[2012] UKFTT 366 (TC)

TC02052

Appeal number: TC/2011/03004

VAT – supply of disposable barbecues – whether VAT chargeable at a reduced rate on the charcoal element of the supply – reduced rate of VAT on solid fuel pursuant to Schedule 7A Group 1 Item 1(a) VATA 1994 – Commission v France Case C-94/09 considered – interaction with Card Protection Plan v C & E Case C-349/96 considered – significance of charcoal being a concrete and specific aspect of the supply – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

W M MORRISON SUPERMARKETS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MISS SUSAN STOTT

Sitting in public at Manchester on 17 April 2012

Mr David Scorey of counsel instructed by PricewaterhouseCoopers Legal LLP for the Appellant

Mr Richard Chapman of counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

Introduction

1. The appellant is a well known supermarket chain. In the course of business it sells what are known as "disposable barbecues". This appeal concerns the liability to output tax on sale of such barbecues. Put briefly, the appellant contends that a reduced rate of VAT is payable on the sale of the charcoal element of the supply with the remainder of the supply being subject to the standard rate. The respondents contend that the whole supply is subject to the standard rate.

2. There is no dispute as to the underlying facts. The barbecues in question comprise a rectangular foil tray which contains charcoal and lighting paper and is covered by a metal grill. As the name implies, they are designed to be disposed of after a single use. We need say little more about the facts which are deceptively simple. The real issue between the parties is how established legal principles apply in determining the rate of VAT on the barbecues.

3. The appellant has accounted for output tax at the standard rate on sales of the barbecues. By letter dated 5 November 2010 the appellant claimed a refund of VAT in the sum of £192,934.51. This reflected the difference between VAT at the standard rate and VAT at the reduced rate on the charcoal element of the supply over a period of some 4 years. The respondents have refused to make the refund on the basis that the whole supply was properly treated as standard rated.

4. On 11 November 2011 the Tribunal directed by consent that the lead case procedure should apply and that this appeal should be specified as a lead case pursuant to Tribunal Rule 18(2)(a). We understand that there are two appeals made by other supermarkets in relation to the same products which have been stayed pending the outcome of this appeal.

5. The appellant also seeks compound interest on the sums claimed. The parties have agreed that if necessary this part of the claim should be stayed pending determination by the higher courts of issues concerning entitlement to compound interest.

6. We set out below our analysis of the basic legal framework applicable in the present circumstances. We then consider the parties' written and oral submissions and finally we set out our decision as to how our legal analysis applies to the disposable barbecues in question.

Legal Framework

7. Prior to October 2006 at least some retailers of disposable barbecues treated supplies as having a mixed rate, that is a reduced rate for the charcoal and the standard rate for other elements of the supply. On 19 October 2006 HMRC issued a

Business Brief 17/06 dealing with the supply of disposable barbecues. HMRC set out what they considered to be the correct treatment of such supplies, namely that they were a single, standard rated supply.

8. *Group 1 Schedule 7A Value Added Tax Act 1994* ("*VATA 1994*") makes provision for a reduced rate of VAT, presently 5%, on the supply of domestic fuel. *Item 1(a)* is relevant for present purposes:

> "*Supplies for qualifying use of –*
>
> *(a) coal, coke or other substances held out for sale solely as fuel;*"

9. *Note 1(1)* then provides as follows:

> "*Item 1(a) shall be deemed to include combustible materials put up for sale for kindling fires …*"

10. For the purposes of *Item 1(a)*, qualifying use includes domestic use. It is common ground that the sale of charcoal for use in barbecues qualifies for the reduced rate. Similarly the sale of lighting paper used to ignite charcoal would also qualify for reduced rate.

11. Member States may apply a reduced rate pursuant to *Article 98 Council Directive 2006/112/EC* ("the Principal VAT Directive") which provides as follows:

> "*1. Member States may apply either one or two reduced rates.*
>
> *2. The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III.*"

12. *Annex III* does not include supplies of fuel and it is not therefore in point on the present facts. However it is referred to in a number of authorities described below. By *Article 99* the reduced rate shall be fixed on a percentage of the taxable amount, which may not be less than 5%.

