TC02697

Appeal number: TC/2010/04122

VAT – Whether provision of pharmaceutical supplies and/or supply of and surgical fitting of prosthesis to patients were part of a single exempt supply or zero-rated for the purposes of the legislation (Value Added Tax Act 1983) – If a single exempt supply whether the provision of drugs and prosthesis should nevertheless be zero-rated as a result of the application of the legislation and Talacre Beach Sales v Customs and Excise Cmmrs. (C-251/05)

FIRST-TIER TRIBUNAL
TAX CHAMBER

NUFFIELD HEALTH **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
HARVEY ADAMS FCA

Sitting in public at 45 Bedford Square, London WC1 on 18 and 19 March 2013

Amanda Brown, (non-practising solicitor) of KPMG for the Appellant

Owain Thomas and Matthew Donmall, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. By a letter dated 27 March 2009, following the decision of the House of Lords in *Fleming (trading as Bodycraft)/Conde Nast Publications Limited v Revenue and Customs Commissioners* [2008] STC 324, Nuffield Health ("Nuffield") claimed the input VAT it had incurred on drugs and prostheses used in the treatment of private in-patients.

2. The claim, amounting to £1,199,670, relates to periods before 17 March 1981 (prostheses) and 1 April 1986 (drugs) (the "claim period") when, as a result of the Value Added Tax (Handicapped Persons and Charities) Order 1981 and Value Added Tax (Handicapped Persons and Charities) Order 1986, Nuffield was able to acquire medicinal supplies and prosthesis at a zero rate and therefore incurred no input tax on these purchases.

3. Although the claims in respect of both the prosthesis and drugs were stated to be from 1 January 1974, before us Mrs Amanda Brown, who appeared for Nuffield, accepted that, as the relevant legislation had not come into force until 1 July 1974, the claims should be treated as having been made from that date.

4. HM Revenue and Customs ("HMRC"), in a letter dated 19 November 2009, rejected the claim by Nuffield upholding this following a review. Nuffield was notified of the outcome of the review by HMRC in a letter dated 8 April 2010.

5. On 7 May 2010 Nuffield appealed to the Tribunal on the grounds that, under the applicable legislation and following the decision of the Court of Appeal in *Customs and Excise Commissioners v Wellington Private Hospital* [1997] STC 445 ("*Wellington*"), the supplies of drugs and prostheses should properly be zero-rated and treated as separate supplies and should not to be regarded as a single supply of exempt health care.

6. Alternatively, in the event that its primary argument is unsuccessful, Mrs Amanda Brown, who appeared on behalf of Nuffield, contends, relying on the wording of the legislation, the fact that zero-rating takes precedence over the exemption and the ECJ decisions in *Talacre Beach Caravan Sales Limited v Customs and Excise Commissioners* [2006] STC 1671 ("*Talacre*") and *European Commission v France* [2012] STC 573 (the "French Undertakers case"), that the independent character of each element of the supply should be preserved so that the supply of drugs and prosthesis should be zero-rated and the supply of hospital care exempt.

7. Mr Owain Thomas and Mr Matthew Donmall, who appeared on behalf of HMRC, contend, on the basis of subsequent case law, both European and domestic, that *Wellington* was wrongly decided and that the supply of drugs and prosthesis should now be analysed either as single supplies of healthcare or supplies so closely linked with the supply of healthcare that they attract the same VAT liability.

8. During the beginning of the claim period the relevant domestic legislative provisions were first contained within the Finance Act 1972, then the Value Added Tax Act 1983 (which repealed and replaced the 1972 Act with effect from 26 July 1983) and finally the Value Added Tax Act 1994 which came into force and repealed the 1983 Act on 5 July 1994.

9. There is no material difference in the relevant provisions of the 1983 Act and the 1972 and 1994 Acts in respect of the provisions setting out the exemption from VAT for the provision of medical care. Therefore, as the Value Added Tax Act 1983 was in force at the end of the claim period and the 1983 statutory provisions were also cited by the Court of Appeal in *Wellington*, in this decision we have adopted the same position as the parties in their submissions and have referred to the relevant provisions of the Value Added Tax Act 1983 ("VATA").

