the legal position.

54. Spectrum emphasised the generality of the principle that *EC v UK* established and that the principle was not restricted to the facts. We do not accept, however, that the FTT thought that either *EC v UK* or *Klinikum* was restricted to their facts. It fully acknowledged the principle that a supply of goods or medicines falling within the physically and economically indissociable exception explained in *EC v UK* would be within c) but it disagreed the converse held true i.e. that goods outside that exception could never fall within c). We specifically reject the suggestion that the FTT thought that *EC v UK* was restricted to its facts, and that those facts concerned only corrective spectacles.

55. Spectrum also pointed out that *Klinikum* and another authority, *EC v France* (Case C-76/99) (which saw *EC v UK* as applying generally) did not suggest that *EC v UK* would have to be re-evaluated in the light of *CPP*. That, however, misses the point; the FTT was not suggesting *EC v UK* was wrong because it omitted the (as yet to be uncovered) principles on single complex supplies. The FTT's point, in essence, was that *EC v UK could not* have set out to modify principles on single supply that had not been revealed yet.

56. It is also a false comparison to say that the FTT decision means that goods that would not have been within exemption b) as "closely related" to b) cannot then be within exemption c), because it is narrower. Exemption c) is indisputably narrower than b), but that is beside the point. In both cases, if on a proper analysis something 1) is a single supply and 2) the predominant element (per *Gray and Farrar*) is within one or other of exemption b) or exemption c), then the composite supply will be exempt under the relevant provision on a straightforward single supply analysis. Even in an exemption b) case, therefore, services or goods which are not closely related might nevertheless fall within an exempt composite single supply because the predominant element is within b).

57. Ms Hall submitted that the Advocate General (at [48] – see [21] above) had determined that patient choice made it "impossible" to conclude that drugs were part and parcel of medical care. We read that passage, however, as relating to the question whether there could be a single supply given the different identities of the persons making the supply of medical care (the doctor on the one hand and the pharmacy on the other (see [95] below)). She also submitted that the FTT failed to acknowledge that the CJEU introduced (at [36]) a concept of a series of

activities or steps which although interrelated were "individually distinct". She argued that the FTT was wrong to suggest at FTT [110] that the situation of there being more than one supply (as there was in *Klinikum*) was the only circumstance in which a series of interrelated activities or steps could be classified as individually distinct. We do not accept that the reference to "individually distinct" steps was intended to lay down any modification of, or to supplant, the *CPP/Levob* analysis. It appears in neither the Advocate General's or the CJEU's conclusions. The concept of interrelated but individually distinct activities was simply a convenient description to get across the point that while activities could be inter-related that did not preclude the activities being distinct.

58. Finally, on this aspect, Spectrum argued that the FTT failed to give any or sufficient regard to the Advocate General's and the CJEU's conclusion that weight should be attached to the fact that pharmaceutical products used for treatment for medical purposes were in principle subject to VAT, or they would not have been listed in Annex H to the Sixth Directive. This, however, begs the question whether there was a separate supply of such drugs. As there was not, the point is irrelevant.

59. For these reasons, on this aspect of Ground 2 we agree with HMRC. Neither *EC v UK* nor *Klinikum* suggest that it is impossible for elements of a single supply which would not be exempt if viewed as a separate supply to be exempt when they form part of a single complex supply.

FTT misunderstood Spectrum's concession/ oversimplified Spectrum's case?

60. Spectrum raised a separate, discrete, point under this ground, namely that the FTT erred in stating (at [70]) "…both parties accept that if Spectrum makes a single composite supply then that supply is exempt as a supply of medical care". It contends that this represents an oversimplification of its case. Ms Hall submitted that Spectrum's concession was qualified, in that the single composite supply only fell within exemption c) if "medical care" was the predominant element within that supply, but that the FTT failed to acknowledge this.

61. At face value, this is a surprising submission. As we have noted above, once it is established that there was a single supply, in order to determine whether it falls within a particular exemption it is necessary to determine its predominant element. The FTT did not do so, because it did not need to do so in view of the concession recorded at [70]. If Spectrum's concession was qualified in the way now suggested, then that meant that the FTT should have investigated, as a matter of fact, what was the predominant element of the supply. Its failure to do so would be an obvious independent ground of appeal.

