TC02534

Appeal number: LON/2006/0998

VALUE ADDED TAX – supplies of holiday accommodation and power by the operator of a holiday camp to customers taking short term holidays in static caravans or chalets – different considerations charged for the accommodation and the power – the charge for the power did not relate to the power consumed by the customer concerned – whether there was a single supply of serviced holiday accommodation taxable at the standard rate or separate supplies of accommodation and power, the supply of power being taxable at the reduced rate – Section 29A and Group 1, Schedule 7A, VATA considered – held on the basis of* European Commission v France *(Case C-94/09) that the UK was entitled to legislate to provide for the reduced rate to apply to supplies of domestic fuel or power even in a case where such supplies formed merely an element in a large single complex supply which was not a supply of domestic fuel or power, provided the supply of domestic fuel or power was a concrete and specific aspect of the larger supply and such treatment did not infringe the principle of fiscal neutrality or distort competition – held further that section 29A and Group 1, Schedule 7A, VATA made such provision and that the supplies of power in the instant case were accordingly taxable at the reduced rate – held further that if that was wrong there was a single supply on the application of the* Card Protection Plan *jurisprudence (Case C-349/96)which was taxable at the standard rate – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

COLAINGROVE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
JOHN ROBINSON

Sitting in public at London on 21 and 22 May 2012

Roderick Cordara QC, instructed by PricewaterhouseCoopers Legal LLP, for the Appellant
Jeremy Hyam, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal concerns supplies made by the appellant, Colaingrove Limited ("Colaingrove") and/or other companies within the Bourne Leisure Group Limited VAT group, of or including power (gas and/or electricity) at holiday parks owned or operated by Colaingrove in the UK. Colaingrove is the representative member of the Bourne Leisure Group Limited VAT group and we refer in this Decision to Colaingrove, without distinguishing between it and other companies in that VAT group. There are, in fact, 3 appeals, which have been consolidated. The first relates to the refusal by the Respondents ("HMRC") to repay VAT of £129,743 claimed pursuant to a voluntary disclosure by Colaingrove dated 23 December 2002. The second appeal relates to an assessment in the sum of £941,650 in respect of output tax made on 4 January 2007 in respect of the periods 12/03 to 09/08. The third appeal relates the refusal by HMRC of a claim for repayment of VAT of £691,891.38 made by Colaingrove on 7 December 2010. All 3 appeals raise the same issues.

2. Colaingrove makes a claim for compound interest if successful. The parties agreed, however, that consideration of that issue should be deferred and, accordingly, we make no further mention of it in this Decision.

3. Colaingrove argues that the supplies, insofar as they are supplies of power, or 'concrete and specific' elements of supplies which include the provision of power, should properly be subject to VAT at the reduced rate (currently 5 per cent.) under the provisions of section 29A of and Schedule 7A to the VAT Act 1994 ("VATA").

4. HMRC, on the other hand, contend that the power concerned is being provided by Colaingrove as part of supplies of fully serviced holiday accommodation and such supplies are standard-rated in their entirety.

5. We received Witness Statements from two witnesses – Dermot Francis King, the Company Secretary of Colaingrove, and Peter John Bennett, an Officer of HMRC. We were also provided with a bundle of documents. Mr Cordara QC, for Colaingrove, did not require to cross-examine Mr Bennett. Mr Hyam's cross-examination of Mr King did not take up much time. From the evidence, we find the basic facts as follows (there are some additional findings made later in this Decision under the heading "Discussion"):

The facts

6. The relevant provision of power was by Colaingrove to holiday makers who stayed at Colaingrove's chalets and static caravans while taking holidays which had been advertised as promotional offers by the News of the World or The Sun newspapers.

7. Colaingrove has 37 holiday parks and resorts trading under the names 'British Holidays', 'Haven' and 'Butlins'. At these holiday parks and resorts, Colaingrove provides accommodation to customers in the form of static caravans, chalets and pitches for static caravans and touring caravans not owned by Colaingrove. Each

pitch (which includes pitches where static caravans and chalets are located) has its own electric meter and gas meter.

8. Since the early 1990s, Colaingrove has had a contractual relationship with News International Limited, the owner of The Sun newspaper. Pursuant thereto, The Sun publishes, from time to time, promotional 'offers' of holidays in static caravans and/or chalets to be taken (at heavily discounted rates) at places including Colaingrove's holiday parks. We refer to these holidays as 'Sun Holidays'. Touring caravans are not included within the scope of this promotion. The contract between Colaingrove and the entity acting for News International Limited (GFM Services) provides for the promotional offers to be published, for the discounted prices to be charged in the promotional offers as 'holiday prices', and for any supplementary charges for, *inter alia*, gas and electricity to be clearly indicated in the promotional offer and to be in accordance with Colaingrove's standard programme of charges, to be collected by Colaingrove either in advance or upon arrival. The terms of the contract between Colaingrove and a Sun Holiday customer provides for power charges to be made at a 'per night' rate and for them to be payable at least 56 days before arrival (or if the holiday is booked less than 56 days in advance, on booking). The attention of potential Sun Holiday customers is drawn to this and other points in a column in The Sun headed '20 things every Sun holiday-taker must know'.

9. Customers taking a Sun Holiday at one of Colaingrove's holiday parks can stay in a static caravan or chalet at one of a number of the parks operated by Colaingrove. Separate amounts are charged to Sun Holiday customers in respect of (1) accommodation and (2) power. The charge for accommodation (typically in the region of £60) is collected by The Sun and held by The Sun until the holiday has taken place. It is then remitted (less a commission) to Colaingrove. The charge for power (typically in the region of £12) is a fixed charge, which is collected separately by Colaingrove from the customer at the time when the customer makes a holiday reservation (i.e. before the holiday starts). In 2008 the fixed charge was at a rate of £5.75 per day – at the time of the hearing of the appeal it was (Mr King thought) £6. The charge for power is not optional – if the Sun Holiday customer does not pay it to Colaingrove by the specified date before the holiday is taken, the holiday booking 'is treated as a cancellation' according to the terms of the contract between Colaingrove and the Sun Holiday customer. Power supplied to static caravans and chalets at Colaingrove's parks is metered, but the Tribunal accepts (and finds) that in the periods in issue it would have been disproportionately burdensome and expensive to read the meter for each fixed caravan and chalet at the start and at the end of every holiday period and that is why Colaingrove charged a fixed daily fee for fuel and power. Mr King accepted in evidence that there was no correlation between the actual consumption of power by a Sun Holiday customer and the charge made to the customer for the provision of power. The Tribunal accepts that electricity has been supplied to any Sun Holiday customer using a fixed caravan or chalet at a rate not exceeding 1000 kilowatt hours a month (see: below, item 5(g) of Group 1, Schedule 7A, VATA). Similarly, piped gas has been supplied to any Sun Holiday customer using a fixed caravan or chalet at a rate not exceeding 150 therms or 4397 kilowatt hours a month (see: below, item 5(c) of Group 1, Schedule 7A, VATA). The actual

amounts of electricity and gas supplied were not established, but the Tribunal accepts (and finds) that they were well below these limits.