10. Although *Wellington* is a decision of the Court of Appeal it was common ground that it was not binding upon us. This is consistent with the ECJ being the final authority on the interpretation of Community law (which has supremacy over domestic law) and its decision in *Fallimento Olimpiclub* [2009] EUECJ C-2/08 in which it held that the principle of res judicata was inconsistent with the application of the Community Law principles of effectiveness and equivalence.

Lead Case

11. In addition to Nuffield over 200 other hospitals, healthcare trusts and authorities have appealed to the Tribunal against decision of HMRC rejecting claims for recovery of input tax amounting, in total, to over £60m on the purchase of drugs and/or prosthesis supplied in the course of private 'in-patient' treatment.

12. These appeals give rise to common or related issues of law, namely:

(1) whether or not the provision of pharmaceutical supplies and/or the supply and surgical fitting of prosthesis, such as artificial hip joints or pacemakers, to patients were at the relevant time part of a single exempt supply or zero-rated for the purposes of VATA; and

(2) accordingly, whether or not the Appellants can recover the attributable input tax on such expenditure incurred in the course or private 'in-patient' treatment prior to 1997.

13. On 5 July 2011, following an application by HMRC, Judge Berner directed that the appeal brought by Nuffield "shall proceed as the Lead Case" pursuant to Rule 18(2)(a) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 and stayed all the related cases under Rule 18(2)(b) of the Tribunal Rules until further direction.

14. This appeal, as the Lead Case, was allocated to the "Complex" case category pursuant to Rule 23(2)(d) of the Tribunal Rules and all related cases were allocated to the Standard category.

Evidence

15. We were provided with a witness statement with exhibits attached from Mrs Vivienne Heckford, the Clinical Director of Nuffield.

16. In her statement Mrs Heckford refers to three Tribunal decisions, *Wellington Private Hospital Limited* (LON/92/2203, *British United Provident Association (No 1 Drugs)* (LON/92/3137A, and *British United Provident Association (No 2 Prostheses)* (LON/92/1735A), and compares the factual situation in these decisions (which were appealed and decided by the Court of Appeal in *Wellington*) with Nuffield drawing specific attention any different practices.

17. Mrs Heckford also gave oral evidence before us and was cross examined by Mr Thomas.

18. In addition to Mrs Heckford's evidence we were provided with a bundle of documentary evidence which included correspondence between the parties.

Facts

19. We note that there was little, if any, dispute in relation to the facts.

20. Nuffield is a company limited by guarantee. It came into existence on 14 January 1957 and was originally known as the Nursing Homes Charitable Trust then as Nuffield Nursing Homes Trust, it was subsequently known as Nuffield Hospitals and most recently Nuffield Health. It is a registered charity in respect of the provision of healthcare and is registered for VAT under a VAT group registration as the representative member.

21. The objects of Nuffield are to advance, promote and maintain health and healthcare of all descriptions and to prevent, relieve and cure sickness and ill health of any kind.

22. Nuffield Hospitals are of a general nature and cover a wide range of procedures with the largest number being orthopaedic, general surgery, medical, imaging (such as fixed CT) scans and MRIs, ophthalmology and gynaecology. The hospitals all have operating theatres, bedrooms, imaging suites, consulting rooms, and pharmacy and pathology services.

23. Patients are referred, by a letter from their GP either to a Nuffield department or, more usually, to a specific consultant not employed by Nuffield. Where the consultation takes place at Nuffield's hospitals, Nuffield may charge the consultant for the use of the room as well as any consumables the consultant uses (eg diagnostic tests) and, if applicable, medical secretary services.

24. Many initial outpatient appointments will result in diagnostics or admission to the hospital for further diagnostic procedures. The majority of admitted patients will require some type of further treatment, some type of therapy (such as physiotherapy) and/or drug treatment.

25. Where a surgical or medical procedure is required, the consultant's medical secretary will book the theatre and bed appointments and any diagnostic tests required at any hospital which best suits the consultant and/or the patient.

26. During the claim period, Nuffield did not have written contractual relationships with the consultants but rather had "gentlemen's agreements" in place requiring the consultants to abide by Nuffield's General Administration and Procedure Policies. Also during this time patients would either pay themselves for their consultation and treatment or use private medical insurance. 75% of patients used private medical insurance and 25% paid themselves. It would have been extremely rare for any patients to have come to Nuffield via the NHS.