62. Nowhere, however, does this point feature in Spectrum's actual grounds of appeal (as we set out at [34] above). The only reference to it in the grounds of appeal document, which expands on each of the four numbered grounds of appeal, is at [49] where it is said that the FTT over-simplified Spectrum's case, because it had accepted that if the FTT found against it on the multiple supply issue, and therefore on the *EC v UK* issue, and if the predominant element of a single supply was medical care, then it would accept that such a single supply was medical care.

63. Moreover, it was no part of Spectrum's case before the FTT that medical care was *not* – as a matter of fact – the predominant element in the single supply. No argument was addressed by it to the FTT on the point. Rather, its case was that the single supply *could not* be within exemption c) because, on its view of *EC v UK*, of the inherently narrow nature of that exemption.

64. In the course of the hearing, however, we understood Ms Hall to accept that it was not part of Spectrum's case that – as a matter of fact – the predominant element of the single supply

(if, contrary to its primary case, there was a single supply at all) was something other than medical care. She clarified that Spectrum would "never have made the concession without the caveat *because to do so would have effectively conceded away the central proposition in Spectrum's case – that the concept of medical care in (c) is very narrow and could not be expanded via CPP/Levob principles.*" In other words, the contention advanced before the FTT was that the single supply could *not* (as a matter of law) be within exemption c) because of the narrow scope of that exemption. She confirmed that Spectrum had not made submissions to the FTT that medical care was not in fact the predominant element of a single supply.

65. Understood in that way, then we do not accept that the FTT misunderstood, or oversimplified, the concession that was being made by Spectrum. The FTT clearly understood that Spectrum contended that even if there was a single supply it could not fall within exemption c), because of the inherently narrow scope of the exemption, *per EC v UK*. The FTT addressed, and rejected, Spectrum's case on *EC v UK* and *Klinikum* at [101] to [111]. It therefore understood that Spectrum was not conceding the central proposition in its case.

66. Given this conclusion, it is unnecessary to consider the precise formulation of the concession made to the FTT (noting, for example, that in Spectrum's pleaded case the concession is unqualified, although the qualification is identified in one paragraph of its skeleton before the FTT). However it was formulated, we are satisfied that Spectrum was not contending before the FTT that if there was a single supply, and if its case on *EC v UK* failed, medical care was not the predominant element of the single supply.

67. In clarifying Spectrum's case before us, Ms Hall also pointed to the description of the supply at FTT [67]. She contended that it went far beyond anything Spectrum would have accepted as being a description of a single supply, and indeed beyond anything that HMRC had argued for. She pointed out that the FTT's description included, for example, social care and went much broader than the confines of the medical care envisaged by exemption c). Ms Hall also submitted that HMRC did not clearly identify the scope of the single supply it relied upon and highlights the number of different ways they referred to it: their Statement of Case referred to "health and wellbeing related services in prisons" and "care or medical or surgical treatment and in connection with it, the supply of any goods, in any hospital or state regulation institution; HMRC's FTT skeleton referred variously to "prison health care services", healthcare package", and "healthcare"; HMRC's oral submissions referred to "healthcare in prisons" and "exempt medical care".

68. Insofar as Ms Hall submitted that Spectrum had not made submissions that medical care was not the predominant element of the single supply, *because it had not anticipated* the width of the description the FTT would subsequently make, then we reject that submission. The scope of the elements which it was contended fell within the single supply was always known to Spectrum. The elements were identified in the various evidence and documents which HMRC relied on before the FTT, and which are described at FTT [17] to [46]. The term subsequently used by the FTT to describe the single supply is irrelevant, particularly as (given Spectrum's concession, and the fact that it was not contending otherwise) it was common ground that the predominant element in the supply was medical care. The precise formulation of the single supply was not in issue.

Ground 3 – Error of contractual approach

69. As we develop below, in determining the single/multiple supply question, it is necessary to view the transaction from the perspective of the typical consumer. Spectrum contends that the FTT erred in regarding NHSE as the typical consumer, and did so because it wrongly regarded the fact that NHSE contracted with Spectrum as relevant to that question.