10. Before 1995, Colaingrove accounted for output VAT in respect of the supply of power in relation to touring caravans at the standard rate (then 17.5 per cent.). On 10 May 1995 PricewaterhouseCoopers LLP ("PwC") submitted a voluntary disclosure to HMRC claiming repayment of wrongly paid output tax in relation to the VAT periods 03/89 to 12/94, on the basis that the supplies of power concerned were supplies for 'domestic use' within Group 7, Schedule 5, VAT Act 1983, as being supplies 'for use in self-catering accommodation'. As supplies of power for domestic use, Colaingrove claimed that they should have been zero-rated until 31 March 1994 and charged at the reduced rate (then 8 per cent.) thereafter. It appears from PwC's letter of 10 May 1995 that the charge for power (in 1994) was a fixed charge of £3.50 per night, which was charged over and above the 'touring fee', and that the charge was optional, in the sense that a customer was not required to 'hook up' for electricity and the booking form required a customer to indicate whether he/she required the electricity 'hook up' facility. Mr King's evidence (which the Tribunal accepts) was that most touring caravans are designed to be connected to an electricity 'hook-up' at a caravan site (such as the parks operated by Colaingrove) and nearly every touring caravan using Colaingrove's parks takes advantage of the electricity 'hook-up' where Colaingrove has it available.

11. Subject to a minor amendment to the quantum of the claim, this claim was accepted by HMRC and a VAT repayment was made in 1995. Colaingrove has continued to apply the reduced rate to the output VAT due in respect of the supply of power to touring caravans, and this has not been opposed by HMRC.

12. Colaingrove submitted a voluntary disclosure on 21 March 1996 in relation to the supply of power to Sun Holiday customers on the same basis. By this disclosure, Colaingrove sought repayment of £63,762 in respect of the periods 03/94 to 12/95. This claim was paid (with an addition of £2,900) by HMRC.

13. Colaingrove made manual adjustments in the periods 03/96 to 12/98 to their VAT accounts in order to treat supplies of power to Sun Holiday customers as being reduced rate supplies. In the periods 03/99 to 03/02, this process of manual adjustment became (in Mr King's words) 'unduly onerous' and Colaingrove accounted for output VAT on the supplies at the standard rate with the intention of making voluntary disclosures from time to time in order to recover the overpaid VAT. Such a voluntary disclosure was made on 23 December 2002 (in the amount of £129,743 relating to power supplied to Sun Holiday customers) but was refused by HMRC on the grounds that there was no separate supply of power to Sun Holiday customers. With effect from the period 06/02, Colaingrove resumed accounting for output VAT on these supplies at the reduced rate.

The relevant legislation

14. With effect from 1 November 2001, section 29A VATA has relevantly provided as follows:

'(1) VAT charged on-

(a) any supply that is of a description for the time being specified in Schedule 7A …

shall be charged at the rate of 5 per cent.

…

(3) The Treasury may by order vary Schedule 7A by adding to or deleting from it any description of supply or by varying any description of supply for the time being specified in it.

(4) The power to vary Schedule 7A conferred by subsection (3) above may be exercised so as to describe a supply of goods or services by reference to matters unrelated to the characteristics of the goods or services themselves.

In the case of a supply of goods [and by paragraph 3 of Schedule 4, VATA, the supply of any form of power, heat, refrigeration or ventilation is a supply of goods], those matters include, in particular, the use that has been made of the goods.'

15. Also with effect from 1 November 2001, Schedule 7A VATA has relevantly provided as follows:

'Group 1: Supplies of domestic fuel or power

Item 1: Supplies for qualifying use of-

(a) Coal, coke or other solid substances held out for sale solely as fuel;

(b) Coal gas, water gas, producer gases or similar gases;

(c) Petroleum gases, or other gaseous hydrocarbons, whether in a gaseous or liquid state;

(d) Fuel oil, gas oil or kerosene; or

(e) Electricity, heat or air-conditioning.

…

Note 3: Meaning of 'qualifying use'

In this Group "qualifying use" means-

(a) Domestic use; or

(b) use by a charity otherwise that in the course of furtherance of a business.

…

Note 4: Supplies only partly for qualifying use

For the purposes of this Group, where there is a supply of goods partly for qualifying use and partly not-

(a) if at least 60 per cent. of the goods are supplied for a qualifying use, the whole supply shall be treated as a supply for a qualifying use; and

(b) in any other case, an apportionment shall be made to determine the extent to which the supply is a supply for a qualifying use.

Note 5: Supplies deemed to be for domestic use

For the purposes of this Group the following supplies are always for domestic use-

…

(c) a supply to a person at any premises of piped gas (that is, gas within item 1(b), or petroleum gas in a gaseous state, provided through pipes) where the gas (together with any other piped gas provided to him at the premises by the same supplier) was not provided at a rate exceeding 150 therms a month or, if the supplier charges for the gas by reference to the number of kilowatt hours supplied, 4397 kilowatt hours a month;

…

(g) a supply of electricity to a person at any premises where the electricity (together with any other electricity provided to him at the premises by the same supplier) was not provided at a rate exceeding 1000 kilowatt hours a month.

Note 6: Other supplies that are for domestic use

For the purposes of this Group supplies not within paragraph 5 are for domestic use if and only if the goods supplied are for use in-

(a) a building, or part of a building, that consists of a dwelling or number of dwellings;

(b) a building, or part of a building, used for a relevant residential purpose [item 7 contains a definition of 'use for a relevant residential purpose' which is not directly relevant to the appeal];

(c) self-catering holiday accommodation;

(d) a caravan; or

(e) a houseboat.'

16. The Community law authorising these provisions (as at 1999) was contained in article 12.3(b) of the Sixth VAT Directive, as follows:

> 'Member States may apply a reduced rate to supplies of natural gas, electricity and district heating provided that no risk of distortion of competition arises. A Member State intending to apply such a rate must inform the Commission before doing so. The Commission shall give a decision on the existence of a risk of distortion of competition. If the Commission has not taken that decision within three months of the receipt of the information a risk of distortion of competition is deemed not to exist.'

17. With effect from 15 January 2010, the applicable Community law provision has been article 102 of the Principal VAT Directive, which provide as follows:

> 'Article 102: After consultation of the VAT Committee, each Member State may apply a reduced rate to the supply of natural gas, electricity or district heating.'

The parties' submissions

18. Mr Cordara's first submission is that the jurisprudence n the line of cases flowing from the judgment of the Court of Justice ("ECJ") in *Card Protection Plan Ltd v Customs and Excise Commissioners* (Case C-349/96) [1999] STC 270 ("*CPP*") concerning the discernment of single or multiple supplies for VAT purposes where a transaction comprises several elements, is not applicable in a case, such as this, where the application of a reduced rate is at issue. In such cases, he submitted, the ECJ has recognised that a single supply can be taxed at two separate rates, citing *Talacre Beach Caravan Sales Ltd v Customs and Excise Commissioners* (Case C-251/05) [2006] STC 1671 ("*Talacre Beach*"). He also cited *European Commission v France* (Case C-94/09), which concerned services by undertakers ("*French Undertakers*"), a case where the ECJ confirmed that French legislation applying a reduced rate of VAT

to the transportation of a body by vehicle, as a concrete and specific element of the supply of services by undertakers, fulfilled the conditions required by the relevant European Union legislation providing for the application of reduced rates to supplies of services including, *inter alia*, supplies of services by undertakers (article 98(1) and (2) and Annex III of the Principal VAT Directive, corresponding to article 12(3)(a) and Annex H of the Sixth VAT Directive).