27. The cost of patient procedures can be "package-priced", "fixed-price" (for self-pay patients) where a flat fee is charged irrespective of what occurs post-surgery or billed on a "fee for service" basis. During the claim period most patients, including those who were insured were charged on a "fee for service" basis met through private health insurance. Nuffield would send its invoice directly to the patient, who then recovered it from the insurer. This was the case both for diagnostic tests and surgical procedures. However, in some cases, and for the sake of expediency, Nuffield would submit insurance claims on the patient's behalf.

28. We were provided with an example of a private medical insurance "fee for service" invoice which itemised 156 services including physiotherapy, accommodation and nursing, full blood count, chest x-ray, bone profile, swabs, etc.

29. Following treatment the consultant and anaesthetist would send their own invoices to the insurer and the patient and would then be paid directly. However, whatever form of billing was used, each time an expense was incurred by the patient it would have been noted on the patient's charge sheet or account.

30. Although Nuffield takes responsibility for planning and forecasting the drugs and medical devices likely to be required during the year, purchasing and managing logistics, storage and appropriate document trails whether a patient requires medication and/or a prosthesis is determined by the consultant after a clinical assessment.

31. It is the consultant who prescribes, tailors or amends the patient's medication as relevant, and/or prescribes a device (taking into account relevant information, such as radiology results). The consultant selects the required medication and any medical device by reference to the patient and the stock available.

32. Patients will only receive drugs where the consultant has prescribed them, and Nuffield has the responsibility of ensuring that the consultant's orders are carried out correctly. Most hospitals have an on-site pharmacy run directly or indirectly by a registered pharmacist. In all cases, a pharmacist has overall responsibility for the dispensing of all drugs within the hospital and is obliged to ensure that the consultant has written the correct prescription for the patient.

33. For surgical procedures, Nuffield provides the operating theatre and the ancillary personnel (such as nurses). The staff ensure that any required devices, surgical instruments and disposable materials are available in the right quantity and sequence, working to a set of clinical guidelines kept by Nuffield that shows each consultant's preference when carrying out different procedures.

34. The consultant retains all decision-making authority in the operating theatre and he or she will choose which anaesthetist they wish to work with and may bring their own operating assistant with them. The consultant is personally liable for his or her actions within the operating theatre.

35. Upon the patient's discharge, the consultant writes the patient's prescription of take home medicines and provides notification to the patient's GP along with any discharge instructions.

36. Notwithstanding the consultants primary role in relation to the provision of medical care, the following types of medical treatment are provided by Nuffield, not the consultant:

(1) Nuffield's resident medical officer, a qualified doctor and the equivalent of a senior house officer, takes down details of the patient's medical history on admission.

(2) The resident medical officer is also present for 24 hour patient care, and will prescribe drugs if required if the consultant is not present.

(3) Nuffield hospitals generally include a pharmacy, and the pharmacist is responsible for the maintenance of stocks of drugs, both prescription-only and non-prescription drugs, in the wards, operating theatres and x-ray department. The responsibility for all drugs within the hospital, other than drugs that the patient may have brought with him, lies with the pharmacist.

(4) The administration of drugs given on ward is the responsibility of the nurse. When a consultant wishes a patient to receive a drug he writes an order to that effect on the prescription sheet. In x-ray departments and in operating theatres drugs are administered on the oral order of the consultant.

(5) Pre and post-operative care is provided by the hospital, by properly trained staff.

(6) The hospital team working with the team post-operatively monitor, and brief the consultant, about the patient's development.

(7) The hospital provides the backup team to the consultant in theatre, including the operating department assistant, the 'scrub' nurse and a 'runner' nurse), although the consultant may bring their own operating assistant with them.

(8) Diagnostic services (biochemistry, haematology, microbiology, histopathology, histology) eg full blood count, chest x-ray, liver function profile, bone profile.

(9) Cardiac catheterization.

(10) X-rays.

(11) Physiotherapy (where not provide by physiotherapists contracting directly with the patients).

(12) Various other medical treatments, such as 'suction of outer ear'.

37. In addition to drugs and/or prosthesis Nuffield provided other medical consumables to patients eg syringes, needles, bed drapes, catheters, tubing drips etc.