13. Member States may also apply reduced rates on certain supplies if a reduced rate was applied to those supplies prior to 1991. *Articles 110* and *113* of the *Principal VAT Directive* provide as follows:

> "*110. Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates*
>
> *The exemption and reduced rates referred to in the first paragraph must be in accordance with Community law and must have been adopted for clearly defined social reasons and for the benefit of the final consumer.*
>
> …

> *113. Member States which, at 1 January 1991, in accordance with Community law, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99, in respect of goods and services other than those specified in Annex III, may apply the reduced rate, or one of the two reduced rates, provided for in Article 98 to the supply of such goods or services.*"

14. The arguments addressed by the parties on this appeal concern the relationship between a line of cases involving *Card Protection Plan v C & E Case C-251/05* ("*CPP*") and a line of cases involving *Commission v France Case C-94/09*.

15. In *CPP* the ECJ was concerned with the question of the distinction between single and multiple supplies. The principle is well established. In deciding whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be taxed separately, regard must first be had to all the circumstances in which that transaction takes place, taking into account:

> "*29.… first, that it follows from article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, secondly, 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: Customs and Excise Commissioners v. Madgett and Baldwin (trading as Howden Court Hotel) (Joined Cases C-308/96 and 94/97) [1998] STC 1189, 1206, para 24."*

16. The second line of cases commences with *Commission v French Republic Case C-384/01*. This concerned supplies of gas and electricity at a reduced rate pursuant to *Article 12(3)(b) Sixth Directive. Article 12(3)(b)* is a provision specific to supplies of gas and electricity which permits Member States to apply a reduced rate of VAT and had effect outside what is now Annex III. French domestic legislation charged a reduced rate on standing charges for supply of gas and electricity and a standard rate on the consumption of gas and electricity. The Commission challenged the French provisions. One ground was that the same rate must apply to the standing charge as to the consumption of gas and electricity in accordance with the principle of neutrality. The ECJ held that there was no requirement in *Article 12(3)(b)* to charge VAT at the same rate. At [27] and [28] the Court said:

> *"27. … there is nothing in the text of Article 12(3)(b) of the Sixth Directive which requires that provision to be interpreted as requiring that the reduced rate can be charged only if it is applied to all supplies of natural gas and electricity …*
>
> *28. Moreover, since the reduced rate is the exception, the restriction of its application to* ***concrete and specific aspects****, such as the standing charge conferring entitlement to a minimum quantity of electricity on the account holders, is consistent with the principle that exemptions or derogations must be interpreted restrictively.*"
>
> [emphasis added]

17. Mr Scorey described this situation as a "carve out", where certain elements of the supply were carved out of what would otherwise be a standard rated supply. The reduced rate applied to the elements carved out. He went on to develop the significance of this in his submissions.

18. *Talacre Beach Caravan Sales Ltd v Customs and Excise Commissioners Case C-251/05* is a well known case concerning the VAT treatment of supplies of fitted caravans. *Group 9 Schedule 8 VATA 1994* applies to zero rate supplies of caravans. *Talacre* relied on *CPP* and argued that there was a single indivisible supply subject to a single rate of VAT which should be the zero rate. The principal element of the supply was the supply of a caravan and goods fitted in the caravan were ancillary to that supply.

19. The Commissioners in *Talacre* argued that the zero rate should apply only to the sale of the caravan and the standard rate should apply to the contents. In particular they argued that *Note (a) Group 9 Schedule 8 VATA 1994* specifically excluded the contents of a caravan from zero-rating. The Note provides as follows:

> *"This Group does not include –*
>
> *(a) removable contents …"*

20. Mr Scorey described this argument as the mirror image of the carve out identified above. Here the domestic legislation was carving out standard rated elements of what would otherwise be a zero rated supply.