19. His second submission was that even if the *CPP* jurisdiction applied to this case (which in his submission it did not), then the Tribunal should hold that Colaingrove made two supplies, one of holiday accommodation, and one of power (gas and electricity) for separate contractual considerations, and the supply of power attracted VAT at the reduced rate, not the standard rate. To support this submission he cited *RLRE Tellmer Property sro v Finančni ředitelství v Ústí nad Labem* (Case C-572/07) ("*Tellmer*"), where the ECJ held that there had been two supplies by the same person, a landlord of premises, to the tenant, namely the passive letting of property, and also a supply of services of cleaning the common parts of the apartment block where the property was situated. He also cited the First-tier Tribunal's decision in *Honourable Society of Middle Temple v Revenue and Customs Commissioners* [2011] UKFTT 390 (TC) ("*Middle Temple*") and *Suffolk Heritage Housing Association Ltd v Customs and Excise Commissioners* (a 1995 VAT Tribunal Decision, No. 13713) in which the earlier VAT Tribunal decision in *Adams, Woskett and Partners v Customs and Excise Commissioners* (Decision 9647) on very similar facts to the present appeal was cited and followed.

20. Mr Hyam, for HMRC, submitted that the facts of this appeal demonstrated a single supply for VAT purposes by Colaingrove of fully serviced holiday accommodation, subject to VAT at the standard rate. It is significant, in his submission, that the charge for power made to a Sun Holiday customer of Colaingrove is not related to a consumption of any specific quantity of power by the customer, ascertained by metering, which HMRC accept would (if that were the fact) amount to a supply of power attracting the reduced rate, separate from the standard rated supply of holiday accommodation. He explained the rationale for that distinction (which was forcefully attacked by Mr Cordara as being a manifest distortion of competition and in breach of the principle of fiscal neutrality) as follows. Where a customer is charged for the power actually consumed by him/her, it must follow that there is an element of choice for the customer as to how much, if any, power he/she will consume, which serves to demonstrate that the supply of power is in reality separate from the supply of holiday accommodation.

21. Mr Hyam submitted that the question of the nature of the supply or supplies made must be ascertained from the point of view of the typical consumer, and from that point of view there is only one basic economic supply – *viz:* a supply of serviced holiday accommodation, which it would be artificial to split, because both elements (holiday accommodation and power) are essential and fully integrated. He cited *Levob Verzekeringen BV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766, *CPP, Revenue and Customs Commissioners v Weight Watchers UK Ltd* [2008] EWCA Civ 715; [2008] STC 2313, *Revenue and Customs Commissioners v David Baxendale Limited* [2009] EWHC 162 (Ch); [2009] STC 825, *Commissioners*

for Revenue and Customs v Diana Bryce trading as The Barn [2010] UKUT 26 (TCC), *Don Bosco Onroerend Goed BV v Staatssecretaris van Financiën* (Case C-461/08) [2010] STC 476 and *College of Estate Management v Customs and Excise Commissioners* [2005] UKHL 62; [2005] STC 1597.

22. He sought to distinguish the First-tier Tribunal's Decision in *Middle Temple* on the basis that whereas in that case (as in *Tellmer*) there had been no 'particular economic purpose' underlying the link between the two supplies (of premises and water). He submitted that in this case the charges for holiday accommodation and power are 'economically indivisible both contractually and economically' from the point of view of the typical consumer.

23. Mr Hyam also submitted that the Tribunal should reject Colaingrove's argument that on the basis that it makes a single supply, the charges for power should nonetheless attract VAT at the reduced rate for the following reasons.

24. First, such an approach would involve artificially splitting a single supply and distortion of the functioning of the VAT system (*CPP*, paragraph 29).

25. Secondly, reliance on note 5 of Group 1, Schedule 7A, VATA – which provides, for example, that a supply of electricity to a person at any premises where the electricity (together with any other electricity provided to him at the premises by the same supplier) was not provided at a rate exceeding 1000 kilowatt hours a month is deemed to be a supply for domestic use, and thus for a qualifying use rendering the supply taxable at the reduced rate – to override the *CPP* jurisprudence on the taxation of supplies with more than one element would rob the *CPP* principles of much of their force.

26. Thirdly, he submitted that Colaingrove's reliance on *Talacre Beach* was misconceived. That case showed that national legislation providing for zero-rating (exemption with refund) pursuant to a transitional derogation could not be extended to cover elements of a single supply to which the derogation did not apply, and, to that end, the supply required to be split for VAT purposes to ensure that those elements were taxed at the standard rate. In this case the single supply is taxable at the standard rate on broad principles (not zero-rated by reason of a derogation) and there is no reason to construe the broad principle of taxability narrowly. He cited the First-tier Tribunal's Decision in *Queen Mary v HMRC* [2011] UKFTT 229 (TC).

27. Fourthly, he made a general submission that it would be distortive of competition and contrary to the principle of fiscal neutrality to permit Colaingrove to benefit from the reduced rate of output VAT in relation to a flat rate charge for power which is raised regardless of a customer's usage of power.

28. Fifthly, he submitted that *French Undertakers* did not assist Colaingrove because that case was concerned with the extent of a Member State's discretion to legislate, in particular whether French legislation providing for the application of a reduced rate of VAT to a particular service undermined the principle of fiscal neutrality.

29. Sixthly, he urged the Tribunal not to have regard to decisions on the question of the ascertainment of single or multiple supplies, or the application of VAT to such supplies, which pre-date *CPP* (for example *Adams, Woskett and Partners* and *Suffolk Heritage Housing Association*), having regard to the dictum of Lord Hoffmann in *Dr Beynon and Partners v Customs and Excise Commissioners* [2005] STC 55 to the effect that citation of such earlier cases should be discouraged because *CPP* was a restatement of principle (*ibid.* at [19]).

30. After the hearing had concluded, on 23 May 2012, Mr Hyam made a further written submission to bring to the Tribunal's attention the ECJ's decision in *Purple Parking Ltd. v HMRC* (Case C-117/11), which was handed down on 19 January 2012. His submission was that the ECJ in *Purple Parking* had in effect provided reinforcement to the arguments already made by him on behalf of HMRC.

31. The Tribunal invited a written response from Colaingrove, which was made by Mr Cordara on 7 June 2012. Mr Cordara submitted that the facts of *Purple Parking* were far removed from those in Colaingrove's appeal in that in *Purple Parking* a single charge was made for 'parking services', with no separate and distinct charge being made for transport to and from the airport terminal.