70. Spectrum contends that legally relevant consumers on the facts here were the patients. The FTT rejected that contention, explaining at FTT [60]:

> "…In my view, that is not the correct analysis. While the prisoners are undoubtedly beneficiaries of the provision of medical care by Spectrum, that does not mean that they are recipients of the supply for VAT purposes. As the Supreme Court has made clear on a number of occasions, determining who makes and receives a supply is a two-stage process which starts with consideration of the contractual position and then looks at whether that is consistent with the economic and commercial reality (see *WHA Ltd v HMRC* [2013] UKSC 24, [2013] STC 943 ('WHA') at [27], *Secret Hotels2 Ltd v HMRC* [2014] UKSC 16, [2014] STC 937 ('SH2') at [35], *HMRC v Airtours Holidays Transport Ltd* [2016] UKSC 21, [2016] STC 1509 ('Airtours') at [47]). There is no suggestion in this case that the contractual position does not reflect the economic reality of the transactions. On the basis of the contracts and the evidence, it is clear that NHSE is the recipient of the supplies made by Spectrum.
>
> 61. Accordingly, NHSE is the average consumer from whose perspective I must view the elements of the transactions."

71. Ms Hall accepts a contractual analysis is relevant to identifying *who* makes and receives the supply. She contends, however, that it is not relevant in determining the question of single vs multiple supplies.

72. The viewpoint of the typical consumer features both with respect to *CPP* composite supplies and *Levob* composite supplies. In *CPP,* which concerned whether an exempt insurance supply and a taxable card registration service comprised a single supply or were separate supplies, the CJEU explained (at [28]) (by reference to *Faaborg-Gelting* (Case C-231/94)) that "where a transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which the transaction takes place". The CJEU continued:

> "29. In this respect, taking into account, first, that it follows from art 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, **being a typical consumer**, with several distinct principal services or with a single service.
>
> 30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute **for customers** an aim in itself, but a means of better enjoying the principal service supplied…". [*Emphasis added*]

73. The first paragraph in the excerpt above corresponds to a *Levob* "artificial to split" type supply, the second to the *CPP* "principal /ancillary" type single composite supply. Both the passages lay the foundation for the typical consumer or customer's perspective being the relevant one to consider. The fact this consumer perspective is relevant to the question of single or multiple supplies more generally is also consistent with how the CJEU viewed this paragraph in *CPP* in *Everything Everywhere Ltd v HMRC* (Case C-276/09). That case concerned handling charges invoiced by a mobile phone provider when the customer used certain payment

methods. It raised the question of whether there was a single supply or separate supply of payment handling and telecoms services. The CJEU explained (at [26]):

> "In order to determine whether the taxable person is supplying the customer—envisaged as being a typical consumer—with several distinct principal services or with a single service, the essential features of the transaction must be ascertained and regard must be had to all the circumstances in which that transaction takes place (see, to that effect, *CPP* (paras 28 and 29); *Aktiebolaget* NN (paras 21 and 22); *Ludwig* (para 17); and order in *Tiercé Ladbroke and Derby* (paras 19 and 20))."

74. This suggests the typical consumer perspective is relevant whether one is talking about a *CPP* or *Levob* supply. The extracts also suggest that the typical consumer is the customer who is being supplied; in other words the recipient of the supply.

75. That was also how the term consumer was understood by the Advocate General in *Frenetikexito* where the question was whether there were separate supplies of fitness and nutrition advice or a single complex supply that was exempt.

76. In paragraph 22 of her opinion, when discussing a single complex supply which it would be artificial to split (i.e. *Levob)* the Advocate General explained:

> "22. The Court determines whether this is the case by ascertaining the essential features or characteristic elements of the transaction from the perspective of the "typical consumer".
>
> 23. It is therefore crucial whether the typical consumer (**the typical recipient of the supply**) regards the supply received as multiple distinct supplies or as a single supply. The decisive criterion is the generally accepted view, that is to say, the understanding of the general public. By having regard to the 'typical consumer', the Court applies a generalisation which it also uses in other fields of law." [*Emphasis added*]

77. While Ms Hall's submissions in reply invited us to ignore those emphasised words as merely "loose language" we consider that the Advocate General, recognising that there could be ambiguity in the term, specifically sought to address that with more precise language. The Advocate General's formulation is also consistent with the CJEU's earlier references to the typical consumer being the customer – in other words the recipient of the supply under consideration.

