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UT (Tax & Chancery) Case Number: UT/2025/000070

**Upper Tribunal  
(Tax and Chancery Chamber)**

*VAT – exemption – whether Aligners are “dental prostheses” within Items 2 and 2A of Group 7 to Schedule 9 VATA 1994 – held – no – appeal allowed*

Hearing venue: Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London  
EC4A 1NL

**Heard on:** 7 May 2026  
**Written submissions:** 12 and 15  
May 2026  
**Judgment date:** 7 July 2026

**Before**

**MR JUSTICE EDWIN JOHNSON**

**JUDGE JEANETTE ZAMAN**

**Between**

**THE COMMISSIONERS FOR HIS MAJESTY’S  
REVENUE AND CUSTOMS**

**and**

**(1) ALIGN TECHNOLOGY SWITZERLAND GMBH  
(2) ALIGN TECHNOLOGY BV**

Appellants

Respondents

**Representation:**

For the Appellants: Michael Ripley, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

For the Respondents: Valentina Sloane KC and Ben Elliott, counsel, instructed by Ernst & Young LLP

## DECISION

### INTRODUCTION

1. HMRC appeal against the decision of the First-tier Tribunal in *Align Technology Switzerland GmbH and Align Technology BV v HMRC* [2025] UKFTT 462 (TC) (the “FTT Decision”) which concerned the VAT liability of supplies of Invisalign clear aligners (the “Aligners”).
2. Align Technology Switzerland GmbH and Align Technology BV (referred to together as “Align”) treated the supplies of the Aligners as exempt supplies of dental prostheses within items 2 and 2A in Group 7 of Schedule 9 to the Value Added Tax Act 1994 (“VATA 1994”). HMRC issued decisions that supplies of the Aligners were chargeable to VAT at the standard rate. Align appealed to the FTT which allowed the appeal.
3. HMRC sought and were granted permission to appeal on a single ground, that the FTT erred in its interpretation of the phrase “dental prostheses” and thereby misapplied VATA 1994 to the Aligners.
4. For the reasons set out below, we have allowed HMRC’s appeal.

### RELEVANT LEGISLATION

5. Section 31(2) VATA 1994 provides that the goods or services of a description for the time being specified in Schedule 9 are exempt. Group 7 of Schedule 9 to VATA 1994 provides that the following are exempt from VAT:

“Item no. 2.

The supply of any services consisting in the provision of medical care, or the supply of dental prostheses, by:

- (a) a person registered in the dentists’ register;
- (b) a person registered in the dental care professionals register established under section 36B of the Dentists Act 1984;

Item no. 2A.

The supply of any services or dental prostheses by a dental technician.”

6. We refer to the exemption from VAT in respect of the supply of dental prostheses in Items 2 and 2A of Group 7 of Schedule 9 to VATA 1994 as the “Exemption”.
7. The Exemption implemented Article 132(1)(e) of Directive 2006/112/EC (“the Principal VAT Directive”), which provides:

“Exemptions for certain activities in the public interest

1. Member States shall exempt the following transactions:

...

- (e) the supply of services by dental technicians in their professional capacity and the supply of dental prostheses by dentists and dental technicians...”

### FTT DECISION

8. There was no challenge to the FTT’s findings of fact, which were set out clearly in the following paragraphs of the FTT Decision:

“16. The Aligners are removable orthodontic appliances used by dental professionals to treat malocclusion in patients by repositioning their teeth. As part of the Invisalign system, a patented solution, dental professionals use advanced 3-D scanners and digital software to scan patients’ mouths. These

scans are then used to manufacture the Aligners using a proprietary and patented invisible aligner material, the SmartTrack material. The Aligners are bespoke products specially designed and produced for each individual patient. Dentists use the bespoke Aligners to treat patients as part of a sequenced treatment plan that restores occlusal (bite) functionality. The Aligners are designed to reposition teeth and to respond to each patient's unique characteristics to produce the desired clinical outcome. ...

17. Once the Aligners have been manufactured and delivered to the dentist, the patient will arrange an appointment and the dentist will check the fitting of the Aligners and confirm the treatment plan. The treatment may take as little as six months, but it can differ depending on the complexity of the patient's condition and the average is around 18 months. During the course of treatment, the patient will visit the dentist regularly to check the progress of the re-alignment and to collect the next set of Aligners. The patient will usually change their Aligners weekly. The difference between each set of Aligners as treatment progresses is small. The patient is required to wear the Aligner for 20 to 22 hours a day, only removing the Aligner for eating and drinking (this is primarily for hygiene reasons). The Aligners do not wear out as they are changed so frequently.

18. Aligners can be used to treat a number of conditions such as: misalignment between the teeth of the upper and lower dental arches when they bite together; open bite; overbite; underbite; crossbite; crowding; narrow or asymmetrical arches; and spacing problems. When there is malocclusion, the functionality of the bite is damaged, and the Aligners are used to replace the dysfunctional bite with a more functional bite. Malocclusion can be associated with functional difficulties with chewing (mastication) and with various medical issues, for example:

- (1) Inadequate regulation of blood glucose levels;
- (2) Speech issues;
- (3) Traumatic dental injury;
- (4) Various temporomandibular disorders;
- (5) Tooth surface loss;
- (6) Periodontal disease; and
- (7) Breathing difficulties.

19. Some people may wear their Aligners because they want to improve their smile but an imperfect smile may often be a sign that their bite is not functioning properly. Equally, some patients may not realise that they have a functional problem but they do. Aligners restore the natural function of the teeth eg enabling or improving biting and chewing of food, breathing and talking.”

9. The FTT recorded at FTT[20] that there is no dispute that the Aligners are used in relation to a person's teeth and are therefore “dental”, and stated that the real focus of the appeal is whether they are “prostheses” for this purpose. The FTT was referred to various dictionary definitions of “prosthesis” and “dental prosthesis” and considered that the relevant meaning of “prosthesis” is the one that is used in the context of dental treatment and had particular regard to the definitions of “dental prosthesis” in the specialist medical dictionaries.

10. The FTT concluded at FTT[31] that “dental prostheses” includes orthodontic appliances used to move a person's teeth, that including the Aligners in the term “dental prostheses” is consistent with the purpose of the Exemption, and that they should not follow the view

expressed in the guidelines of the EU VAT Committee that “dental devices” are not “dental prostheses”.

#### NATURE OF OUR JURISDICTION IN THE APPEAL

11. In their application for permission to appeal HMRC raised a single ground of appeal, namely “the FTT erred in its interpretation of the phrase “dental prostheses” and thereby misapplied VATA 1994 to the Aligners”. HMRC’s reasons given in the Notice of Appeal included that a “prosthesis” is an artificial replacement for part of the body and a “dental prosthesis” is an artificial item used to replace missing or damaged teeth – the Aligners are orthodontic appliances used to reposition teeth and, accordingly, are not “dental prostheses”.

12. On its face, this ground of appeal appears to raise a point of statutory construction, and thus a point of law in relation to the meaning of the words “dental prostheses” in the Exemption. If the FTT did err in their decision on the meaning of these words in the Exemption, they erred in their construction of the Exemption, and made an error on a point of law. By s12 of the Tribunals, Courts and Enforcement Act 2007 (“TCEA 2007”), the Upper Tribunal then has the power to set aside the decision of the FTT and remit the case to the FTT or re-make the decision.

13. However, in their skeleton argument Align’s counsel argued as follows:

“15. HMRC appeal on the basis that the FTT erred in its identification of the ordinary meaning of the word “dental prostheses”. The meaning of an ordinary English word is a question of fact (and not a question of law), as is the question of whether the facts as found fall within the words of the legislation. HMRC’s appeal can succeed only if they establish that no Tribunal acquainted with the ordinary use of language could reasonably reach that conclusion. That is an ambitious submission in circumstances where HMRC’s own guidance, for many years, gave orthodontic appliances as examples of dental prostheses.”