21. The zero rating of caravans was in force on 1 January 1991. The question referred to the ECJ in *Talacre* was as follows:

> *"…whether the fact that specific goods are counted as a single supply, including both a principal item which is by virtue of a Member State's legislation subject to an exemption with refund of the tax paid within the meaning of Article 28(2)(a) of the Sixth Directive* [now article 110 of the Principal VAT Directive] *and items which that legislation excludes from the scope of that exemption, prevents the Member State concerned from levying VAT at the standard rate on the supply of those excluded items.*"

22. In its judgment the Court stated as follows:

" 20 It is also common ground that the VAT Act specifically excludes some items supplied with the caravans from exemption with refund of the tax paid. It follows that, so far as those items are concerned, the conditions laid down in Article 28(2)(a) of the Sixth Directive, in particular the condition that only exemptions in force on 1 January 1991 can be maintained, are not fulfilled.

21 Therefore, an exemption with refund of the tax paid in respect of those items would extend the scope of the exemption laid down for the supply of the caravans themselves. That would mean that items specifically excluded from exemption by the national legislation would be exempted nevertheless pursuant to Article 28(2)(a) of the Sixth Directive.

22 Clearly, such an interpretation of Article 28(2)(a) of the Sixth Directive would run counter to that provision's wording and purpose, according to which the scope of the derogation laid down by the provision is restricted to what was expressly covered by the national legislation on 1 January 1991. As the Advocate General observed in points 15 and 16 of her Opinion, Article 28(2)(a) of the Sixth Directive can be compared to a 'stand-still' clause, intended to prevent social hardship likely to follow from the abolition of exemptions provided for by the national legislature but not included in the Sixth Directive. Having regard to that purpose, the content of the national legislation in force on 1 January 1991 is decisive in ascertaining the scope of the supplies in respect of which the Sixth Directive allows an exemption to be maintained during the transitional period.

23 Furthermore, as the Court has pointed out on a number of occasions, the provisions of the Sixth Directive laying down exceptions to the general principle that VAT is to be levied on all goods or services supplied for consideration by a taxable person are to be interpreted strictly (see, to that effect, Joined Cases C-308/96 and C-94/97 Madgett and Baldwin [1998] ECR I-6229, paragraph 34; Case C-384/01 Commission v France [2003] ECR I-4395, paragraph 28; Joined Cases C-394/04 and C-395/04 Ygeia [2005] ECR I-0000, paragraphs 15 and 16; and Case C-280/04 Jyske Finans [2005] ECR I-0000, paragraph 21). For that reason as well, the exemptions with refund of the tax paid referred to in Article 28(2)(a) of the Sixth Directive cannot cover items which were, as at 1 January 1991, excluded from such an exemption by the national legislature.

24 The fact that the supply of the caravan and of its contents may be characterised as a single supply does not affect that conclusion. The case-law on the taxation of single supplies, relied on by Talacre and referred to in paragraph 15 of this judgment, does not relate to the

exemptions with refund of the tax paid with which Article 28 of the Sixth Directive is concerned. While it follows, admittedly, from that case-law that a single supply is, as a rule, subject to a single rate of VAT, the case-law does not preclude some elements of that supply from being taxed separately where only such taxation complies with the conditions imposed by Article 28(2)(a) of the Sixth Directive on the application of exemptions with refund of the tax paid.

25 In this connection, as the Advocate General rightly pointed out in points 38 to 40 of her Opinion, referring to paragraph 27 of CCP, there is no set rule for determining the scope of a supply from the VAT point of view and therefore all the circumstances, including the specific legal framework, must be taken into account. In the light of the wording and objective of Article 28(2)(a) of the Sixth Directive, recalled above, a national exemption authorised under that article can be applied only if it was in force on 1 January 1991 and was necessary, in the opinion of the Member State concerned, for social reasons and for the benefit of the final consumer. In the present case, the United Kingdom of Great Britain and Northern Ireland has determined that only the supply of the caravans themselves should be subject to the zero-rate. It did not consider that it was justified to apply that rate also to the supply of the contents of those caravans.