78. Spectrum relies on paragraph 19 of the Advocate General's opinion in *Frenetikexito* to support its argument that the contractual position is irrelevant. Under the heading "**1 Principle: every supply is independent**" (and which preceded the discussion of the three exceptions to supplies being separate and distinct (being *CPP, Levob,* and "closely-related" – see [7] above)) the Advocate General said this:

> "The contractual structure in question is likewise irrelevant. The VAT assessment of a transaction cannot depend on the contractual arrangements available under national civil law. If, as is the case here to some extent, multiple supplies are made on the basis of a single contract under civil law, this does not call into question the independence of those supplies for VAT purposes."

79. The words "likewise irrelevant" refer to the Advocate General's preceding point that the fact the supplies were linked "because they pursued a single economic aim" did not stop the principle that every supply was independent.

80. This paragraph, when read in its proper context, does not support Spectrum's argument. The Advocate General was simply making the point that the fact that under national law there

was a single contract or multiple contracts was not relevant to the single vs multiple supply analysis. The proposition that the existence of a single contract will not rule out there being multiple separate supplies for VAT purposes is not in dispute. (The FTT did not reason that just because there was a single contract the supply was a single supply).

81. Moreover, the Advocate General was not addressing here the question of either 1) how to identify the recipient of the supply or 2) whose perspective of the various possibilities one might need to have regard to. On the facts of *Frenetikexito* there could be no doubt the recipient of the supply was the person to have regard to; it was not a case where the customer of the supply and the beneficiary of the supply were different persons. For similar reasons, we consider there is no support for Spectrum's case in paragraphs 26, 48 and 52 of the Advocate General's opinion, on which Ms Hall placed reliance.

82. The Court in that case, referring to the Advocate General's opinion, reiterated the importance of the "average consumer". There is nothing in its decision, however, which assists on the issue of whose perspective is relevant where the recipient of a supply, and the beneficiary of the services constituting that supply, are different.

83. Although the specific situation present here was not in issue in the above cases they are all clear in our view that the relevant person's perspective is the customer or recipient of the supply. Standing back that seems correct as a matter of general principle. The question, who is the relevant consumer begs the question "consumer of what?" In the case of VAT, which as Articles 1 and 2 PVD explain, is a tax on consumption charged on supplies of goods and services, it appears entirely consistent that the correct perspective to be taken is that of the person who receives the supply.

84. On the facts here the recipient of the supply is NHSE (Spectrum did not argue the prisoners are the recipients of the supply and that NHSE's payments are third party consideration). We therefore consider the FTT was correct to look at matters from NHSE's perspective.

85. In the following paragraphs, we address a number of other authorities, on which Spectrum relied in support of its case that the patient is the typical consumer whose perspective is relevant in determining whether the supplies were single or multiple. None, in our view, take Spectrum's case on this ground further.

86. *d'Ambrumenil and another v CCE* (Case C-307/01) concerned medical expert reports conducted in the context of litigation. The checks were carried out on employees/insured persons at the request of the employer/insurer. The court held that the fact such checks took place at the third party's request and might also serve the third party's interests did not preclude health protection being regarded as the principal aim of such checks. Spectrum highlighted that the UK in that case submitted that the identity of the person requesting the examination or diagnosis could not be the determining factor.

87. However, as Mr Henderson rightly pointed out, the case was not about single or multiple supplies but about the scope of exemption c). In reply, Ms Hall sought to persuade us that it was wrong to consider the principles concerning whether there were single/multiple supplies and the characterisation of the supply as inhabiting separate silos. Underlying both sets of principles was the idea that one should establish what the essential economic aim was or as Ms Hall put it "what is going on in the real world". But it does not follow that because similar analytical themes arise in both tests, the questions they seek to answer are not discrete. (A similar point arises in relation to *Gambro Hospal* below – see [92] which we reject for similar reasons).