14. Ms Sloane relied on the decision of the Court of Appeal in *A Taxpayer v The Commissioners for His Majesty’s Revenue and Customs* [2025] EWCA Civ 106 (“*A Taxpayer*”) in support of this submission. The position set out in Align’s skeleton was essentially that “dental prostheses” were said by HMRC to be ordinary English words, and as such their meaning is a question of fact; the Upper Tribunal can only set aside the decision of the FTT on the meaning of these words if the *Edwards v Bairstow* test is satisfied, ie the FTT came to a conclusion which no reasonable tribunal could have reached.

15. Ms Sloane’s oral submissions at the hearing started by reiterating this position – at the very beginning of her submissions, Ms Sloane submitted that for HMRC to succeed they have to show that the only permissible ordinary meaning of “dental prostheses” is for the replacement of missing or damaged teeth. Ms Sloane accepted that the construction of a statute is a question of law; but, in support of her submissions that the issue in this appeal involved a question of fact, she made reference to the way in which HMRC had framed their ground of appeal, describing this as being that “the only available meaning is the replacement of missing or damaged teeth”. Ms Sloane did accept, in the course of her submissions, that the meaning put forward by HMRC is “one available meaning” but submitted it is wrong to say it is the only meaning because the dictionaries show a much broader meaning which encompasses orthodontic appliances. Relying on *A Taxpayer*, Ms Sloane submitted that in order to succeed in this appeal HMRC must show that the FTT’s decision was perverse, in the *Edwards v Bairstow* sense.

16. Ms Sloane referred us to the decision of the Upper Tribunal in *Oak Tree Homes Limited v The Commissioners for Her Majesty’s Revenue and Customs* [2017] UKUT 0027 (TCC) (“*Oak Tree Homes*”), where the issue was whether motor homes were “caravans” for the purpose of Item 1 of Group 9 of Schedule 8 to the VATA 1994. In that case, the Upper Tribunal

considered the FTT’s conclusion on the meaning of “caravan” both as a question of fact and a question of law. Ms Sloane stated that Align would be addressing the issue in this appeal as a question of law and alternatively as a question of fact.

17. Whilst Ms Sloane put forward Align’s submission on these alternative bases, we do not consider that we should follow the approach in *Oak Tree Homes*. To make our decision on alternative bases would result in uncertainty and we have concluded that the nature of our jurisdiction in this appeal is clear – for the reasons explained below, we are making a decision on a question of law.

18. The position is clearly explained by Nugee LJ in *A Taxpayer*. The issue in that case was whether the appellant would not have been present in the UK at the end of the day but for exceptional circumstances beyond her control that prevented her from leaving the UK and whether she intended to leave the UK as soon as those circumstances permit. The appellant’s case was that she had been compelled to stay in the UK in order to help her sister, who was in serious difficulties with her alcoholism, mental health and the responsibility of caring for her children.

19. The first ground of appeal was what was meant by “prevented”. Nugee LJ accepted that “prevent” was an ordinary English word, but this did not cause him to treat the FTT’s decision on what was meant by “prevent” as a question of fact. Nugee LJ reached his own view on what circumstances were capable of preventing the appellant from leaving the UK, within the meaning of the statute. This is clear from the judgment of Nugee LJ at [46] and [54]:

“46. I do not accept this submission. I agree that “prevent” is an ordinary English word; that it is a stronger word than “hinder”; and that the sense of it is well captured by saying it refers to stopping something or making it impossible rather than merely impeding it or making it more difficult. But where I differ from Mr Stone’s submission is that I do not think that what prevents someone from leaving the country can be limited to certain defined categories: legal obligations, physical impossibility, medical advice and the like. There may be any number of reasons why a person in any particular case has to stay in the UK, and as a matter of ordinary experience we can distinguish between cases where they are compelled or obliged to stay (and hence are prevented from leaving) and cases where they simply find it more convenient or attractive or otherwise preferable for them to stay.

...

54. It seems to me therefore that the position is this. The FTT is ultimately required, having found the primary facts, to make an assessment whether the circumstances prevented P from leaving the UK. That to my mind requires them to identify whether the circumstances were objectively compelling such as to prevent P from leaving. Those circumstances can include the reaction of P to such matters as the illness of a close relative, and other moral obligations operating on P in the circumstances, but the assessment whether such circumstances are really sufficiently cogent to amount to prevention is a value-judgement for the FTT, and can take into account such matters as whether P’s reaction is reasonable and in accordance with ordinary societal expectations, or is unreasonable and idiosyncratic.”

20. Nugee LJ then went on to consider the question of whether a moral obligation, of the kind owed by the appellant to her sister, could be part of the exceptional circumstances. Nugee LJ stated his conclusion on this question at [63]:

“63. In my judgement therefore the moral or societal obligations which the illness of a relative – or any other situation – imposes on P form part of the

overall circumstances, and can and should be taken account of in considering whether the circumstances as a whole qualify as exceptional. I would therefore accept that Ground 4 of the appeal is well-founded.”

21. Nugee LJ then turned to whether the question of what circumstances qualify as exceptional was a question of law. The Upper Tribunal had treated this question as a mixed question of fact and law. After citing *Cozens v Brutus* [1973] AC 854 and *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44, Nugee LJ stated the following principles:

“70. Taking the two judgments together, one can extract the following principles:

(1) The meaning of an ordinary English word is a question of fact: *Cozens v Brutus* at 861C. The meaning of a word depends on conventions known to the ordinary speaker of English or ascertainable from a dictionary, and is not a question of law because it does not in itself have any legal significance: *Moyna* at [24].

(2) The proper construction of a statute however is always a question of law: *Cozens v Brutus* at 861C. This is so whether the statute uses simple words or difficult ones: *Moyna* at [23]. This is because when a person uses a word in a particular sentence, what they intend to convey depends not only on conventional meaning but on the syntax, context and background. So when a word is used in an Act, the intention to be ascribed to “the notional legislator” (what is often, if perhaps inaccurately, referred to as “the intention of Parliament”) is a statement of law: *Moyna* at [24].

(3) If on its true construction a word used in an Act is intended to have its ordinary meaning, then it is a question of fact, not law, whether the facts as found do or do not come within the words of the Act as a matter of ordinary usage of the English language. This is what Lord Reid says in *Cozens v Brutus* at 861D, and is why he decided that since Parliament had given no indication that “insulting” was to be given any unusual meaning (“Insulting means insulting and nothing else”), it was for the magistrates, not for the Divisional Court or the House of Lords, to decide if Mr Brutus’s conduct was insulting: *Cozens v Brutus* at 863A-B.

(4) Lord Hoffmann does not dispute this, although he clearly finds it a little odd that whether certain facts fall within some legal category is regarded as a question of fact rather than law: *Moyna* at [26]-[27]. But he accepts that there is a “good deal of high authority” (including *Edwards v Bairstow*) that whether facts as found fall one side or the other of a conceptual line drawn by the law is indeed a question of fact: *Moyna* at [25].

(5) The practical effect is that an appellate court that can only hear an appeal on a point of law has a limited ability to disturb the decision of a fact-finding tribunal on such a question. There can be a question of law but only of a limited character: the question would normally be whether their decision was unreasonable in the sense that no tribunal could reasonably reach that decision: *Cozens v Brutus* at 861E. Or, as Lord Hoffmann puts it, such an appellate court will not hear an appeal unless the decision falls outside the bounds of reasonable judgment: *Moyna* at [25]. He does however say that the degree to which an appellate court will be willing to substitute its own judgment for that of the tribunal will vary with the nature of the question: *Moyna* at [27].”