26 Lastly, there is nothing to support the conclusion that the application of a separate rate of tax to some elements of the supply of fitted caravans would lead to insurmountable difficulties capable of affecting the proper working of the VAT system (see, by analogy, Case C-63/04 Centralan Property [2005] ECR I-0000, paragraphs 79 and 80).

27 In the light of all the foregoing, the answer to the question referred must be that the fact that specific goods are counted as a single supply, including both a principal item which is by virtue of a Member State's legislation subject to an exemption with refund of the tax paid within the meaning of Article 28(2)(a) of the Sixth Directive and items which that legislation excludes from the scope of that exemption, does not prevent the Member State concerned from levying VAT at the standard rate on the supply of those excluded items."

Parties' Submissions and Discussion

23. Mr Scorey sought to derive a general principle that the *Principal VAT Directive* permitted dual rates of tax in the narrow field of exemptions. Certainly that seems unobjectionable so far as it goes, but it says nothing about the circumstances in which dual rates will apply or will be permitted to apply.

24. In our view the reason dual rates were permitted in *Talacre* was because the conditions in what is now *Article 110* of the *Principal VAT Directive* were not satisfied. The domestic legislation in force before 1991 exempted only the supply of

caravans and specifically excluded the contents. In those circumstances it is the domestic legislation which "*… is decisive in ascertaining the scope of the supplies in respect of which the Sixth Directive allows an exemption to be maintained …*". Simply because dual rates were applied in *Talacre* does not mean that they will or could be applied in all cases where a supply could theoretically be split into elements with different rates applying to each element. It is necessary to consider the statutory framework to establish whether dual rates will or can apply.

25. Mr Scorey submitted that whenever a domestic derogation was involved a reduced rate would apply to any element of the supply which was a "*concrete and specific aspect*" of the whole supply. We note however that that language was not used by the Court in *Talacre* to justify the dual rate applied in that case. Rather it is language that appears to have derived from the Court in *Commission v French Republic* (see above).

26. We agree with Mr Scorey that *Commission v French Republic* and *Talacre* are in one sense different sides of the same coin. Each depends on how a Member State chooses to enact in domestic legislation derogations available in the *Principal VAT Directive*. A Member State might do so either by carving out a reduced rate element from what would otherwise be a standard rated supply (*Commission v French Republic*). Alternatively it might carve out a standard rated element from what would otherwise be a reduced rate supply (*Talacre*). The effect is the same. However we do not consider that either case justifies a wider principle that whenever a derogation is involved what would otherwise be a single supply can be dissected into separate elements by a trader with different rates of VAT applying to the different elements.

27. Mr Scorey referred to *Finanzamt Oschatz v Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien Case C-442/05* ("Zweckverband"). There transactions relating to the supply of water were chargeable to VAT at a reduced rate in Germany by virtue of domestic legislation taking advantage of what is now *Annex III*. The activities of the trader included the collection, piping, treatment and supply of drinking water to customers. The tax office took the view that the laying of a mains connection was distinct from the supply of water and applied VAT at the standard rate to that element of a transaction.

28. The relevant question formulated by the ECJ was whether laying a mains connection formed part of the water supplies covered by Annex III. The answer to that question was yes. However the Court confirmed that a selective application of the reduced rate could be applied by Member States to "*concrete and specific aspects*" of a water supply such as the mains connection (see [38] to [44] of the judgment of the Court). By analogy the Court relied on *Commission v French Republic*. It appears that the German tax office had standard rated the mains connection so that it was carving out a standard rated element from what would otherwise be a reduced rate supply in a similar way to HMRC in *Talacre*. It does not appear that this was justified on the same basis as the Court in *Talacre* which was not cited. In particular there was no reference to any German domestic legislation which restricted the scope of the exemption. Indeed the answer of the Court to the question asked appears merely to recognise that Member States may apply a reduced rate to elements of a supply

without identifying in what circumstances they can do, or indeed whether they must do so. It does not seem to us that *Zweckverband* assists the appellant in identifying any general principle beyond the previous cases.