Discussion

32. We address, first, the debate about the extent of the application of the jurisprudence in the line of cases following the judgment of the ECJ in *CPP*. Our starting point is the speech of Lord Walker in *College of Estate Management* with which the others of their Lordships agreed and in which he discussed the principles in *CPP* (*ibid.* at [28] to [30]). We set out the relevant parts of this passage:

33. Lord Walker said:

> '[29] In *CPP* [when it returned to the House of Lords, see: [2001] STC 174; [2002] 1 AC 202] Lord Slynn [at [22] and [25]] emphasised the need to take an overall view, without 'over-zealous dissection', and to look for the essential purpose (objectively assessed) of a transaction. In *Customs and Excise Commissioners v British Telecommunications plc* [1999] STC 758 at 766, [1999] 1 WLR 1376 at 1384 he referred to the need to look at the commercial reality. In the same case Lord Hope of Craighead said ([1999] STC 758 at 768, [1999] 1 WLR 1376 at 1386) that a supply which comprises a single service from an economic point of view should not be artificially split. In *Beynon* … at [20] Lord Hoffmann explained:
>
> > 'The Court of Justice observed [in *CPP* at paras. 27-29] that the diversity of commercial operations made it impossible to give exhaustive guidance as to how to approach the problem correctly in all cases. Regard should always be had to the circumstances in which the transaction took place. Every supply of "a service" is by definition distinct and independent but a supply which "from an economic point of view" comprises a *single* service should not be artificially split into separate "services". What matters is "the essential features of the transaction".'
>
> Lord Hoffmann then went on to quote para 30 of the ECJ's judgment in [*CPP*]:
>
> '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. As 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 (see *Customs and Excuse Commissioners v Madgett and Baldwin (trading as Howden Court Hotel)* (Joined cases C-308/96 and C-94/97) [1998] STC 1189 at 1206, para. 24).'

[30] In the course of this appeal there has been much discussion of para. 30 of the ECJ's judgment. In my opinion it is clear that this paragraph (which uses the introductory words 'in particular') is dealing with a particular case exemplified by *Madgett and Baldwin*. It is not asserting that every distinct element of a supply must be a separate supply for VAT purposes unless it is 'ancillary'. 'Ancillary' means .. subservient, subordinate and ministering to something else. It was an entirely apposite term in the discussion in *British Telecommunications* (where the delivery of a car was subordinate to its sale) and in [*CPP*] itself (where some peripheral parts of a package of services, and some goods of trivial value such as labels, key tabs and a medical card, were subordinate to the main package of insurance services). But there are other cases (including [*Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (C-231/94) [1996] STC 774; [1996] ECR I-2395], *Beynon* and the present case) in which it is inappropriate to analyse the transaction in terms of what is 'principal' and 'ancillary', and it is unhelpful to strain the natural meaning of 'ancillary' in an attempt to do so. Food is not ancillary to restaurant services; it is of central and indispensable importance to them; nevertheless there is a single supply of service (*Faaborg*). Pharmaceuticals are not ancillary to medical care which requires the use of medication; again, they are of central and indispensable importance; nevertheless there is a single supply of services (*Beynon*).'

34. In his speech in *College of Estate Management*, agreeing with Lord Walker, Lord Rodger of Earlsferry said (*ibid* at [12]):

'But the mere fact that the supply of the printed materials [in the context of the provision of distance learning courses consisting of printed materials, face-to-face teaching sessions and materials on the College's website] cannot be described as ancillary does not mean that it is to be regarded as a separate supply for tax purposes. One has still to decide whether, as a matter of statutory interpretation, the College should properly be regarded as making a separate supply of the printed materials or, rather, a single supply of education, of which the provision of the printed materials is merely one element. … The answer to that question is not to be found simply by looking at what the taxable person actually did, since *ex hypothesi*, in any case where this kind of question arises, on the physical plane the taxable person will have made a number of supplies. The question is whether, for tax purposes, these are to be treated as separate supplies or merely as elements in some over-arching single supply. According to the [ECJ] in [*CPP*] (at para 29) for the purposes of the directive the criterion to be applied is whether there is a single supply "from an economic point of view". If so, that supply should not be artificially split, so as not to distort (altérer) the functioning of the VAT system. The answer will accordingly be found by ascertaining the essential features of the transaction under which the taxable person is operating when supplying the consumer, regarded as a typical consumer. Since the 1994 Act has not adopted any different mechanism to give effect to this aspect of the directive, the same approach must be applied in interpreting the provisions of the Act. The key lies in analysing the transaction.'

35. This passage was cited by Sir Andrew Morritt C in his judgment (with which Hooper and Lloyd LJJ agreed) in *Weight Watchers (UK) Ltd*. He also cited the formulation adopted by the ECJ in *Levob* in its ruling (delivered 5 days after the decision of the House of Lords in *College of Estate Management*) as follows (see: *Levob* at [30]):

'Article 2(1) of the Sixth Directive must be interpreted as meaning that where two or more elements or acts supplied by a taxable person to a customer, being a typical customer, are so closely linked that they form objectively, from an economic point of view, a whole transaction,

> which it would be artificial to split, all those elements or acts constitute a single supply for purposes of the application of VAT …'

36. Sir Andrew Morritt C said (*Weight Watchers (UK) Ltd. ibid* at [17]):

> 'In summary, therefore, the court must have regard to all the circumstances. It must apply the test on an objective basis. There are various formulations of what the relevant test is in [*CPP*] (para 29) and *Levob* .. Common to all of them are the requirements that the court must look at the transactions from the view point of the typical consumer rather than the supplier. The extent of the linkage between the relevant transactions must be considered from an economic point of view, rather than, say, a physical, temporal or other standpoint. So regarded, the question then is whether it would be artificial to split them into separate supplies. The fact that the supplier has charged a single price for the aggregate of the transactions is a relevant circumstance but is not conclusive because that price may be apportioned.'

37. The Court of Appeal's decision in *Weight Watchers (UK) Ltd.* (which concerned the provision of services – weight-loss and weight-management classes and printed material –in the context of a weight-loss programme, the issue being whether there was one supply of a weight-loss programme, or separate supplies of classes and printed material) was that there was a single standard-rated supply of a weight-loss programme. Sir Andrew Morritt C said (*ibid* at [46]):

> 'I reach that conclusion for the following reasons. First, the typical consumer … is or is about to become a member of WW. Second, the purpose of such a consumer being or becoming a member is to obtain the benefit of the weight-loss programme … Third, one of the cardinal features of that programme … is the reinforcing combination of the diets as taught in the *Handbook* and the group therapy to be derived from the meetings. Fourth, if it is the combination which the meeting member is buying, then it makes no sense from an economic point of view to pay (be charged) separately for the meetings and the publications … [Sir Andrew Morritt's fifth and sixth reasons relate to the particular facts relating to the different meetings of the programme]'

38. *Weight Watchers (UK) Ltd* was followed by Morgan J in *David Baxendale*, which also concerned the provision of a weight-loss programme. This time, the unsuccessful taxpayer's argument (before Morgan J) was that the operation of the programme gave rise to separate supplies of special food (falling to be zero-rated) and support services (standard-rated). In rejecting this argument, Morgan J said (*ibid* at [66]):

> '… my own conclusion … applying the correct legal principles to the facts as found by the tribunal, is that it is artificial to split the transaction in the present case into the separate elements of a supply of food packs and a supply of support services. On my reading of the primary facts found by the tribunal, what the typical customer is buying is the combination of food packs and support services. The two elements reinforce each other. From an economic point of view, it does not make sense for the supplier to charge, or for the customer to pay, separately for the elements of food packs and support services. I do not reach this decision merely because the two elements have been placed in a single 'package'. The links between the two elements go well beyond mere packaging.'