88. In any case, we place little reliance on the position the UK adopted in a particular case in seeking to ascertain the correct legal principles.

89. In contrast the next authority Ms Hall relies on, *Dr Beynon and Partners v CCE* [2004] UKHL 53 ("*Dr Beynon"*) *did* consider the question of single and multiple supplies. That case involved doctors who could both dispense and administer pharmaceutical services to patients (in contrast to the normal division between doctors prescribing medicine and pharmacists dispensing/administering it) because the patients did not have a pharmacy nearby. The doctors argued that when administering drugs to such patients e.g. injecting a vaccine, that was a separate supply of medical care and a separate supply of goods (drugs), whereas Customs argued that the supply of drugs was ancillary to the single exempt supply of medical services. The House of Lords allowed Customs' appeal. Lord Hoffmann (which whom the other Law Lords agreed) considered the CJEU principles in *CPP* and *Faaborg-Gelting*. In his opinion (at [31]):

> "…the level of generality which correspond[ed] with social and economic reality [was] to regard the transaction as the patient's visit to the doctor for treatment and not to split it into smaller units…"

90. Ms Hall argued this case shows that it is the patient's perspective, as the typical consumer of the service, whose perspective was relevant. We disagree. Lord Hoffman was not considering the question of whose perspective as between the patient and the commissioning authority was relevant. There was no discussion of this point, nor any analysis of the particular contractual framework under which the services were provided (as opposed to the contractual provisions regarding reimbursement for payment of the drugs).

91. All Lord Hoffmann was setting out at [31] was an application of the approach that he had summarised earlier in his speech at [20] from *CPP*. That required one to look at the circumstances in which the transaction took place. He was heeding the warning given there that a supply "which from an economic point of view" comprised a single service should not be "artificially split into separate services" together with his observation that what mattered was the "essential features of the transaction". The reasoning at [31] was also by way of contrast to Lord Hoffmann's discussion in the preceding analysis of the Court of Appeal's approach. The Court of Appeal had divided the transaction into various different stages such as consultation, diagnosis, drug dispensing and administration. Lord Hoffmann considered that involved just "the kind of artificial dissection" of the transaction which the European Court had warned against in *CPP*.

92. *Gambro Hospal Limited v CCE* VAT Tribunal decision 18588 (2004) ("*Gambro Hospal"*) concerned whether kidney dialysis services the taxpayer company provided to patients pursuant to an agreement with an NHS trust were exempt, as HMRC ruled, or standard rated as the taxpayer argued. Spectrum relied in particular on [28] and [29]:

> "28. Item 4 of Group 7 of Schedule 9 to the VAT Act 1994 is not worded in such a way as to suggest that the identity of the recipient of the supply is of the essence. The provision of care or medical or surgical treatment will of course always be to a natural person but that does not mean that, from the VAT point of view, the supply cannot be to a legal person. For example a self employed consultant may well supply his services to a hospital for VAT purposes rather than to an individual but those services will still consist of the care of natural persons. We did not understand Mr Southern to have argued to the contrary. His argument was that the supply of services took on an altogether different character from that of the supply of care or medical services for the reasons summarised in paragraph 18 above. We do not agree. The fact that the operations of the appellant could be said to include those

> described in the Treasury Direction does not mean that they must be so characterised. The fact is that the essence of what is supplied is treatment, not the operation of a hospital. The acceptance of economic risk is not the essence of the supplies made by the appellant and is at best a better means for the Trust to enjoy the services supplied under the contract to the Trust.
>
> 29. For the same reasons that we have concluded that there is a composite supply we hold that the supplies are supplies of care and medical treatment. That is their predominant characteristic. No supply took place when the clinic was built, staffed and equipped. Supplies only began when patients were referred. The essence of the supply is the treatment of patients."