29. The principal authority relied upon by Mr Scorey was *Commission v France.* This involved a supply of services by undertakers which appears in Annex III giving Member States the opportunity to apply one or two reduced rates of VAT. French domestic law provided that only transportation of the body was subject to a reduced rate. All other services for funerals were subject to the standard rate. The Commission commenced proceedings against France contending that all supplies of goods and services by undertakers constituted a single supply which should be subject to a single rate.

30. The Court held as follows:

> *" 24. The rules defined by those provisions* [Article 99 and Annex III] *are, in essence, identical to those set out in Article 12(3)(a), first and third subparagraphs, of the Sixth Directive and in Annex H, fifteenth category, thereto.*
>
> *25. The Court has held, as regards Article 12(3)(a), third subparagraph, of the Sixth Directive, that there is nothing in the text of that provision which requires that it be interpreted as meaning that the reduced rate can be charged only if it is applied to all aspects of a category of supply covered by Annex H to that directive, so that a selective application of the reduced rate cannot be excluded provided that no risk of distortion of competition results (see Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien, paragraph 41, and, by analogy, Commission v France, paragraph 27).*
>
> *26. The Court has inferred that, subject to compliance with the principle of fiscal neutrality inherent in the common system of VAT, Member States may apply a reduced rate of VAT to concrete and specific aspects of a category of supply covered by Annex H to the Sixth Directive (see Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien, paragraph 43).*
>
> *27. Since Article 98(1) and (2) of Directive 2006/112 in essence repeats the wording of Article 12(3)(a) of the Sixth Directive, the interpretation given by the Court to the earlier provision should be extended to the provision replacing it.*
>
> *28. It follows that, where a Member State decides to make use of the possibility given by Article 98(1) and (2) of Directive 2006/112 to apply a reduced rate of VAT to a category of supply in Annex III to that directive, it has, subject to the requirement to observe the principle of fiscal neutrality inherent in the common system of VAT, the possibility of limiting the application of that reduced rate of VAT to concrete and specific aspects of that category.*

29. The possibility thus granted to Member States of applying the reduced rate of VAT selectively is justified, inter alia, by the fact that, since that rate is the exception, the restriction of its application to concrete and specific aspects is consistent with the principle that exemptions or derogations must be interpreted restrictively (Commission v France, paragraph 28).

30. However, it must be pointed out that the exercise of that possibility is subject to the twofold condition, first, to isolate, for the purposes of the application of the reduced rate, only concrete and specific aspects of the category of supply at issue and, secondly, to comply with the principle of fiscal neutrality. Those conditions seek to ensure that the Member States make use of that possibility only under conditions ensuring the correct and straightforward application of the reduced rate chosen and the prevention of any possible evasion, avoidance or abuse.

31. The Commission maintains that the Member States, when they make use of the possibility available to them under Article 98 of Directive 2006/112 to apply a reduced rate of VAT, must comply with the criteria identified by case-law in order to determine whether a transaction including several elements must be considered to be a single supply, subject to the same tax treatment, or to be two or more separate supplies, which may be treated differently.

32. In this connection, it must be recalled that those criteria, such as the expectations of a typical consumer, to which the Commission refers, are intended to protect the functioning of the VAT system in the light of the diversity of commercial operations. However, the Court itself has acknowledged that it is impossible to give exhaustive guidance on that issue (CPP, paragraph 27) and pointed out that it is necessary to take into account all the circumstances in which the transaction at issue takes place (CPP, paragraph 28; Levob Verzekeringen and OV Bank, paragraph 19, and Case C-425/06 Part Service [2008] ECR I-897, paragraph 54).