22. *A Taxpayer* was not a case where the parties were contending for rival constructions of the meaning of the phrase “exceptional circumstances”. The question was whether the relevant

facts of the case constituted exceptional circumstances and this was a question of fact. Nugee LJ explained the application of the relevant principles:

“71. Applying those principles here:

(1) The meaning of “exceptional” as an ordinary English word is a question of fact. In *R v Kelly (Edward)* [2000] QB 198, a case which concerned the meaning of “exceptional circumstances” in s. 2 of the Crime (Sentences) Act 1997, Lord Bingham of Cornhill CJ said at 208C:

“We must construe “exceptional” as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance that is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.”

No issue has been taken with that – nor do I think any could reasonably be – as an explanation of what “exceptional” (or “exceptional circumstances”) means as a matter of ordinary English.

(2) The interpretation of para 22(4) is in principle a question of statutory construction and hence a question of law. As with any other question of statutory construction, its meaning can take into account both the context in which words are used, and the purposes of the statutory provisions in question. In particular, I accept, as Mr Stone submitted, that one has to read the word “exceptional” in para 22(4) not as an isolated one but as it appears in the composite phrase “exceptional circumstances beyond P’s control that prevent P from leaving the UK”. Moreover the use of the word can be elucidated by reference to the statutory examples in para 22(5). The very purpose of such examples is to illustrate circumstances that Parliament recognises to be exceptional. And one can take into account the evident purposes of the introduction of the statutory residence test as a whole, which was to produce a more prescriptive and predictable test for residence that was easier to apply than the somewhat uncertain test under the general law. All of this suggests that Parliament did not intend the exceptional circumstances test to be met too readily.

(3) But having said that, it has not been suggested that “exceptional circumstances” in para 22(4) has some special or unusual or technical meaning, or is a term of art. Nor is it a case where rival constructions have been put forward and the Court is being asked to choose between them. So just as in *Cozens v Brutus* with the word “insulting”, or as in *R v Kelly* with the very phrase “exceptional circumstances”, there is no reason to think that Parliament used the word in any other than its normal meaning as an ordinary English word, albeit read in its context and informed by the statutory examples and statutory purpose.

(4) That means that whether the facts as found by the FTT do or do not fall within the words of para 22(4) is indeed a question of fact not law; and that an appellate tribunal, such as the UT, that can only hear appeals on a point of law, is limited to deciding whether the FTT reached a decision that no tribunal reasonably could.”

23. Nugee LJ then summarised the position as follows:

“78. After this survey of the relevant authorities, I think the position in the present case can be summarised quite briefly. The meaning of para 22(4) is, like any other question of statutory construction, a question of law. But there is no reason to think that “exceptional circumstances” in that paragraph has

any special meaning. It is a matter for the FTT as the fact-finding tribunal to consider whether the circumstances as found by them (as primary facts) do or do not qualify as exceptional. This is also a question of fact, albeit one of evaluation or assessment rather than of primary fact. The UT can only disturb their conclusion on this if it involves an error of law. That can be shown in accordance with *Edwards v Bairstow* principles if the “true and only reasonable conclusion” contradicts their determination.”

24. Ms Sloane emphasised the principles set out by Nugee LJ, at [70(1)] and [70(3)], that the meaning of an ordinary English word is a question of fact and that if, on its true construction, a word used in a statute is intended to have its ordinary meaning then it is a question of fact whether the facts as found do or do not come within the words of the statute. Ms Sloane relied on the way in which HMRC had framed its ground of appeal, submitting that HMRC’s position was that “dental prostheses” are ordinary words with a single meaning and (effectively) that the FTT had erred by finding there was any other ordinary meaning.

25. In our view, there is a clear difference between the present case and cases such as *Cozens v Brutus* and *A Taxpayer*. In *A Taxpayer* there was no issue taken with the meaning of “exceptional”, or “exceptional circumstances”, as a matter of ordinary English language. The issue was whether the facts as found were exceptional. By contrast, in the present case, we are asked to decide between rival constructions of the expression “dental prostheses” (which Nugee LJ acknowledged at [71(3)] was different to the exercise being undertaken in that case) – it is, as Mr Ripley submitted, a definitional dispute, and this is a question of law. Furthermore, Align’s reliance on the way in which HMRC framed the ground of appeal does not assist; HMRC’s single ground of appeal is that the FTT erred in its interpretation of the phrase “dental prostheses” and thereby misapplied VATA 1994. It is clear that HMRC were challenging, and were granted permission to challenge, the meaning of the phrase that was being applied by the FTT.

26. As Ms Sloane accepted, there can be no doubt that the proper construction of a statute is a question of law. We are not, therefore, in a position where the *Edwards v Bairstow* test applies to the decision of the FTT that “dental prostheses” includes the Aligners. The findings of fact in the present case are set out at FTT[16] to [19]. Those findings of fact, which essentially explain the operation and functions of the Aligners, have not been challenged. The question of whether dental prostheses include the Aligners is a question of the construction of the expression “dental prostheses”, as it appears in the Exemption. Each party argues for a different construction of that expression. If we disagree with the decision of the FTT on the construction of the expression we are entitled to do so, without having to find that the FTT reached a conclusion which no reasonable tribunal could have reached.

27. We recognise that there may be cases where the determination of the correct construction of a word or expression in a statute leaves outstanding the question of whether the facts of the relevant case fall within the terms of the statute as correctly construed. In answering this outstanding question it is likely that issues of fact will be engaged, in respect of which the FTT will have to make findings to resolve the issues of fact. If there is an appeal against those findings of fact, the *Edwards v Bairstow* test will be engaged. The present case is not, however, such a case. Once the Upper Tribunal has decided on the meaning of “dental prostheses”, as this expression is used in the Exemption, the answer to the question of whether Aligners are included within this expression follows, or at least follows on the rival construction arguments which we have heard, without the need for further factual inquiry.

#### **APPROACH TO THE QUESTION OF CONSTRUCTION**

28. As correctly identified by the FTT at FTT[20], there is no definition of “dental prostheses” in the EU or UK VAT legislation or case law. The meaning of the expression has

to be found without the assistance of a statutory definition. This, in turn, requires us to range more widely than might be the case if we were dealing with a statutorily defined expression.

29. The approach which should be taken to the construction of the Exemption was correctly summarised by the FTT:

“21. Where a term is undefined in VAT legislation, its meaning falls to be determined “by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it forms part” (see *Leisure, Independence, Friendship and Enablement Services Ltd and The Learning Centre (Romford) Ltd v HMRC* [2020] EWCA Civ 452 at [99]). The same point was also made by the CJEU in Case C-228/20 *I GmbH v Finanzamt H* (*I GmbH*) at paragraphs 33 and 34 (references removed):

“33. In accordance with settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part.

34. In that regard, it should be borne in mind that the terms used to specify the exemptions laid down in Article 132 of the VAT Directive are to be interpreted strictly, as they are a departure from the general principle that VAT is to be paid on each supply of services made for consideration by a taxable person. However, the interpretation of those terms must comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT and be consistent with the objectives underlying those exemptions. Accordingly, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 must be construed in such a way as to deprive the exemptions of their intended effect.”

22. It follows that when considering the meaning of ‘prostheses’, we must consider the meaning of the word in everyday language; the context in which it occurs; and the objectives of the provision of which it forms part. As it is used to describe an exempt supply, we must interpret the word strictly but not in such a way as to deprive the exemption of its intended effect but consistently with the objectives underlying the exemption and in compliance with the principle of fiscal neutrality.”

30. In approaching the construction of the phrase “dental prostheses” we start by identifying the purpose of the Exemption, about which there was no dispute between the parties.