93. These passages do not assist Spectrum. The tribunal was considering the *nature* of the supply (which it was common ground – see [27] was *to* the NHS trust). All that it concluded was that, in considering whether the supply fell within the exemption, it was relevant to have regard to the fact that the supply (to a legal person, the trust) consisted of medical services provided to natural persons (the patients). The case did not concern the question of who was the typical consumer for the purposes of the single/multiple supplies principles, and the tribunal said nothing about that.

94. For the same reason, Spectrum's reliance on the guidance HMRC issued in its HMRC VAT Health Manual VATHLT 3030 based on *Gambro Hospal* does not assist. That guidance similarly makes the point that the health exemption was not worded to make the identity of the recipient of the supply of the essence. That guidance does not preclude the recipient of the supply being viewed as the typical consumer of the supply.

95. Ms Hall also argued that the Advocate General's emphasis at [48] of *Klinikum* (see above) on the patient having a choice whether to accept administration of the drugs supported the fact it was the patient's perspective which was relevant. We disagree. In this passage, the Advocate General, following her discussion of the *Levob* test (i.e. on the topic of single or multiple supplies) reasoned that the fact that neither the doctor nor the health insurance company could dictate to the patient whether or not to accept administration of the drugs made it necessary to proceed on the basis the patient received more than one supply. In that passage, it is clear the Advocate General's analysis was addressing the question of *who* was making the supply. In her view the patient's choice made it "impossible to consider that the doctor passe[d] on the supply of the drugs to the patient, as part and parcel of the medical care provided". The Advocate General was simply ruling out that the drugs were supplied by the doctor. Rather, the drugs were supplied by someone else, the hospital pharmacy. That then led to the Advocate General's point in the subsequent paragraph that where separate supplies were made by separate persons it seemed inevitable that those supplies could not form a *Levob* supply or be "physically and economically dissociable" (per the test in *EC v UK*). The Advocate General was not saying anything about whose perspective should be taken when determining the question of single or multiple supplies.

96. Finally, Spectrum suggested that a special approach applied in the case of health exemptions. Ms Hall submitted that the principles in *CPP* and *Levob* are focussed on commercial cases and have limited application in relation to health exemptions. We do not accept this. *Frenetikexito* and *Dr Beynon* are both examples of cases concerning the health exemptions but where the CJEU and House of Lords respectively mentioned the conventional jurisprudence on single/multiple supplies. More generally, and as we have already discussed under Ground 1, as a matter of principle, the question of the scope of an exemption is logically second to the prior question of whether there are single or multiple supplies. In that light it would be odd if the principles on single/multiple supplies were to vary according to the exemption in contemplation. We also do not agree that a contractually based analysis is

inappropriate on the basis that it would run counter to protection of the well-being of patients (because the availability of the exemption could then be "gamed" by the parties' chosen contractual structure). The authorities are clear that a contractual analysis is not the end of the story if it does not accord with economic and social reality.

97. In conclusion, we reject Spectrum's ground of appeal that the FTT erred in its approach by looking to the contractual situation, and in regarding NHSE as the relevant typical consumer in analysing the issue of whether there was a single composite supply under exemption c) or multiple supplies.

Ground 4 ***Edwards v Bairstow***

98. Under this ground Spectrum argues that an error of law arises under *Edwards v Bairstow* [1955] 3 WLR 410 because the only conclusion available to FTT, on the evidence (all of which the FTT accepted) and the facts found, was that Spectrum did not make a single supply of medical care within exemption c).

99. Ms McAndrew, who addressed this part of the case on behalf of Spectrum, advanced the following nine factual indicators which, she submitted, meant the FTT had to find that there were multiple supplies.

(1) Prisoners do not take up all services – for instance a prisoner may see a GP but may not receive a prescription, or a repeat prescription may not require medical care (FTT [38]). Self-evidently a prisoner might get nursing care but no other services, they might get optometry but not dentistry. The services are provided independently, and the prisoner may choose to receive them separately. Each is thus an end in itself.

(2) The services are provided to prisoners in different physical locations (FTT [39]). Doctors conduct GP surgeries, and each prison has separate consulting room for this purpose. The evidence referred to the pharmacy dispensing and it could reasonably be assumed that, as well as e.g. dentistry and optometry services would be carried out at different specific locations.