39. Mr Cordara's submission is that the principles outlined and applied in the authorities referred to above are not determinative in cases where the application of a reduced rate of VAT is in issue, at any rate where no abuse is alleged. His argument is based in part on inferences which he draws from the form of UK domestic statutory provisions in section 29A(4) VATA and in Notes 4, 5 and 6 to Group 1, Schedule 7A,

VATA and in part from the ECJ's case law, in particular *French Undertakers*, which he describes as his 'best case', though he also relies on *Talacre Beach*.

40. With regard to the UK domestic statutory provisions mentioned, his point is that they do not sit well with the *CPP* jurisprudence, and indicate that the reduced rate is to be applicable to the provision of domestic fuel or power, even if such provision is not the subject of a supply for VAT purposes (whether or not determined by the application of the *CPP* jurisprudence).

41. Section 29A(4) VATA gives power to the Treasury to vary Schedule 7A (the descriptions of supplies which for the time being are to be charged at the reduced rate) 'so as to describe a supply of goods or services by reference to matters unrelated to the characteristics of the goods or services themselves'. Mr Cordara's point is that the *CPP* jurisprudence would not permit a supply to be described by reference to matters unrelated to the characteristics of the goods or services themselves. He suggests that section 29A(4) indicates that power is being taken to describe supplies to be charged at the reduced rate by reference, for example, to use for a beneficial social purpose.

42. Note 4 to Group 1, Schedule 7A provides for the application of the reduced rate to supplies of goods partly for qualifying use (which gives general eligibility for the reduced rate) and partly not, on the basis of deeming a supply, which is in fact supplied at least as to 60 per cent. for a qualifying use, as if it were entirely for a qualifying use, and requiring an apportionment between qualifying use and other use, in a case where less that 60 per cent. is supplied for a qualifying use. Mr Cordara's point is that it would not be lawful under the *CPP* jurisprudence for a Member State to impose a 60 per cent. 'cut-off' in this way. The ascertainment of the substance of the supply has no regard to its objective nature from the customer's point of view, having regard to all the circumstances of the transaction. Also, he submits that the provision for an apportionment of a supply where the qualifying use is less that 60 per cent. 'to determine the extent to which a supply is a supply for qualifying use' is wholly contrary to the *CPP* jurisprudence, because it provides for splitting a single supply and, moreover, it is directly indicative of the proposition that a single supply can be taxed at more than one rate, i.e. as to part at the standard rate and as to part at the reduced rate.

43. Note 5 to Group 1, Schedule 7A deems supplies of a very low quantity to be 'always for domestic use', and therefore eligible to be charged at the reduced rate. Mr Cordara's point is that supplies which may in fact not be for domestic use can pursuant to this Note be deemed to be for domestic use. That again is a provision which would not be lawful under the *CPP* jurisprudence.

44. Mr Cordara submits that these are examples of the UK, as a Member State, exercising its discretion relative to the charge of the reduced rate in ways which 'go well beyond' *CPP* principles. They demonstrate that 'we are in an area where all of those principles are in suspension'.

45. Note 6 to Group 1, Schedule 7A expands the concept of supplies for domestic use to supplies not within Note 5 but which are (whatever the quantity) supplied for use

in, *inter alia*, self-catering holiday accommodation and caravans. This, Mr Cordara submits, shows the intention of Parliament that people who get electricity in self-catering accommodation or caravans should benefit, even if the quantities supplied are high, and even if they are not actually making domestic use of them. He hastens to add that the power supplied in this case is in small quantities and is used for domestic purposes. He submits that Note 6 demonstrates 'the intensity of Parliamentary intent' that electricity supplied to a caravan or self-catering accommodation should attract the reduced rate.

46. *French Undertakers* is relied on by Mr Cordara for the ECJ's acceptance of the proposition that there is nothing in the text of the Community legislation enabling Member States to apply reduced rates (article 12(3)(a), third sub-paragraph of the Sixth VAT Directive, but for the purposes of the present appeal, article 12.3(b) of the Sixth VAT Directive and its legislative successor, article 102 of the Principal VAT Directive) 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 specified in the legislation, so that a selective application of the reduced rate cannot be excluded provided that no risk of distortion of competition results (*ibid.* paragraph 25).

47. *French Undertakers* is also relied on by Mr Cordara for the ECJ's recognition 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' specified in the legislation (*ibid.* paragraph 26).

48. The ECJ dealt specifically with the Commission's case based on the application of the *CPP* jurisprudence as follows:

> '31. The Commission maintains that the Member States, when they make use of the possibility available to them under article 98 of [the Principal VAT Directive, which is a parallel provision to article 102 which is in issue in this appeal] 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* (para 27)) and pointed out that it is necessary to take into account all the circumstances in which the transaction at issue takes place (*CPP* (para 28), [*Levob*] (para 19), and *Ministero dell'Economia e delle Finanze v Part Service Srl* (Case C-425/06) [2008] STC 3132, [2008] ECR I-897, para 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 [the Principal VAT Directive] 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 *EC Commission v France* [Case C-384/01; [2003] ECR I-4416] and *Finanzamt Oschatz v*

Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien [Case C-443/05; [2009] STC 1] and reiterated in paras 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 [the Principal VAT Directive - a parallel provision to article 102 which is in issue in this appeal], and, if so, to examine whether or not the application of that rate undermines the principle of fiscal neutrality.'

49. Mr Cordara's submission on *Talacre Beach* is that in that case also the ECJ stated that the *CPP* jurisprudence provides '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' (*ibid.* [25]) with the result that a single supply of goods (including a principal item – the caravan – the supply of which was properly subject to the zero-rate, and other items, the supply of which the applicable legislation excluded from the zero-rate) is taxable in part at the zero-rate and in part at the standard rate. The decision of the ECJ was that the Member State (the UK) was permitted to levy VAT at the standard rate on the supply of the other items even though they were elements of a supply which would be recognised under the *CPP* jurisprudence as a single supply of a caravan.

50. Mr Hyam's response to Mr Cordara's submissions on this aspect of his case was that the *CPP* jurisprudence requires the Tribunal to ascertain in the first place, having considered the essential features of the transaction under which the taxable person is operating when supplying the consumer, regarded as a typical consumer (*College of Estate Management*) or, if one likes, 'all the circumstances, including the specific legal framework' (*Talacre Beach*) what the supply in issue is. In his submission, one reaches the conclusion that Colaingrove makes single composite supplies of serviced holiday accommodation before one considers *French Undertakers* or *Talacre Beach*.