31. In *VDP Dental Laboratory NV v Staatssecretaris van Financiën* (Joined cases C-144/13, C-154/13 and C-160/13) [2015] STC 1133 (“*VDP Dental Laboratory NV 2015*”) the Court of Justice of the European Union (“CJEU”) considered the question whether the VAT exemption provided for in Article 140(a) and (b) and Article 143(a) of the Principal VAT Directive applies to the intra-Community acquisition and importation of dental prostheses and whether, depending on the circumstances, the application of that exemption was subject to the condition that the dental prostheses had been supplied from another Member State or a third country by a dentist or dental technician and/or supplied to a dentist or dental technician. The CJEU set out the purpose in the following terms:

“46. The exemption of the supply of dental prostheses made by dentists and dental technicians is intended to ensure that the supply of health-related products does not become inaccessible by reason of the increased costs of those products if their supply were subject to VAT (see, concerning Article 13A(1)(b) of the Sixth Directive, now Article 132(1)(b) of the VAT Directive, judgment in *Commission v France*, C 76/99, EU:C:2001:12, paragraph 23).”

32. The FTT set out at FTT[18] the conditions which the Aligners can be used to treat, and the medical issues which can be associated with malocclusion. We accept, and we did not take Mr Ripley to disagree, that on the basis of the FTT’s findings of fact the Aligners can be described as health-related products.

33. However, whilst it is necessary to consider the context in which the expression “dental prostheses” is used, and the objectives pursued by the Exemption, context and purpose do not mean that one can override or enlarge the wording of the Exemption. The construction of the Exemption is limited by its wording – one cannot say that dental prostheses or any other dental devices must be within the meaning of the Exemption, regardless of the actual wording of the Exemption, simply because they can be described as health-related products which are likely to become more expensive if subject to VAT. The extent of the Exemption is limited by the wording used to express the Exemption; consideration of context and purpose is part of the construction exercise but they do not dictate the outcome of that exercise.

34. This point is well made by the CJEU in *VDP Dental Laboratory NV 2015*:

“45. It must also be remembered that the aim of art 132 of the VAT Directive is to exempt from VAT certain activities which are in the public interest. That provision does not, however, provide exemptions from VAT for every activity performed in the public interest, but only for those which are listed therein and described in great detail (judgment in *Institute of the Motor Industry v Customs and Excise Comrs* (Case C-149/97) [1998] STC 1219, [1998] ECR I-7053, para 18).” [underlining added]

35. Mr Ripley and Ms Sloane both referred us to the guidance given by the CJEU in *VDP Dental Laboratory NV v Staatssecretaris van Financien* (Case C-401/05) [2007] STC 474 (“*VDP Dental Laboratory 2007*”), which addressed the argument made by the Netherlands that supplies of dental prostheses made by intermediaries who were not dentists or dental technicians should be exempt. The CJEU stated at [24] that Article 13A of the Sixth Directive “does not exempt from VAT every activity performed in the public interest, but only those which are listed therein and described in great detail”. The CJEU then stated its conclusions in the following terms:

“33. Therefore, the exemption provided for by the 1968 Law on VAT, which, since 1 December 1997, has applied to all supplies of dental prostheses regardless of the status of the supplier, is inconsistent with the wording of the corresponding provisions of the Sixth Directive. The broad interpretation advocated in that respect by the Netherlands government is at variance with the case law of the court cited in para 23 of this judgment according to which the exemptions provided for in art 13 of the directive, and in particular the terms ‘dentists’ and ‘dental technicians’, are to be strictly interpreted.

34. However, that government submits that the principle of strict interpretation of exemptions is not the only one of relevance for establishing the scope of the exemptions and that both their objective and the principle of fiscal neutrality must also be taken into account. Firstly, art 13A(1)(e) of the Sixth Directive, like art 13A(1)(b) and (c), has the objective of preventing medical care, in this case dental care, from becoming inaccessible on account of the increased costs that would follow if that care were subject to VAT (see, to that effect, *EC Commission v France* (Case C-76/99) [2001] ECR I-249, para 23, and *Ambulanter Pflegedienst f Kugler GmbH v Finanzamt fur Körperschaften I in Berlin* (Case C-141/00) [2002] ECR I-6833, para 29). That would, however, be the case if supplies of dental prostheses made by intermediaries were not exempt, as dentists, who effect exempt transactions themselves, would not be able to deduct input VAT and would, therefore, pass that tax on

to their patients. Secondly, intermediaries and dental technicians effect the same supplies since it is of no account to dentists whether the supplier manufactures the dental prostheses himself or whether he subcontracts that transaction to a dental technician.

35. In this respect, it must be stated that the terms ‘dentists’ and ‘dental technicians’ in art 13A(1)(e) of the Sixth Directive are unambiguous. If the wording of that provision is not to be radically altered and the condition relating to the status of the supplier rendered inoperative, those terms clearly cannot be understood as including intermediaries who are not specifically either dentists or dental technicians.

36. Consequently, since the Community legislature did not intend to extend the exemption referred to in that provision to supplies of dental prostheses which are not made by dentists or dental technicians, neither the objectives of that exemption nor the principle of fiscal neutrality can compel a broad interpretation of art 13A of the Sixth Directive in that respect.”

36. Mr Ripley relied on *VDP Dental Laboratory 2007* for the proposition that exemptions must be construed strictly and that means they must not be construed purposively beyond their wording. Ms Sloane drew attention to the context of this decision, which was whether supplies made by intermediaries were within the exemption in a situation where the terms of the exemption referred to supplies by “dentists” and “dental technicians”, which phrases were said by the CJEU to be unambiguous.

37. We find the decision of the Court of Appeal in *Expert Witness Institute v Customs and Excise Commissioners* [2001] EWCA Civ 1882 helpful in relation to the approach to the construction of exemptions. Chadwick LJ rejected the premise that the proper approach to construction requires the court to confine the scope of an exemption if it can, stating at [19] that “The task of the court is to give the exempting words a meaning which they can fairly and properly bear in the context in which they are used.”

38. When approaching the construction of the phrase “dental prostheses”, we take account of the purpose of the Exemption as identified above and its context, recognising that we need to decide whether or not the Aligners are one of the products which are specifically exempted within items 2 and 2A, and seek to give the term a meaning which it can fairly and properly bear in this context.

#### COMPETING CONSTRUCTIONS

39. The FTT set out its conclusion as:

“35. Taking into account the ordinary meaning of ‘prostheses’, the fact that the word is used in the context of dental treatment and that the purpose of the exemption is to ensure that the supply of health-related products is not made more expensive by the addition of VAT, we conclude that ‘dental prostheses’ includes the Aligners in this case.

40. HMRC’s position was that the ordinary meaning of a “dental prosthesis” is an artificial item used to replace missing or damaged teeth, and it does not extend to any appliance for straightening the teeth. Mr Ripley submitted that this flows from what he described as well-known and authoritative dictionaries (including the Oxford English Dictionary and Black’s Medical Dictionary), UK case law and EU guidance. Mr Ripley submitted that even if this term can have different, broader, meanings, the Aligners would remain outside such broader meaning, as they are not, by way of example, used to correct a congenital abnormality.

41. Align’s position was that the Aligners fall within the scope of the ordinary everyday meaning of “dental prostheses” as that term is used in dictionaries (including medical

dictionaries) and common usage in the dental industry. Ms Sloane submitted that Black's Medical Dictionary has the most restricted definition and did not accept that this should be treated as pre-eminent, submitting that the majority provide a wider definition. Ms Sloane referred in particular to the Oxford Dictionary of Dentistry which defines "dental prostheses" as including "partial and complete dentures, bridges (fixed prostheses), and orthodontic appliances".

42. Ms Sloane objected to Mr Ripley's oral submissions in relation to how any broader meaning of "dental prostheses" may (or may not) apply to the Aligners, submitting that these submissions were not part of HMRC's ground of appeal, would have fundamentally changed Align's approach to the appeal if they had been included in the ground of appeal (in particular they would have filed a Respondents' Notice) and might have required further evidence and findings of fact.