33. It follows that, while those criteria may be applied on a case-by-case basis, in order to prevent, inter alia, the contractual structure put in place by the taxable person and the consumer from leading to an artificial splitting into a number of fiscal transactions of a transaction which, from an economic point of view, must be regarded as a single transaction, they cannot be regarded as decisive for the purpose of the exercise by the Member States of the discretion left to them by Directive 2006/112 as regards the application of the reduced rate of VAT. The exercise of such discretion requires general and objective criteria, such as those identified in Commission v France and Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien and reiterated in paragraphs 26, 28 and 30 of this judgment.

34. Accordingly, in order to rule on the merits of this action, it is not necessary to examine whether, as the Commission maintains, the supply of services by undertakers must be regarded as a single transaction from the point of view of the expectations of a typical consumer. On the other hand, it is necessary to ascertain whether the transportation of a body by vehicle, in

respect of which the French legislation provides for the application of a reduced rate of VAT, constitutes a concrete and specific aspect of that category of supply, as set out in Annex III, point 16, to Directive 2006/112, and, if so, to examine whether or not the application of that rate undermines the principle of fiscal neutrality."

31. Mr Scorey submitted and Mr Chapman accepted that the same principles could be transposed to reduced rates arising pursuant to *Articles 110 and 113*. However Mr Scorey went further to describe the way in which he submitted these principles related to the *CPP* analysis. He submitted that the CJEU in *Commission v France* had rejected a *CPP* analysis in cases where Member States took advantage of a domestic derogation. *CPP* would apply where the *Principal VAT Directive* provided for a supply to be standard rated, zero rated or exempt but that where a domestic derogation was in point it was not simply a question of applying *CPP*. The derogation would be applied, limited by reference to any specific and concrete elements of the supply which fell within the derogation. It was then necessary to apply the *CPP* analysis to what was left. On the facts of the present case he submitted that it is necessary to strip out the charcoal which was a concrete and specific aspect of the supply and should be taxed at a reduced rate. What was left would then be treated as a single supply of a barbecue grill taxable at the standard rate.

32. In support of this approach Mr Scorey submitted that the draftsman could have carved out disposable barbecues from the reduced rate in *Schedule 7A* but had chosen not to do so. If *Schedule 7A* had been subject to such a carve out then the position would have been as it was in *Talacre* and *Purple Parking* (see below). However Mr Scorey submitted that HMRC were using *CPP* to narrow the scope of the exemption when there was no such limitation in the Act which introduced the exemption.

33. Mr Chapman submitted that *Commission v France* simply confirmed that a Member State could be selective in applying a reduced rate to goods and services within *Annex III* and by analogy *Articles 110 and 113*. It could do so by applying a reduced rate to certain aspects of a supply which could be identified as concrete and specific aspects of that supply. In the present case he said that the respondents were not being selective as to which particular aspect of a supply should be subject to a reduced rate. Hence it wasn't necessary to embark upon any analysis as to whether charcoal was a concrete and specific aspect of the supply of barbecues.

34. In *Purple Parking Ltd v Commissioners for HM Revenue & Customs Case C-117/11* the CJEU was concerned with off-airport parking and park and ride services. *Group 8 Schedule 8 VATA 1994* applied to zero rate certain transport services. However *Note 4A(b)* excluded from zero rating what may be described as park and ride services. The matter came before the CJEU on a reference by the Upper Tribunal and it applied a straightforward *CPP* analysis.

35. Mr Scorey identified what he described as 7 principles which could be identified from the authorities:

(1) As a general rule single supplies should have a single rate of tax so as to give simplicity and uniformity.

(2) The CPP analysis was a judicial creation dealing with harmonised rules under the *Principal VAT Directive*.

(3) Different considerations arise where there is a unilateral variation by a Member State of the rate of tax, under *Article 98* (*Annex III*) or *Article 113* or *Article 110*.

(4) When considering a non-harmonised area, the CJEU has held that the CPP analysis is not read across mechanically

(5) The reason for this is that in a non-harmonised area it is a matter for the Member State to define the scope and extent of the reduced rate or exemption, rather than the Commission or the CJEU.