(3) Services are provided by different personnel with different specialist functions. For example, pharmacists dispense medication (FTT [40]). Sexual health services are provided principally by specialist nurses (FTT [43]). The highly specialist nature of the healthcare services including optometry, podiatry and physiotherapy would obviously require different trained personnel.

(4) Prisoners do not generally receive all or most of services at same time. For instance drugs are dispensed after a GP consultation and this also flows from the fact different services are provided at different physical locations at different times.

(5) Prisoners who receive dispensed drugs have the choice whether to take them. The same is true of contraceptive products. Consumption is separate from the care provided by the GP.

(6) Contraceptive products may ordinarily be provided separately to medical care (products may be available outside of healthcare wing, condoms provided to all prisoners who ask for them).

(7) There are distinct service specifications for each distinct element of the NHSE contract. The FTT gave pharmacy services as the example (FTT [30]) but it can be seen the other ones are set out differently with different personnel, times of provision and with their own scope and objectives. Additionally, Spectrum can choose to sub-contract under the overarching contract (sub-contracting for instance the supply and dispensing of drugs

to community pharmacies) (FTT [19], [33-34], [40] [42]). The fact that particular services could be subcontracted and hived off showed they were regulated separately.

(8) The way in which the contract was used and its scope of services were not static and varied over time. Under the original contract Spectrum was a "partnership provider" only responsible for delivering some of the services which made up the full suite of health care services – other services were commissioned separately from different providers. That changed in 2013 to Spectrum being a lead provider under an "apex" contract. Ms McAndrew submitted the fluidity of the commissioning structure indicated the services were separate - with services coming in (e.g. mental health) and going out (e.g. dentistry).

(9) The cost of each service is easily identifiable (HMRC did not appear to dispute this but highlight a single headline price is invoiced).

100. We are not persuaded that the above points surmount the hurdle of showing that the *only* conclusion open to the FTT was to find multiple supplies and that it erred in rejecting Spectrum's case. As HMRC point out, many of the points (points 1 to 6) fall away if the FTT was correct (as we have found it was under Ground 3 above) to consider the circumstances from the point of view of NHSE as the typical consumer. We do not see, for instance, how the fact that the services were provided by different specialists, in different locations, and at different times would be significant pointers towards to separate supplies from the point of view of a consumer (NHSE) tasked with providing an integrated suite of primary healthcare services to cohorts of prisoners.

101. None of the remaining factors, whether individually or together, would have compelled the FTT to conclude there were separate services. The fact there are different specifications for the various services simply reflected the different nature of the services but was not inconsistent with the services being related to each other as a composite supply to NHSE of primary healthcare. The fact that elements within the single price that was paid could be identified in respect of one or more distinct elements could not be of any significance and was not inconsistent with the existence of a single composite supply. We consider the fact that Spectrum could, and did, subcontract certain services to be more consistent with the supply being a single supply, where Spectrum was responsible to the NHSE for providing an overall package of primary healthcare.

102. As regards Ms McAndrew's 8th point, we consider that the fluidity of the contractual structure, whereby certain elements could be dropped or introduced over time, is not inconsistent with whatever elements that were covered by the contract at a given point in time being considered a single package of services at a given point in time. In other words, a healthcare package was no less a healthcare package because at one point it did not contain dentistry, and at another it included mental health.

103. From the transcript of the oral exchanges which took place before the FTT on this matter it is clear the FTT understood the contract had changed in scope and acknowledged (noting the limited scope of evidence it had heard) that changes to the scope of the contract might occur in the future. It rightly identified that the question of whether there were single or multiple supplies arose in relation to a VAT registration decision with respect to a particular period. It is implicit in that view, and we did not understand HMRC to disagree, that if the different content of elements in a particular period following that considered in the proceedings before the FTT were to give rise to a materially different analysis, then the question of whether there were single or multiple supplies might need to be revisited on the basis of the particular contract which applied at the time.

104. We accordingly reject this ground of appeal.

CONCLUSION

105. For the reasons set out above, we dismiss Spectrum's appeal.

MR JUSTICE ZACAROLI
JUDGE SWAMI RAGHAVAN

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