### **Dictionary definitions**

43. It is clear that dictionaries may be consulted in order to assist with the meaning of terms (Bennion, Bailey and Norbury on Statutory Interpretation (Eighth Edition) ("Bennion") at Section 24.23). However, this also recognises that the court is always free to depart from a dictionary definition.

44. The following note of caution, sounded by Lewison LJ in *Haneen Abdelrahman v The Mayor and Burgesses of the London Borough of Islington* [2025] EWCA Civ 1038 is relevant:

"50. While I accept that, in principle, recourse to a dictionary is a permissible tool in interpreting any document, it remains the case that, as Steyn LJ said in *Arbuthnott v Fagan* [1995] CLC 1396, 1402:

"Dictionaries never solve concrete problems of construction. The meaning of words cannot be ascertained divorced from their context. And part of the contextual scene is the purpose of the provision."

51. Moreover, in view of the differing definitions it is worth recalling what Lord Denning MR said in his dissenting judgment on the interpretation of a will in *Re Rowland* [1963] Ch 1, 10:

"True it is that you must discover his intention from the words he used: but you must put upon his words the meaning which they bore to him. If his words are capable of more than one meaning, or of a wide meaning and a narrow meaning, as they often are, then you must put upon them the meaning which he intended them to convey, and not the meaning which a philologist would put upon them. And in order to discover the meaning which he intended, you will not get much help by going to a dictionary. It is very unlikely that he used a dictionary, and even less likely that he used the same one as you."

45. This authority was relied upon by Align as part of their submissions that the purpose of the Exemption justified a wide reading of the Exemption. However, this is to disregard the authorities, such as the *VDP Dental Laboratory 2015*, which make it clear that one must focus on what is listed in the relevant exemption. An item cannot be included simply because it can be said to meet the purpose of the exemption. The real point is that dictionaries are, at best, a guide to the meaning of words.

46. The parties have taken us and the FTT to various definitions of both "prosthesis" and "dental prosthesis". Ms Sloane submitted that we should take account of the meaning of "prostheses" but we should focus on "dental prostheses" as a composite term, referring to Bennion which states at Section 22.3:

"A composite expression must be construed as a whole, but the whole is not necessarily the same as the sum of its parts. Because a certain meaning can be

collected by taking each word in turn and then combining their several meanings, it does not follow that this is the true meaning of the whole phrase. Each word in the phrase may modify the meaning of the others, giving the whole its own meaning.”

47. An example given in Bennion was the term “original literary work” in *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119 where Oliver LJ said:

“...I do not think that the right way to apply a composite expression is, or at any rate is necessarily, to ascertain whether a particular subject matter falls within the meaning of each of the constituent parts, and then to say that the whole expression is merely the sum total of the constituent parts. In my judgment it is not necessary, in construing a statutory expression, to take leave of one’s common sense ...”

48. We are not persuaded in the present case that we should approach the issue solely by reference to the composite phrase. The dictionaries generally define “prosthesis” and then go on to provide a definition of “dental prosthesis” as a sub-set of that term. This can be seen in, eg, Black’s Medical Dictionary, Mosby’s Dental Dictionary and Taber’s Medical Dictionary. Similarly, the Oxford Dictionary of Dentistry has a definition of “prosthesis” and then provides “In dentistry ...”. We conclude that to resolve the question of construction before us we should consider the meaning of “prostheses” and, armed with that meaning, consider the effect of the additional word “dental”.

#### **The dictionaries – the meaning of prosthesis**

49. As referred to above, we were taken to a variety of both UK and US dictionaries by HMRC and Align. Mr Ripley and Ms Sloane agreed that we should not be counting how many dictionaries support each side’s preferred approach (and we agree).

50. The definitions of “prosthesis” include:

(1) The Oxford English Dictionary contains the following definition of “prosthesis”:

“An artificial replacement for a part of the body.”

(2) Black’s Medical Dictionary has a similar definition, which expressly refers to the replacement being not just of a missing body part but also a malfunctioning body part:

“An artificial replacement of a missing or malfunctioning body part. Examples include false legs or arms fitted after AMPUTATION (see below); artificial hear valves; COCHLEAR IMPLANTS to improve hearing ...”

(3) The following definition in the Oxford Concise Medical Dictionary (referred to by the FTT as the Oxford Reference) is also helpful:

“**prosthesis** n. (pl. **prostheses**) any artificial device that is attached to the body as an aid. Prostheses include bridges, dentures, artificial parts of the face, artificial limbs, hearing aids and cochlear implants, implanted pacemakers, and many other substitutes for parts of the body that are missing or nonfunctional. **Penile prostheses** are malleable, semirigid, or inflatable rods inserted into the corpora cavernosa of the penis to produce rigidity sufficient for vaginal penetration in men with erectile dysfunction. – **prosthetic** adj.”

(4) Taber’s Medical Dictionary then defines “prosthesis” by reference to replacement of missing body parts, artificial organs and:

“... 3. A device to augment performance of a natural function, such as a hearing aid.”

(5) The Oxford Dictionary of Dentistry, on which Align placed particular reliance contains the following definition:

“**prosthesis** n. (adj. **prosthetic**) An artificial appliance used as a replacement for a body part or to correct a congenital abnormality. In dentistry this includes partial and complete dentures, bridges (fixed prostheses), and orthodontic appliances. A **provisional prosthesis** is an interim prosthesis worn for a limited period of time, either to allow time to construct the permanent prosthesis or to allow for tissues to heal.”

51. The definitions of prosthesis in the other dictionaries to which our attention has been drawn are broadly consistent with the above range of definitions.

52. Mr Ripley accepted that there may be scope for argument as to whether “prosthesis” includes something which takes over the function of a part of the body, but submitted that this does not assist here. He described the Aligners as being used temporarily as a course of treatment, and removed during eating and drinking (thus not performing the function of teeth). Furthermore, the FTT had not found that the Aligners were used to correct a congenital abnormality.

53. Ms Sloane drew attention to the definition in the Oxford Concise Medical Dictionary, submitting this was not limited to replacements for body parts as it includes any device “attached to the body as an aid”, and expressly includes “hearing aids and cochlear implants”.

54. We recognise the differences between these various definitions. Looking at them in the round, these dictionary definitions of a prosthesis confirm what one would have in mind as a prosthesis, that is to say something which acts as an artificial replacement of a missing or malfunctioning body part. The prosthesis enables the performance, or assists in the performance, of the relevant bodily function. Without the prosthesis, the relevant bodily function cannot be performed, because the relevant body part which performs that function is missing or malfunctioning. The classic example of a prosthesis is a prosthetic limb, which performs the function of the missing limb, as part of the body. We are not persuaded that prosthesis is generally understood to include something external to the body which may provide some support or assistance, or which may operate as a course of corrective treatment to a particular part of the body.

#### **Case law – the meaning of a prosthesis**

55. The only UK case law on the meaning of “prosthesis” is to be found in very different contexts, namely social security and employment. Ms Sloane submitted that for this reason alone these authorities were not helpful.

56. We have considered whether these cases, which are not binding on us, are of any assistance, bearing in mind the different context and that therefore these decisions were reached without reference to the purpose of the Exemption or the statutory context.