(6) Once the scope and extent of the reduced rate has been determined by a Member State, a taxpayer cannot use a *CPP* analysis to widen the scope of the reduced rate.

(7) It follows that the reverse is equally true. The scope and extent of the reduced rate is determined by the domestic provisions. The Member State cannot limit the scope of the reduced rate other than by legislation.

36. We were told that there is no case where a *CPP* analysis has been used in a non-harmonised area to extend or restrict the scope of a reduced rate supply. In *Zweckverband* the mains connection was treated as part of a supply of water. Having identified the supply of water, the Court held that it was open to Member States to apply a reduced rate to concrete and specific aspects of that supply such as the mains connection. However the Court does not appear to have applied *CPP* principles in identifying a single supply of water. Similarly, the Advocate General in that case did not apply a *CPP* analysis in his opinion (see [48] and [49]) although the *CPP* analysis did appear to confirm his view that the mains connection was part of a water supply (see [54] to [56]).

37. Mr Scorey submitted that in the present case the respondents were seeking to carve out disposable barbecues from the reduced rate without any legislative authority. He submitted that the respondents were being selective. They were seeking to exclude from *Schedule 7A* a supply which would otherwise be within it. The position in *Talacre* was analogous. On the one hand there was a zero rated caravan with standard rated items, and on the other reduced rate charcoal with a standard rated grill.

38. Mr Chapman did not take issue with principles 1-6 identified by Mr Scorey and set out above. He did take issue with principle 7 which he submitted did not follow from the earlier principles and was not supported by any authority. *Talacre* was dealing with the question of whether or not a CPP analysis could be used to effectively extend an exemption. He relied upon paragraphs [21] and [22] referred to above. He was not seeking to resile from the judgment in *Talacre*. Rather it was dealing with a different issue. Nor was he seeking to effect a carve out of disposable

barbecues by the back door. He also relied upon paragraphs [35] to [37] of the Advocate General's opinion in *Talacre* which read as follows:

> "*35. If one were to apply the principles developed in the case-law on composite supplies irrespective of the particular circumstances of the present case, one might conclude that caravans and their removable contents in fact constitute one single supply. Only one rate of VAT would then have to be applied to that supply, namely the rate applicable for the principal element of the supply. Assuming that the principal element is the caravan, the zero rate would have to be extended to the ancillary supply of the removable contents.*
>
> *36. However, in the present situation the extension of the exemption would be contrary to the objectives of Article 28 of the Sixth Directive, as set out above. This conflict between the principle that national exemptions under Article 28(2)(a) of the Sixth Directive should not be extended and the rules developed in the case-law for the treatment of composite supplies can be resolved by comparing the purpose of each principle.*
>
> *37. The rules established in CPP and other relevant decisions are based on the consideration that splitting transactions too much could endanger the functioning of the VAT system. In contrast to this objective, is the concern to limit national derogations from the rules of the Sixth Directive to those which are absolutely necessary.*"

39. Mr Chapman submitted that *Commission v France* was about the ability of a Member State to effect a carve out, a question which does not need to be asked in the present appeal. He also suggested that there was a danger if the CPP analysis was "trumped" by that in *Commission v France*. Mr Scorey highlighted that no examples of how this risk might materialise in practice had been provided and this was not surprising because it concerned a very narrow area. The appellants were simply seeking a return to the way in which VAT applied to disposable barbecues prior to the Business Brief in 2006. The principle they relied on was only concerned with the narrow field of domestic variations to rates of tax in the transitional period.

40. We do not accept that there is any question of the analysis in *Commission v France* "trumping" that in *CPP*. It is clear from the judgments of the CJEU that they are not alternatives as such. Whether or not one analysis or the other is appropriate will depend on the circumstances of the case.