51. Mr Hyam contends that one cannot derive the wide-ranging propositions, which Mr Cordara seeks to derive, from *French Undertakers* or *Talacre Beach*. To do so, in his submission would 'completely rob the *CPP* line of authority of its force and undermine the principle which lies behind the rule in *CPP*', which was there to prevent over-complication of VAT and the need to separate out, in relation to every transaction, each concrete and specific element which could be identified in order to decide what rate of tax was to be applied to it.

52. *Talacre Beach* is, in Mr Hyam's submission, only of relevance if the conclusion in any particular case, applying the *CPP* jurisprudence, is that there is a single composite supply, and the proposition that the entire supply should be taxed at the rate indicated by that conclusion raises a conflict with another principle of VAT, which should be given priority over the objectives pursued by the *CPP* jurisprudence – in *Talacre Beach*, the principle that article 28 of the Sixth VAT Directive prevented the extension of the zero-rate to supplies for which it was not authorised (the removable contents of caravans).

53. Mr Hyam submitted that all the ECJ was saying in *French Undertakers* was that when a Member State decides to exercise its discretion to introduce a reduced rate of VAT, it must do so in relation to matters that are capable of being distinct and dealt with separately, provided that the principle of fiscal neutrality is not infringed. He submitted that *French Undertakers* does not impact on the problem raised by this case – which is solved once the conclusion is reached by application of the *CPP* jurisprudence that there is here a single composite supply of serviced holiday accommodation. He contended that Mr Cordara was seeking to draw parallels which were not properly to be drawn between the situations in *French Undertakers* and *Talacre Beach* and the situation in the present case.

54. Mr Hyam's first point on *Purple Parking* is that where the pricing of a supply comprising two (or more) elements is exclusively calculated by reference to one of those elements (in *Purple* Parking, the period for which the vehicle is parked) and without any regard to the extent to which the other element(s) is used (the number of passengers using the airport parking transport is irrelevant to the pricing of the supply), that is another matter pointing to a complex single supply in which the first element (the period of parking) is predominant (*ibid.* [33] to [35]).

55. In Mr Hyam's submission, this translates directly to the facts of this case, where the charge made for power is calculated by reference to the period for which the Sun Holiday customer takes the chalet or static caravan.

56. Mr Hyam also submits that the ECJ in *Purple Parking* has made clear that the principle of fiscal neutrality is not infringed by the mere fact that the treatment of the supply of several services as a single supply is different from what the treatment would have been if separate supplies of those services had been made. It is for the national court to make the determination whether or not for the purposes of the principle of fiscal neutrality two supplies which are taxed differently are similar from the point of view of the average consumer (*ibid.* [38] and [39]).

57. He also submits that *Purple Parking* reinforces his submissions (outlined above) on *French Undertakers*, namely that that case concerns a different question from the question of whether two services constitute a single supply (*ibid.* [40]).

58. Mr Cordara replies on *Purple Parking* as follows. First, he says that *Purple Parking* can be distinguished from the present case because there was no separate and distinct charge made for transport to and from the airport terminal, whereas there was of course a distinct charge made for power by Colaingrove. Secondly, he says that there was, from the point of view of the average consumer, clearly an expectation that transport would be included in the price he/she paid for parking. By contrast, in this case, the average consumer was aware from the outset that a separate charge for power would be made by Colaingrove.

59. He also makes the point that the statutory position was relevantly quite different in *Purple Parking*, as compared with the present case. Note 4A(b), Group 8, Schedule 8, VATA specifically excludes the transport of passengers between a car park and an airport terminal from the scope of the general zero-rating provision for the transport

of passengers contained in Item 4, Group 8, Schedule 8, VATA. By contrast, the domestic legislation relied on by Colaingrove (Item 1 of Group 1, Schedule 7A VATA and Notes 5 and 6 thereto) specifically provides that supplies of power under specified limits and to self-catering holiday accommodation and caravans should benefit from the reduced rate of VAT.

60. Mr Cordara points out that the text paragraph 39 of the Reasoned Order in *Purple Parking* makes clear that, for the purposes of applying the principle of fiscal neutrality, 'a complex supply of services consisting of several elements is *not automatically* similar to a supply of those elements separately' (emphasis added).

61. With regard to *French Undertakers*, Mr Cordara submits that the ECJ in *Purple Parking* (*ibid.* [40]) stated that *French Undertakers* concerned a different question from the first and second questions referred in *Purple Parking*, namely whether the airport parking and transport in that case were to be regarded as a single or as separate supplies for VAT purposes. Mr Cordara submits that if the Tribunal finds that Colaingrove has made a single supply the 'concrete and specific' element constituted by the supply of power should still be eligible to be taxed at the reduced rate, which would be wholly consistent with the ECJ's decision in *French Undertakers*.

62. We accept Mr Cordara's submission that in *French Undertakers*, the ECJ recognised and accepted that the *CPP* jurisprudence did not give 'exhaustive guidance' on the extent of a transaction, an issue which is of particular importance for VAT purposes for, *inter alia*, applying the rate of tax (see *ibid.* [32] and *CPP* at [27]).

63. We further accept his submission that the result of *French Undertakers* was to rule compatible with 'the relevant European Union legislation' (*ibid.* [46]) the French legislation applying the reduced rate only to the transportation of a body by undertakers (and also the transport of passengers in cars following the hearse or in cars of the clergy) but not to other operations carried out by undertakers.

64. We also accept his submission that the practical application of the ECJ's decision is that a single supply of 'undertaker's services' provided by a supplier in France (at any rate, where such a supply includes transport as described) is subject to two different VAT rates. We further accept that there is a relevant similarity with the practical application of the ECJ's decision in *Talacre Beach*.

65. In consequence, it seems to us that the issue for our decision on this aspect of the case is whether the United Kingdom legislation has in fact provided for the reduced rate of VAT to apply to the 'concrete and specific' element (which consists of domestic fuel or power within Group 1 of Schedule 7A VATA) of a larger supply which falls to be characterised as something else – in this case, serviced holiday accommodation.

66. This issue is not as clear cut as it was in *French Undertakers*. In that case, the Ministerial Instruction No 68 of 14 April 2005 (*Bulletin official des impôts* 3 C-3-05) provided for the split VAT treatment of 'the external services for funerals' in terms – see: *ibid.* [6] and [7].

67. We accept Mr Hyam's point that we should not contemplate an analysis which would rob the *CPP* jurisprudence of its force or undermine the principle lying behind it. However we note that there is no indication in *French Undertakers* that the ECJ was suggesting any such thing. On the contrary, in *French Undertakers* at [32] and [33], the ECJ reaffirmed *CPP* in general terms while recognising that it did not give exhaustive guidance on the question of the extent of a transaction (and see: *CPP* at [27]).