57. In *Perry v Adjudication Officer* [1999] NI 338 the Northern Ireland Court of Appeal overturned the decision of the Social Security Commissioner that a colostomy bag was a prosthesis. The essential reasoning of the Northern Ireland Court of Appeal on this point can be found in the judgment of the court, given by Carswell LCJ (as he then was), at 342c-f:

“The commissioner adopted the definition of prosthesis from *Collins’ Concise English Dictionary* as ‘an artificial part [of the body] such as a limb, eye or tooth.’ We think that it would be difficult to improve upon the succinct definition in the *Oxford Companion to Medicine*, ‘An artificial substitute for a body part’. We do not find it easy to accept that the colostomy bag is a prosthesis in the proper sense, although it may perform a function which replaces that of part of the body. As Mr Lavery argued, it is no more than a

receptacle, which is very different from the anal sphincter, and we do not consider that it can readily be regarded as an artificial substitute for that. Many artificial aids clearly could not be classed as prostheses, such as wheelchairs, zimmer frames or dialysis machines. We agree with the decision of the Social Security Commissioner who held in *Decision no CSIB/74/96* that an incontinence pad is not a prosthesis, for it does not purport to be a substitute for a bodily part. We consider that a colostomy bag falls on the same side of the line and that it cannot be classed as a prosthesis. We note that reg 25(2) was amended in 1997 by the addition of the words 'or, as the case may be, any aid or appliance which he normally wears or uses', which clearly would include a colostomy bag."

58. It can be seen from this reasoning that the Northern Ireland Court of Appeal had been referred to different definitions to those to which we were referred. We find this reasoning to be compelling, in showing where the dividing line is to be drawn between a prosthesis and other artificial aids to bodily functions.

59. The second case is *Carden v Pickering's Europe Ltd* [2005] IRLR 723, where the Employment Appeal Tribunal addressed a disability discrimination claim. The question for the Tribunal was whether Mr Carden was a disabled person within the meaning of the Disability Discrimination Act 1995, which turned in part on whether the plate and pins which had been surgically inserted into his ankle were a prosthesis.

60. The Employment Tribunal had concluded that Mr Carden was not a disabled person. In his judgment on the appeal Burton J described the issue in the appeal in the following terms:

"2. The Tribunal concluded, materially to this appeal, that the Applicant was not a disabled person, with the effect that his claims fell away. We have not addressed at all the merits of his claim and as to whether, if he in fact is a disabled person, he has any prospect of establishing that any treatment of him, by dismissal or otherwise, had any causative relationship with the alleged disability.

3. That question of causative relationship must always be a significant question to be raised where the disability is, as is this case, said to be not an actual disability but one resulting from the concept which is commonly described as "deduced effect". That is the concept which is derived from Schedule 1 paragraph 6 of the Disability Discrimination Act 1995, which reads as follows:—

"(1) An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.

(2) In subparagraph (1) "measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3) Sub-paragraph (1) does not apply—

(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in his case, correctable by spectacles or contact lenses or in such other ways as may be prescribed; or

(b) in relation to such other impairments as may be prescribed, in such circumstances as may be prescribed."

We have not been informed whether there have been any prescriptions as set out under 6(3)(b).

4. The effect, as we have indicated, here would be that if this Applicant is disabled, he is disabled by virtue of the deeming provision in Schedule 1 paragraph 6, which, as we have indicated, must make it the more difficult to prove that any alleged unfavourable treatment is by virtue of that deemed disability.

5. Nevertheless, that is not the issue for us to decide, but whether the Tribunal erred in law in concluding that there was no such disability in this case.

6. It was either common ground below, or it certainly is common ground before us, that there is no disability in the ordinary sense, absent the concept of deduced effect. That is, that there was no effect on his every day life, in any sense, within s 1 of the Disability Discrimination Act 1995 by virtue of the matters to which reference is now made.”

61. On appeal Mr Carden renewed his argument, amongst other arguments, that the plate and pins in his ankle were prosthetics and thus fell within the terms of paragraph 6 of Schedule 1. The Employment Appeal Tribunal did not accept this particular argument, for the reasons given by Burton J:

“25. We find it very difficult to see how the plates and pins were a prosthesis. It is a familiar use of the language of prosthesis to refer to an additional limb, an artificial leg, or something of that kind as a prosthesis.

26. Mr O'Carroll submits that if an organ were inserted into the body which replaced the function of another organ or the existing organ, then albeit, internal, that too would be prosthesis. Assuming all that in Mr O'Carroll's favour, we do not see that it can necessarily be said that pins and plates, which do not replace anything in the body, but simply assist its functioning, would fall within the categorisation of prosthesis. We have already indicated that we do not consider that legal opinion offered by Dr Roy was of any assistance to the Tribunal, and thus his view that the pins and plates were to be regarded as a prosthesis would not have assisted.”

62. Burton J concluded that the case had to be remitted to the Employment Tribunal, on the basis that they had not had sufficient evidence before them to make a decision on the question of whether Mr Carden was disabled within the meaning of the Disability Discrimination Act 1995. It follows that what was said by Burton J at [25] to [26] is not part of the ratio of the judgment. Nevertheless, and as with *Perry*, the reasoning is compelling in demonstrating the dividing line between a prosthesis and other artificial aids to bodily functions. The approach taken by the Northern Ireland Court of Appeal and the Employment Appeal Tribunal, albeit in different contexts, is consistent with our approach above having considered the dictionary definitions.

### **The meaning of “dental prostheses”**

63. Given the above conclusion on the meaning of prosthesis, it is not easy to see why the addition of the word “dental” should have the effect of widening this meaning. The addition of the word dental appears, at least at first sight, simply to mean that the prostheses which are referred to in the Exemption are those which operate in relation to teeth.

64. There is no authority which we have been shown to displace this conclusion. The dictionary definitions of dental prostheses which we have been shown do not speak with one voice:

(1) Black's Medical Dictionary sets out the following definition:

“**Dental prostheses** are any artificial replacement of teeth. There are three main types: a crown, a bridge and a denture. ...”

(2) The Oxford Dictionary of Dentistry defines a prosthesis (as set out above) and includes “In dentistry this includes partial and complete dentures, bridges (fixed prostheses), and orthodontic appliances.”

(3) Heinemann Dental Dictionary defines a “dental prosthesis” as “Partial or full dentures, crown or bridge, or any appliance to correct cleft palate”.

(4) Taber’s Medical Dictionary defines “dental prosthesis” as:

“A dental appliance used to restore soft and hard tissue. The prosthesis may be internal or external to the oral cavity. Examples include dentures, partial dentures, orthodontic retainers, obdurators, fixed bridges, and removable bridges.”

(5) Mosby’s Dictionary of Medicine, Nursing & Health Professions has a definition of dental prosthesis which does not include orthodontic devices, instead referring to “a fixed or removable appliance used to replace one or more lost or missing natural teeth”.

(6) Mosby’s Dental Dictionary defines a dental prosthesis as “an artificial replacement for one or more natural teeth or associated structures”.

(7) Stedman’s Medical Dictionary defines a dental prosthesis as “an artificial replacement of one or more teeth and/or associated structures”.

65. Mr Ripley submitted that the Oxford Dictionary of Dentistry and Taber’s Medical Dictionary are outliers in listing orthodontic appliances and orthodontic retainers as examples of dental prostheses. He submitted that whilst listed as examples, these appliances do not seem to fall within the opening definitions given in those dictionaries. On the basis that dictionaries are only helpful if we find them persuasive, he submitted that the inclusion of orthodontic appliances and retainer is not persuasive.

66. Ms Sloane submitted that Black’s Medical Dictionary is the most restrictive definition, and is just one end of the spectrum. Align did not accept that it is pre-eminent, and Ms Sloane showed that the contributors to the Oxford Dictionary of Dentistry include both academics and dental practitioners.

67. There is some, but only limited, support in these dictionary entries for the argument that a dental prosthesis can include orthodontic devices or appliances such as the Aligners. In these circumstances, and in the absence of any direct guidance in the authorities, we go back to the question of whether the addition of the word “dental” to “prostheses” has the effect of widening what we have decided would otherwise be the natural meaning of “prostheses”. Dental clearly means relating to teeth. A prosthesis which relates to teeth is, applying the natural meaning of prosthesis, a device which replaces missing or broken teeth. There is no material support for the argument that the addition of the word “dental” changes the natural meaning of a prosthesis. The obvious function of “dental” is to confirm that the prostheses referred to are not any prostheses, in any part of the body, but only those prostheses which supplement or replace missing or broken teeth, and thereby perform the function of the relevant missing or broken teeth.