41. Mr Chapman relied upon *Purple Parking* in support of his submission, in particular at [40] where the CJEU said:

> "*40. Furthermore, as regards the importance of the judgment in Case C-94/09 Commission v France, referred to in the second question, it follows from paragraphs 25 to 29 and 31 to 34 of that judgment that it concerns the possibility for a Member State to apply, in a selective manner, on the basis of general and objective criteria, a reduced rate of VAT to certain aspects of a category of supplies that is listed in the Sixth*

Directive and, accordingly, concerns a different question from that raised by the first and second questions referred for a preliminary ruling. Indeed, the sole purpose of the latter is whether two services constitute, in the light of the specific circumstances of their supply at issue in the main proceedings, a single supply."

42. Save in relation to the submission referred to at paragraph 40 above, we accept Mr Chapman's submissions.

43. In *Purple Parking* the question of whether there could be a carve out did not arise. Hence the CJEU was concerned only with the *CPP* analysis. In our view, *CPP* is concerned with defining the nature of transactions for VAT purposes. In particular whether a transaction is to be construed as a single supply or as multiple supplies. In contrast, *Commission v France* is concerned with whether Member States can identify specific aspects of what would otherwise be a single supply and treat them as falling inside or outside an exemption or reduced rate. It is not concerned with any general principle beyond identifying the circumstances in which Member States are entitled to treat a single supply as comprising different elements to which different rates can apply. In the present circumstances the UK domestic legislation does not seek to carve out the charcoal element of the supply so as to subject it to a reduced rate. Nor does it seek to carve out the barbecue grill so as to tax it at a different rate to the charcoal.

44. In all the cases we have been referred to above the ECJ has described the principle of applying dual rates of tax in terms of Member States having the possibility of limiting the application of a reduced rate. To use Mr Scorey's terminology, they are concerned with domestic provisions which Member States may choose to use to carve out elements of a supply so as to give rise to a dual rate of tax. They are not concerned with identifying any obligation on Member States to carve out elements of a supply.

45. It is not open to a taxpayer to carve out an element of what would otherwise be treated as a single supply in order to apply a reduced rate to that element of the supply. We were not referred to any authority in which such a general principle has been established.

46. It follows that we do not accept Mr Scorey's 7th principle, at least in the sense he seeks to employ it. The scope of an exemption or reduced rate by way of derogation is defined by the terms of the domestic legislation, provided that it is consistent with the *Principal VAT Directive*. In the present context the respondents are not seeking to limit the scope of the reduced rate in *Schedule 7A* by excluding from that reduced rate a supply that would otherwise fall within it. They are simply seeking to apply *Schedule 7A* which on its terms has no application to the supply of a disposable barbecue.

Application of our analysis to the disposable barbecues

47. For the reasons given above we do not regard it as open to the appellant to treat the supply of barbecues as anything other than a single supply at a single rate. Mr Scorey on behalf of the appellant did not suggest that if the supply was to be treated as a single supply at a single rate then it should be treated as a supply of charcoal at a reduced rate.

48. *Schedule 7A* applies to supplies of charcoal. Supplies of disposable barbecues are not supplies of charcoal and as such they do not fall within the scope of *Schedule 7A*. In the circumstances we find that the supply of disposable barbecues is standard rated.

49. For the sake of completeness, if a dual rate could or should have been applied we deal with the parties' arguments as to whether charcoal is a concrete and specific aspect of the supply.

50. Mr Chapman submitted that if there was a single supply it was artificial to split it. All elements of the supply had come together to make a new item, namely a disposable barbecue. That is a simple product and the simpler the product the harder it is to identify concrete and specific aspects of the product. In *Commission v France* it was straightforward to split the transport element because of the temporal distinction.

51. We do not accept that submission. In our view it is clear that the charcoal is a concrete and specific aspect of the supply. It can very easily be identified and could easily be removed from the product. It is a tangible element of the supply that can be readily recognised as such. However this does not affect our conclusion in relation to the appeal.

52. For the reasons given above we dismiss the appeal. In the circumstances it is not necessary for us to make any direction concerning the claim to compound interest which falls with the appeal.

53. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TRIBUNAL JUDGE

RELEASE DATE: 6 June 2012