68. It seems to us, that applying *French Undertakers* in the way that we propose would not open the floodgates and wash away the *CPP* jurisprudence, because *French Undertakers* can, as we see it, only apply in the very limited class of case where a reduced rate of VAT is in issue and the domestic legislation imposing it indicates an intention that the *CPP* jurisprudence should not apply. Thus it would not apply in the situation considered in *Purple Parking* – see: Note4A(b), Group 8, Schedule 8, VATA

69. In examining Group 1 of Schedule 7A VATA (and section 29A VATA) to ascertain whether they disclose such an intention, we start off by presuming that the references to 'supply', 'supplies' and 'any description of supply' carry the meaning that the supplies concerned, and their description, are to be ascertained by reference to and application of the *CPP* jurisprudence. This approach follows the guidance to be derived from Lord Rodger's speech in *College of Estate Management – ibid.* [12] : the final 3 sentences, set out above, which we repeat here –

> 'The answer will accordingly be found by ascertaining the essential features of the transaction under which the taxable person is operating when supplying the consumer, regarded as a typical consumer. Since the 1994 Act has not adopted any different mechanism to give effect to this aspect of the directive, the same approach must be applied in interpreting the provisions of the Act. The key lies in analysing the transaction.'

70. Mr Cordara has suggested (see: above) that section 29A(4) VATA and in Notes 4, 5 and 6 to Group 1, Schedule 7A, VATA all contain indications that Parliament intended the reduced rate of VAT to apply to the 'concrete and specific' element (consisting of domestic fuel or power within Group 1 of Schedule 7A VATA) of a larger supply which (if the *CPP* jurisdiction were applicable to it) would fall to be characterised as something else.

71. We agree with this submission, for the reasons which Mr Cordara gives. Mr Hyam did not in his submissions give any reason why we should not infer from these provisions the legislative intention for which Mr Cordara contends (apart from the 'floodgates' argument about the undermining of the *CPP* jurisprudence, which we have referred to). Put shortly, these provisions seem to us to indicate that, quite apart from the expectations of a typical consumer of the supply as to what he/she was enjoying by receiving the supply, Parliament has provided for other criteria to apply in determining the nature of a supply of domestic fuel and power which is chargeable at the reduced rate. We agree with Mr Cordara that these provisions indicate Parliament's intention that a supply of fuel or power may qualify to be taxed at the reduced rate by reference not only to the nature of what is supplied (the 'characteristics of the goods or services themselves' – see: section 29A(4) VATA) but

also by reference to the beneficial social purpose to be achieved by the supply – for example, the supply of gas or electricity in whatever quantity for use in self-catering holiday accommodation or a caravan (see: Note 6, Group 1, Schedule 7A, VATA).

72. For these reasons we conclude that the presumption that the references to 'supply', 'supplies' and 'any description of supply' in section 29 and Group 1, Schedule 7A, VATA refer to supplies as ascertained by application of the *CPP* jurisprudence must give way to the conclusion that that the United Kingdom legislation has provided for the reduced rate of VAT to apply to the 'concrete and specific' element (which consists of domestic fuel or power within Group 1 of Schedule 7A VATA) of a larger supply which (if the *CPP* jurisdiction were applicable to it) would fall to be characterised as something else – in this case, serviced holiday accommodation.

73. We also agree with Mr Cordara that the supply of power relation to which a reduced rate is authorised by Group 1 of Schedule 7A VATA is, if it is an element of a transaction which would be analysed as a larger single complex supply not being a supply of power (were the *CPP* jurisdiction to be applicable to it), capable of being a concrete and specific aspect of the larger single complex supply and is, on the facts of this case, a concrete and specific aspect of the transactions entered into by Colaingrove with Sun Holiday customers.

74. We also agree with Mr Cordara that, on the evidence before us, the principle of fiscal neutrality is observed if the reduced rate is applied to the supplies of power in issue and that no distortion of competition results. This is the aspect of the case where it is relevant to consider Mr Cordara's submissions about 'three caravans on a cliff-top'. The occupants of Caravan 1 have a contract with an electricity supplier for supplies of electricity, separate from their contract for the provision of holiday accommodation. HMRC agree that the resultant supplies of electricity attract the reduced rate of VAT. The occupants of Caravan 2 have a contract for supplies of electricity with the same person who provides the holiday accommodation, but the supplies of electricity are metered, the meter is read, and the occupants of Caravan 2 are charged a price for electricity which is directly related to the amount of electricity supplied. HMRC agree that the resultant supplies of electricity also attract the reduced rate of VAT. The occupants of Caravan 3 (Sun Holiday customers) have similar contractual arrangements as the occupants of Caravan 2, but the meter is not read and they are charged a price for electricity which is a *per diem* rate not directly related to the amount of electricity supplied (which is unknown) but 'exclusively calculated on the basis of the period for which [the holiday accommodation is rented]' (cf. *Purple Parking*, *ibid.* [34]). HMRC submit that the resultant supplies of electricity do not attract the standard rate (on *CPP* principles). We find that HMRC's submission, if correct, would undermine the principle of fiscal neutrality inherent in the common system of VAT in that it would not treat similar supplies of electricity, which are this in competition with each other, in the same way for VAT purposes – see: *French Undertakers*, *ibid.* [40].

75. Mr Hyam argued at various points that there either was, or might be, an element of shifting of value between the elements of power and accommodation inherent in

the pricing, arguing that there was a clear enticement to customers who were drawn in by the heavily discounted rates applicable to Sun Holidays, and the *per diem* rates chargeable for power involved an artificial split between the price of accommodation and the price of power, so that relatively more was paid for power and less for accommodation. We find that this suggestion was not made out on the evidence. Mr King frankly acknowledged that the charge for power was 'assessed against what we think the customer would be prepared to pay' and that it was not 'calculated off on actual consumption', but he also said that, in the context of rising wholesale prices for gas and electricity, the increasing consumption of electricity by the occupants of caravans resulting from there being more and more electrical goods in them, and the building and maintenance of an extensive electrical infrastructure at holiday parks, Colaingrove thought that the price charged for utilities was fair. Colaingrove was obliged by the terms of its agreement for the publication of the promotional offer in The Sun to make its charges for power in accordance with its standard programme of charges.

76. We conclude, therefore, (and find) that no abuse arising from artificial splitting has been proved and so no distortion of competition would result from the charges made for power attracting the reduced rate of VAT.

77. On this basis the appeal succeeds. However, if we are wrong in our decision so far, and the *CPP* jurisprudence ought to be applied to determine the nature of the supplies in issue, it would follow that we ought to address the question (fully argued before us) whether, by the application of the *CPP* jurisprudence, there are here two supplies, one of holiday accommodation and one of power, or one supply, of serviced holiday accommodation.

78. We now turn to address this (second) issue.

79. Mr Cordara's argument was based in effect on *Tellmer* and *Middle Temple*. We accept Mr Hyam's submission that we ought not to make reference back to Tribunal decisions made before the ECJ's seminal decision in *CPP*.