68. We are not persuaded that reliance on the purpose of the Exemption or the context requires a different approach or conclusion. Orthodontic appliances such as the Aligners can be described as health-related, and, as Ms Sloane submitted, may potentially be made by the same technicians as those who manufacture items such as crowns (which are clearly within the meaning of “dental prostheses”). The difficulty, when looking at the purpose of the Exemption and the context, is that the Exemption is drafted to apply to supplies by specified persons of specified items; it does not purport to exempt the supply of all health-related products and it has specified that it is “dental prostheses” that are to be exempt, rather than, say, any supplies

by dentists or dental technicians as part of dental treatment. We have described above the meaning to be given to “dental prostheses” within the Exemption. Applying this meaning to the findings of fact made by the FTT, the Aligners are not prostheses. They do not replace missing or broken teeth.

### **EU VAT Committee Guidelines and Working Paper**

69. HMRC referred us and the FTT to EU VAT Committee Working Paper 880 dated 23 September 2015 (the “Working Paper”) and EU VAT Committee Guidelines resulting from the 105<sup>th</sup> meeting of the VAT Committee of 26<sup>th</sup> October 2015 (the “Guidelines”).

70. The Working Paper was prepared by the Commission services for the VAT Committee setting out their opinion on the question from the Netherlands as to the interpretation of “dental technician”, “services by dental technicians in their professional capacity” and “dental prostheses”. The VAT Committee is the committee set up as an advisory committee under Article 398 of the Principal VAT Directive.

71. As summarised below, the FTT concluded it should not follow the view expressed in the Guidelines that “dental devices” are not “dental prostheses”. We consider that it is helpful first to set out the opinions expressed by the Commission services in the Working Paper and by the VAT Committee in the Guidelines. We then summarise the approach of the FTT, the submissions of the parties, our conclusion on the issue which was raised by Mr Elliott at the hearing as to whether the Working Paper is admissible as an aid to interpretation and our consideration of any assistance provided by these papers. (Align’s written submissions after the hearing confirmed that they accept that the Working Paper is admissible.)

72. The relevant section of the Working Paper reads as follows (omitting footnotes):

#### *“3.2.2 Dental prosthesis*

A prosthesis is a replacement made of exogenous, inanimate material aiming at the best possible substitution of a body part in form and/or function. A dental prosthesis is an intraoral prosthesis used to restore (reconstruct) intraoral defects such as missing teeth, missing parts of teeth, and missing soft or hard structures of the jaw. Dental technology distinguishes, for instance, between fixed prostheses (including crowns, bridges and implants), removable prostheses (including dentures and removable partial dentures) and maxillofacial prostheses.

Questionable is the VAT treatment of the supply of braces, titanium girders and the material that is used to manufacture dental prostheses.

A **brace** is a device by which a malposition of the jaw or of teeth is corrected. It does not substitute a body part as required by the definition mentioned above. A brace is an **aliud** in relation to a prostheses and cannot be covered by the literal meaning of the term dental prostheses used in Article 132(1)(e) of the VAT Directive. According to the Commission services, including the supply of a brace within the scope of the tax exemption in question would not be justified in light of the principle of strict interpretation. This applies independently of the fact that prostheses and dental devices might be classified under the same category of the nomenclature.”

73. The Commission services’ conclusions then included:

#### **“3.3 Conclusions**

...

(4) The term ‘dental prostheses’ within the meaning of Article 132(1)(e) of the VAT Directive is broad enough to also include the supply of parts of a

dental prosthesis which are typically manufactured by dentists or dental technicians. However, it does not encompass the supply of dental devices and of material which is used to manufacture dental prostheses.”

74. The Guidelines then record (with no further reasoning):

*“Dental prostheses*

4. The VAT Committee **almost unanimously** agrees that the term ‘dental prostheses’ within the meaning of Article 132(1)(e) of the VAT Directive shall be seen as broad enough to also include the supply of parts of a dental prosthesis which are typically manufactured by dentists or dental technicians. According to the **almost unanimous** view of the VAT Committee it, however, shall not encompass the supply of dental devices and of material which is used to manufacture dental prostheses.”

75. The FTT had recorded its own conclusion on the application of the Exemption to the Aligners before considering what it referred to as the “EU VAT Committee documents”. The FTT then took the following approach:

(1) At FTT[38] the FTT stated it is important to recognise that the Working Paper is a working paper, not settled guidance, and that [3] is the Commission services’ opinion and not the concluded view of the VAT Committee.

(2) At FTT[40] the FTT recorded that it was common ground that the Guidelines are not binding but constitute an aid to the interpretation of the Principal VAT Directive.

(3) Having summarised the parties’ submissions, the FTT concluded at FTT[44] that it should not follow the view expressed in the Guidelines. It reached this view because that view was not held by all of the Member States and the Guidelines do not contain any analysis of competing views or reasons for the “almost unanimous” conclusion.

76. It has been established, and both parties agreed, that guidelines of the VAT Committee do not have binding effect but constitute an aid to the interpretation of the Principal VAT Directive (*Finanzamt T v S* (Case C-184/23) [2024] STC 1391 at [41]).

77. Here, the Guidelines themselves confirm the almost unanimous view (meaning 24 to 27 out of 29 Member States) of the VAT Committee that Article 132(1)(e) of the Principal VAT Directive does not encompass the supply of dental devices. The reference to dental devices would appear to include orthodontic appliances.

78. Mr Ripley submitted that the Guidelines are persuasive, and relied on the reasoning in the Working Paper. Mr Ripley’s submissions included that we can take the reasoning in the Working Paper into account alongside the Guidelines, as the Guidelines effectively endorsed what the Commission services had said.

79. Mr Elliott submitted that the question is whether the FTT “erred materially in its approach to those documents”, ie the VAT Committee Guidelines, in particular in declining to adopt their conclusion. He submitted that:

(1) The Guidelines are an aid to interpretation but they are not binding (on the European Commission, Member States or this tribunal). The Guidelines are not relied upon by HMRC as evidence of uniformity of practice in any of the Member States.

(2) These Guidelines are not particularly cogent or persuasive. The conclusion relied upon is a single paragraph which does not include any reasoning or any explanation of competing views. Mr Elliott submitted that HMRC were trying to “prop these up” by reference to the Working Paper, but there is no case saying that a working paper is an

admissible aid to interpretation. He further submitted in the alternative that the Working Paper is in any event not persuasive.

(3) The FTT made no material error of law in deciding to depart from the Guidelines and cannot have made a material error given they are accepted to be non-binding.

80. We address first Mr Elliott's starting-point, namely that the question is whether the FTT erred materially in its approach to these documents. We have decided that HMRC's ground of appeal raises a question of law; the issue is not, therefore, whether the FTT erred in its approach to the EU documents (whether these be the Guidelines or the Guidelines and the Working Paper) but whether we agree with the FTT's conclusions on the meaning of "dental prostheses". We are entitled to look at the Guidelines and, subject to our decision on Mr Elliott's submissions on which papers are an aid to interpretation, the Working Paper, and decide what weight we should give to them when reaching our decision on the meaning.

81. Whilst there can be no doubt that we are entitled to have regard to the Guidelines, the lack of reasoning in these Guidelines means we do agree with Align that, viewed in isolation, their usefulness as an aid to interpretation is limited.

82. HMRC had relied on the Working Paper before the FTT. Align had not made any submissions prior to the hearing (whether in a Respondents' Notice or its written skeleton argument) that this document was not admissible, or that it was not admissible as an aid to interpretation (as Mr Elliott framed Align's position in his oral submissions). The parties provided written submissions on this issue following the hearing.