38. Before we consider the decision in *Wellington* we first turn to the applicable legislation, both Community and domestic, and the relevant authorities in relation to Nuffield's primary case.

Community Legislation

39. Article 10 of the EC Council Directive 67/228/EEC (the "Second Directive") of 11 April 1967 provided that, so far as is material to the present appeal:

> 3. Each Member State may, subject to the consultations mentioned in Article 16, determine the other exemptions which it considers necessary.

40. Article 13(A) of the EC Council Directive 77/388 (the "Sixth Directive") of 17 May 1977 provided that, so far as is material to the present appeal:

> Article 13(A) Exemptions for certain activities in the public interest
>
> Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse
>
> (a) ….
>
> (b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable to those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;
>
> (c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned.

41. The Sixth Directive was 'recast' without material change by EC Council Directive 2006/112/EC (the "Principal VAT Directive") of 28 November 2006 which provides, so far as is material to the present appeal:

> **General Provisions**
>
> **Article 131**
>
> The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of

ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.

Exemptions for certain activities in the public interest

Article 132

1. Member States shall exempt the following transactions:

(a) …

(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature.

Domestic Legislation

42. Exemption from VAT was dealt with in s 17 and schedule 6 of VATA which provided so far as is material to the present appeal:

Section 17 Exemptions

A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 6 to this Act.

Schedule 6 Exemptions

Group 7 – Health [and Welfare]

Item No.

4. The provision of care or medicinal or surgical treatment and, in connection with it, the supply of any goods, in any hospital or other institution approved, licensed, registered or exempted from registration by any Minister . . ."

43. Zero-rating was dealt with in s 16 and Schedule 5 of VATA. This provided, so far as in material to the present appeal:

Section 16 Zero-rating

(1) Where a taxable person supplies goods or services and the supply is zero-rated, them whether or not tax would be chargeable on the supply apart from this section –

(a) no tax shall be charged on the supply; but

(b) it shall in all other respects be treated as a taxable supply;

and accordingly the rate at which tax is charged on the supply shall be nil.

(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 5 to this Act or the supply is of a description for the time being so specified.

Schedule 5 Zero-rating

> Group 14 – Drugs, Medicines, Aids for the Handicapped Etc.
>
> Item No.
>
> 1. The supply of any goods dispensed, by a person registered in the register of pharmaceutical chemists kept under the Pharmacy Act 1954 . . . . on the prescription of a person registered in the register of medical practitioners . . . .
>
> 2 The supply to a handicapped person for domestic or his personal use, or to a charity for making available to handicapped persons by sale or otherwise, for domestic or their personal use, of –
>
> (a) medical or surgical applications designed solely for the relief of a severe abnormality or severe injury;
>
> …
>
> equipment and appliances not included in paragraphs (a) to (f) above designed solely for use by a handicapped person.

Note 3 to Group 14 of Schedule 5 VATA provides that "handicapped" means "chronically sick or disabled."

Authorities

44. Single versus multiple supply is, as Mrs Brown reminded us, probably the issue that has most frequently been referred to the Court of Justice of the European Union or the European Court of Justice ("ECJ") as it was previously known and how we have referred to it in this decision.

45. As Lord Hoffman observed in *Beynon & Partners v Customs and Excise Commissioners* [2004] UKHL 53 ("*Beynon*"):

> "18. … the question of whether there is one supply or two involves the application of principles of European law in compliance with the Sixth Directive. In *Card Protection Plan Ltd v Customs and Excise Commissioners* (Case C-349/96) [1999] 2 AC 601, 626, para 26 the European Court of Justice gave authoritative guidance on the test for 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 assessed separately."
>
> 19. In the course of argument your Lordships were also referred, as were the courts below, to a number of cases, both in this country and in the Court of Justice, which were decided before the *Card Protection* case. Submissions were made as to whether the principles upon which those cases were decided had application to this case. Their Lordships think that there is no advantage in referring to such earlier cases and their citation in future should be discouraged. The *Card Protection* case was a restatement of principle and it should not be necessary to go back any further."