80. In *Tellmer*, services of cleaning the common parts of a buildings in which dwellings are let (apartment blocks) were supplied by the landlord in addition to the supplies of the dwellings in consideration of rent. A separate service charge for the cleaning services was made by the landlord to the tenants. The national (Czech) court referred to the ECJ the question of whether the letting of an apartment (and possibly of non-residential premises) on the one hand and the related cleaning of common parts on the other hand can be regarded as independent, mutually divisible, taxable transactions.

81. The ECJ, following the Advocate General, decided that they could and should be regarded as separate supplies for VAT purposes, citing *Part Service* (in which, in turn, *CPP* and *Levob* were cited and which therefore is a part of the *CPP* jurisprudence).

82. The reasoning adopted was that cleaning services 'do not necessarily fall within the concept of letting' for the purposes of the exemption provided for the leasing or

letting of immovable property by article 13B(b) of the Sixth VAT Directive (see now: article 135(1)(l) of the Principal VAT Directive). Further, cleaning services could, on the facts, be supplied in various ways, including by a third party (not the landlord). The cleaning services could, on the facts, be separated from the letting of the apartments, and the charges for cleaning services were invoiced separately from the rents. (See: *ibid.* [21] to [24])

83. An important aspect of *Tellmer* was that the ECJ was evidently unwilling to extend the benefit of exemption from VAT, which was specifically referable to the leasing of property, to a supply (of cleaning services) which was not of that nature (*ibid.* [20]).

84. In this case, the supply of accommodation in holiday camps, which would be the predominant supply indicating the nature of a single complex supply, if one is to be discerned applying the *CPP* jurisprudence, is not exempt, but is specifically excepted from the exemption for the leasing or letting of immoveable property by article 125(2)(a) of the Principal VAT Directive. That is a factor distinguishing this case from *Tellmer*.

85. We find, on the evidence, that Sun Holiday customers realistically had no choice but to take supplies of power from Colaingrove. The holidays taken were of short duration and the possibility in practice of Sun Holiday customers making any other arrangements for the supply of power ought to be given minimal weight. Mr King said in evidence that there was a theoretical, technical, possibility that a customer would not take supplies of gas and electricity to a caravan, but he added that 'in the 20 years that we've been running this I have not come across one customer that has ever done that'.

86. We accept that the charges for power were invoiced separately by Colaingrove from the charges for accommodation, but we do not regard this factor as determinative of the issue – compare, for example, *Levob* [25], which is in the following terms:

> 'The fact, highlighted in the question, that separate prices were contractually stipulated for the supply of the basic software, on the one hand, and for its customisation, on the other, is not if itself decisive. Such a fact cannot affect the objective close link which has just been shown with regard to that supply and that customisation nor the fact that they form part of a single economic transaction (see, to that effect, [*CPP* at [31]).'

87. *Middle Temple* concerned the grant of a lease by the Middle Temple to its tenant, and the provision of an unmetered supply of cold water (as a term of the lease) by the Middle Temple to the premises leased to the tenant. Importance was attached by the First-tier Tribunal to the fact that the Middle Temple technically made the supplies of water simply because 'by reason of historical antecedents' the system of pipes, to which the 'wholesale' supply of water by Thames Water was introduced, had been laid under the Middle Temple many years ago. Importance was also attached to the facts that the supply of water to tenants by the Middle Temple (as opposed to another supplier) conferred no economic advantage on the tenants. The Tribunal held that

there had been separate supplies of premises and water (the supply of water being zero-rated). We were told that the decision is under appeal.

88. The main feature which distinguishes this case from *Middle Temple* is that the fact that there is no practical possibility of Sun Holiday customers taking supplies of power from anyone other than Colaingrove is not a historical or geographical anomaly but inherent in the transaction taking place, namely the purchase of power for use in a static caravan or chalet taken at one of Colaingrove's holiday parks for a few days at most.

89. We consider, on the evidence, that what the typical Sun Holiday customer is buying from Colaingrove is the combination of holiday accommodation and power. Therefore, following *Weight Watchers (UK) Ltd* and *David Baxendale*, we conclude that, applying the *CPP* jurisprudence, it would be artificial to split the transaction entered into by a Sun Holiday customer with Colaingrove into the separate elements of a supply of holiday accommodation and a supply of power.

90. We find therefore, in agreement with Mr Hyam, that applying the *CPP* jurisprudence, there are in this case single complex supplies of serviced holiday accommodation.

91. We also consider that it would not be a correct application of the fiscal neutrality principle to split a single complex supply discerned on the application of the *CPP* jurisprudence into separate supplies of accommodation and power because the tax treatment of a single complex supply (taxation at the standard rate) is different from what the tax treatment would have been (taxation at the reduced rate) if the power had been supplied separately from the accommodation. The 'fiscal neutrality' argument raised at this stage is not confined to cases where the reduced rate is in issue, and we consider that it would undermine the efficacy of the *CPP* jurisprudence if single complex supplies were generally required to be disaggregated because the taxation consequences would have been different if the parties had chosen or been able to make their transaction on a different basis. On this point we are following *Purple Parking* (*ibid.* at [39]) and the cases therein cited. The correct treatment on the application of the *CPP* jurisprudence must be discerned from the transaction actually entered into and not from equivalent transactions that might have been, but were not, entered in to.

Conclusions

92. Our conclusions are as follows:

93. We accept that *French Undertakers* is authority for the entitlement of a Member State to legislate that a reduced rate of VAT will apply to a supply of goods or services in relation to which a reduced rate is authorised under the relevant European Union legislation (including natural gas, electricity or district heating), notwithstanding that the application of the *CPP* jurisprudence would lead to the conclusion that such supply was merely an element in a larger single complex supply which receives the tax treatment appropriate to the nature of the larger single complex supply taken as a whole. This is so, provided (a) that the supply of goods or services

in relation to which a reduced rate is authorised is a concrete and specific aspect of the larger single complex supply which an application of the *CPP* jurisprudence would identify, and (b) the principle of fiscal neutrality is observed if the reduced rate is applied to that supply of goods or services and no distortion of competition results.

94. Cases where a Member State has legislated that a reduced rate of VAT will apply to a supply of goods or services which would be merely an element in a larger single complex supply (if the *CPP* jurisprudence were to be applied) are cases where the *CPP* jurisprudence is inappropriate to determine the scope and substance of the supplies made for VAT purposes and the rate(s) of VAT which they respectively attract.

95. Section 29A and Group 1, Schedule 7A, VATA constitute a case within the immediately preceding paragraph. Therefore, the appeal succeeds on this basis.

96. If this conclusion is wrong, then the *CPP* jurisprudence must be applied to the supplies made by Colaingrove. Applying the *CPP* jurisprudence, we conclude that there is a single complex supply of serviced holiday accommodation.

97. We further conclude that that single complex supply would not fall to be artificially split for VAT purposes to recognise any supposed principle of fiscal neutrality.

98. In the result, the appeal is allowed.

99. We were not addressed on the quantum of the subject matter of the appeal. Our decision is a decision in principle. If the parties are unable to agree how the appeal should be disposed of in the light of this Decision they have general liberty to apply to the Tribunal to determine any outstanding issues.

100. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 29 January 2013