83. Having considered the written submissions of the parties, we are satisfied that the Working Paper is admissible and we are entitled to have regard to the Working Paper.

84. Mr Ripley's written submissions focused on the admissibility of the Working Paper. The case law to which he referred illustrated that working papers have been referred to in opinions of Advocates General and in decisions of UK tax tribunals. In each of the cases referred to, there appears to have been no issue raised as to the admissibility of the relevant working paper, which has been used as contextual material in relation to the issue under consideration.

85. Align's written submissions confirmed that they accept that the Working Paper is admissible. They do not cite any authority for the proposition that working papers are not admissible as an aid to the construction of particular legislation. Instead, their submissions are framed in the negative, submitting that there is no authority stating, either expressly or implicitly, that a working paper drafted by the Commission services in advance of a meeting of the VAT Committee is an aid to the interpretation of EU VAT legislation.

86. We do not consider that this submission carries much weight, given the use made of working papers in the cases cited by Mr Ripley. Align's submissions seek to establish that the references to working papers in the case law relied upon by HMRC in this context were not references to the working papers as aids to interpretation of legislation. It is not, however, possible to dissect the various opinions and decisions relied upon by HMRC in this way. In each instance the reference to the relevant working paper is, at the least, part of the context against which the relevant opinion or decision on the meaning of the relevant legislation was made. As such, the relevant working paper was being used as an aid to interpretation.

87. Align's submissions on admissibility are summarised in the final paragraph of their written submissions as follows:

"10. For completeness, HMRC's written submissions appear to be addressing a different submission to that made by Align at the hearing. HMRC appear to be submitting that working papers are "admissible" in the sense that they can be placed before the Upper Tribunal. Align do not dispute that working papers

are admissible in that sense, in the same way as textbooks, articles, HMRC guidance and a myriad of sources that are often placed before the tribunals and courts. However, Align’s submission is that they are not admissible as aids to interpretation of the legislation and nothing in HMRC’s written submissions undermines this conclusion.”

88. If the Working Paper is admissible, as Align concede, it must be possible for us to take the document into account. If the Working Paper is not admissible as an aid to interpretation of the Exemption, it is not then said for what purpose it is admissible, or for what purpose we are taking it into account. This position is compounded by the fact that it is conceded by Align that the Working Paper can be placed before us, in the same way as textbooks, articles, HMRC guidance and “a myriad of sources that are often placed before the tribunals and courts”. These other materials are, however, materials which parties routinely put before tribunals and courts, and to which tribunals and courts routinely make reference, when considering questions of statutory construction. They may or may not command any weight in the relevant arguments on statutory construction, but it is clear that they can be taken into account. The obvious examples of such material which have been put before us in the present case are the dictionary references, which have formed a material part of Align’s arguments. If the dictionary references can be taken into account in the arguments over the construction of the Exemption, it would appear to follow from Align’s concession on the admissibility of the Working Paper, that we can also take the Working Paper into account.

89. The essential problem which confronts Align, in their argument on the admissibility of the Working Paper, is that once it is conceded that the Working Paper is admissible, there is no rational basis for saying that its content cannot be taken into account as an aid to interpretation. It is the equivalent of saying that a particular item of evidence is admissible in a trial, but that it cannot be used to resolve any of the factual issues in that trial. Either the Working Paper is admissible as a document which we can take into account, while making our own decision on what relevance it has to what we have to decide and what weight (if any) we should accord to it, or it is not admissible as a document which we can take into account, in which case we should disregard the Working Paper entirely.

90. This is particularly the case where, as here, the Working Paper explains the basis upon which the VAT Committee reached their almost unanimous view in the Guidelines that the term “dental prostheses” did not encompass the supply either of dental devices or of material which is used to manufacture dental prostheses. That the Working Paper provides such explanation is readily apparent from the papers themselves. The minutes of the 105<sup>th</sup> meeting of the VAT Committee state that the Commission services gave a summary of the Working Paper, saying that this had been drawn up on a request by the Dutch authorities concerning the correct interpretation of certain terms used in Article 132. This is then reflected in the Guidelines, which record that the discussion was conducted on the basis of documents prepared by the Commission services and expressly refer, in the heading to section 6.4 of the Guidelines, to this Working Paper. It would be strange if reference to the Guidelines is permitted, but not to the Working Paper which underpins the conclusions expressed in the Guidelines.

91. We have concluded that the Working Paper is admissible as a document to which we can have regard in making our decision on the appeal. The relevance of the Working Paper, and the weight (if any) to be given to the Working Paper are separate questions.

92. We have decided that we should give limited weight to the Guidelines and the Working Paper. The Guidelines themselves carry an express rider to the effect that they “are merely views of a consultative committee”. As Mr Elliott pointed out in his oral submissions, the VAT Committee is an advisory committee, consisting of the representatives of Member States and chaired by the Commission. The VAT Committee is not a judicial body or a body comprised

of persons who are required to be legally qualified, or who are identified. Only tax authorities are represented on the VAT Committee; there is no taxpayer representation.

93. Limited weight is not, however, no weight.

94. The relevant guidance, within the Guidelines, records the almost unanimous view (meaning 24 to 27 out of 29 Member States) of the VAT Committee that Article 132(1)(e) does not apply to dental devices. What is meant by dental devices is further explained in the relevant section of the Working Paper. “Aliud” is the Latin for “another thing”. A brace is a device used to straighten teeth. The Working Paper draws a clear distinction between braces and prostheses. The same distinction would necessarily apply between Aligners, which perform the same or at least a similar function as a brace, and prostheses. If therefore one reads the Guidelines with the Working Paper, the almost unanimous view of the VAT Committee was that a distinction was to be drawn between dental prostheses and dental devices such as the Aligners, with the dental devices falling outside the exemption in Article 132(1)(e).

95. We conclude that the Guidelines and the Working Paper do assist. They assist in the sense that they provide a measure of additional support for the conclusion which we have reached on the basis of our own construction of the Exemption, our own analysis of the relevant case law and our own consideration of dictionary references to which we have been referred. That conclusion is that “dental prostheses”, as this expression is used in the Exemption, means an artificial item which replaces missing or damaged teeth. The expression does not extend to dental devices such as the Aligners.

#### **CONCLUSION**

96. For the reasons set out above, we have concluded that “dental prostheses”, as used in the Exemption, means artificial items which replace missing or damaged teeth. They do not include the Aligners. The FTT therefore made an error of law in concluding that the Aligners are “dental prostheses” within the Exemption.

#### **DISPOSITION**

97. Section 12(2) TCEA 2007 provides that if the Upper Tribunal finds that the making of the decision under appeal involved the making of an error on a point of law then the Upper Tribunal “may (but need not)” set aside the decision of the FTT.

98. The error of law made by the FTT was material, and we set aside the FTT Decision. We must decide whether to re-make or remit the decision.

99. Mr Ripley submitted that we should re-make it. Align’s position was less clearcut, with Ms Sloane submitting that this depended on the conclusions reached by the Upper Tribunal and whether or not further factual findings may be required. Ms Sloane did accept that if we accepted HMRC’s definition then there would be no remaining question of fact to be determined.

100. We agree that we do not need further evidence in order to re-make the FTT Decision and are able to re-make the decision on the basis of the findings of fact made by the FTT. There is, in this situation, no need for a remission. On the basis of our construction of the Exemption we are able to remake the FTT Decision as a decision that the reference to “dental prostheses” in the Exemption does not extend to Aligners.

101. HMRC’s appeal against the FTT Decision is allowed. We set aside the FTT Decision and remake it to dismiss Align’s appeal against the decision of HMRC that the Aligners are chargeable to VAT.

**MR JUSTICE EDWIN JOHNSON**  
**TRIBUNAL JUDGE JEANETTE ZAMAN**

**Release date: 7 July 2026**