46. The ECJ gave its judgment in *Card Protection Plan v Customs and Excise Commissioners* [1999] STC 270 ("*CPP*") on 25 February 1999. The reference to the ECJ by the House of Lords had included the following questions (which are set out at [12] of the ECJ's decision):

> (1) "Having regard to the provisions of the Sixth VAT Directive and in particular to Article 2(1) thereof, what is the proper test to be applied in deciding whether a transaction consists for VAT purposes of a single composite supply or of two or more independent supplies?
>
> (2) Does the supply by an undertaking of a service or services of the kind provided by Card Protection Plan Ltd (CPP) through the card protection plan operated by them constitute for VAT purposes a single composite supply or two or more independent supplies? Are there any particular features of the present case, such as the payment of a single price by the customer or the involvement of Continental Assurance Company of London plc. as well as CPP, that affect the answer to that question?"

47. The ECJ's decision on these was as follows:

> "26. By its first two questions, which should be taken together, the national court essentially asks, with reference to a plan such as that offered by CPP to its customers, what the appropriate criteria are for deciding, for VAT purposes, whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately.
>
> 27. It must be borne in mind that the question of the extent of a transaction is of particular importance, for VAT purposes, both for identifying the place where the services are provided and for applying the rate of tax or, as in the present case, the exemption provisions in the Sixth Directive. In addition, having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases.
>
> 28. However, as the Court held in Case C-231/94 *Faaborg-Gelting Linien v Finanzamt Flensburg* [1996] ECR I-2395, paragraphs 12 to 14, concerning the classification of restaurant transactions, where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place.
>
> 29. In this respect, taking into account, 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, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.

> 30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (Joined Cases C-308/96 and C-94/97 *Commissioners of Customs and Excise v Madgett and Baldwin* [1998] ECR I-6229, paragraph 24).
>
> 31. In those circumstances, the fact that a single price is charged is not decisive. Admittedly, if the service provided to customers consists of several elements for a single price, the single price may suggest that there is a single service. However, notwithstanding the single price, if circumstances such as those described in paragraphs 7 to 10 above indicated that the customers intended to purchase two distinct services, namely an insurance supply and a card registration service, then it would be necessary to identify the part of the single price which related to the insurance supply, which would remain exempt in any event. The simplest possible method of calculation or assessment should be used for this (see, to that effect, *Madgett and Baldwin*, paragraphs 45 and 46).
>
> 32. The answer to the first two questions must therefore be that it is for the national court to determine, in the light of the above criteria, whether transactions such as those performed by CPP are to be regarded for VAT purposes as comprising two independent supplies, namely an exempt insurance supply and a taxable card registration service, or whether one of those two supplies is the principal supply to which the other is ancillary, so that it receives the same tax treatment as the principal supply.

48. In *Levob Verzekeringen BV and another v Staatssecretaris van Financiën* [2006] STC 766 ("*Levob*"), an insurance business, had entered into a contract with a company, FDP, whereby FDP would provide Levob with a computer programme ('the basic software'), and then would customise the basic software in order to enable Levob to use it in the management of the insurance contracts which it sold.

49. The reference to the ECJ asked whether the acquisition of software in such circumstances:

> "whereby separate payment is stipulated in respect of the basic software, recorded on a carrier, developed and put on the market by the supplier, on the one hand, and the subsequent customisation thereof to meet the purchaser's requirements, on the other – must be regarded as a single supply", and if so, must the supply be regarded as a service, of which the supply of the goods (the basic software recorded on a carrier) forms part.

50. In answer the ECJ, in finding that there was a single supply, reiterated and developed the case law set out in *CPP* as follows:

"19 According to the Court's case-law, where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine, firstly, if there were two or more distinct supplies or one single supply and, secondly, whether, in the latter case, that single supply is to be regarded as a supply of services (see, to that effect, Case C-'231/94 *Faaborg-'Gelting Linien* [1996] ECR I-'2395, paragraphs 12 to 14, and *CPP*, paragraphs 28 and 29).

20 Taking into account, firstly, that it follows from Article 2(1) of the Sixth Directive that every transaction must normally be regarded as distinct and independent and, secondly, that a transaction which comprises a single supply 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 in the first place be ascertained in order to determine whether the taxable person is making to the customer, being a typical consumer, several distinct principal supplies or a single supply (see, by analogy, *CPP*, paragraph 29).

21 In that regard, the Court has held that there is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal supply, whilst one or more elements are to be regarded, by contrast, as ancillary supplies which share the tax treatment of the principal supply (*CPP*, cited above, paragraph 30, and Case C-'34/99 *Primback* [2001] ECR I-'3833, paragraph 45).

22 The same is true where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split.

23 In the context of the cooperation required by Article 234 EC, it is indeed for the national courts to determine whether such is the situation in a particular case and to make all definitive findings of fact in that regard. Nevertheless, it is for the Court to provide the national courts with all the guidance as to the interpretation of Community law which may be of assistance in adjudicating on the case pending before them.

24 With regard to the dispute in the main proceedings, it is apparent, as held by the Gerechtshof te Amsterdam whose decision was the subject of the appeal in cassation pending before the referring court, that the economic purpose of a transaction such as that which took place between FDP and Levob is the supply, by a taxable person to a consumer, of functional software specifically customised to that consumer's requirements. In that regard, and as the Netherlands Government has correctly pointed out, it is not possible, without entering the realms of the artificial, to take the view that such a consumer has purchased, from the same supplier, first, pre-existing software which, as it stood, was nevertheless of no use for the purposes of its economic activity, and only subsequently the customisation, which alone made that software useful to it."

51. The principles of *CPP* and *Levob* have been applied in subsequent ECJ cases.

52. In *Aktiebolaget NN v Skatteverket C-111/05* [2008] STC 3203, where the ECJ had to determine whether a transaction for the supply and installation of a fibre-optic cable linking two member states was a single supply of goods.

53. The ECJ held that:

> "22 Taking into account the two facts that, firstly, it follows from Article 2(1) of the Sixth Directive that every transaction must normally be regarded as distinct and independent and, secondly, a transaction which comprises a single supply 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 in the first place be ascertained in order to determine whether the taxable person is making to the customer several distinct principal supplies or a single supply (see, to that effect, *CPP*, paragraph 29, and *Levob Verzekeringen and OV Bank*, paragraph 20).
>
> 23. In that regard, the Court has held that it is a single supply where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (*Levob Verzekeringen and OV Bank*, paragraph 22).
>
> 24. In the present case, the contract proposed by Aktiebolaget NN concerns the transfer, after completion of the installation and functionality tests, of a cable laid and in working condition.
>
> 25. It follows therefrom, firstly, that all the elements of the transaction at issue in the main proceedings appear to be necessary to its completion and, secondly, they are all closely linked. In those circumstances, it is not possible, without undue contrivance, to take the view that such a consumer will acquire, firstly, the fibre-optic cable and, subsequently, from the same supplier, the supply of services relating to the laying thereof (see, by analogy, *Levob Verzekeringen and OV Bank*, paragraph 24)."

54. In *Don Bosco Onroerend Goed BV v Staatssecretaris van Financien* (C-461/08) [2010] STC 476, the ECJ held, at [39], that the two aspects of the transaction in question, namely the supply of land and the demolition of the buildings upon it, overlapped, as the economic purpose of those actions was to supply land ready for construction. The supply of land alone, on which a dilapidated building stood, was of no economic use to the purchaser.

55. The ECJ its decision in *Purple Parking Ltd and another v HMRC* (C-117/11) [2012] STC 1680 held:

> "26. According to settled case law, it follows from art 2 of the Sixth Directive that every supply must normally be regarded as distinct and independent. However, a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system (see, inter alia, CPP (para 29); *Levob Verzekeringen and OV Bank* (para 20) *Aktiebolaget*

> *NN v Skatteverket* Case-C111/05 [2008] STC 3203, [2007] ECR 1-2697, para 22; judgment of 2 December 2010 in *Everything Everywhere Ltd (Formerly T-Mobile (UK) Ltd v Revenue and Customs Comrs* (Case C-276-09) [2011] STC 316, paras 21 and 22; and judgment of 10 March 2011 in *Finanzampt Burgdorf v Bog and other references* (Joined cases C-497/09, C-499/09 and C-502/09 [2011] STC 1221, para 53)).
>
> 27. Furthermore, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise, separately, to taxation or exemption, must be considered to be a single transaction when they are not independent (see *Ministero dell'Economia e delle Finanze v Part Service Srl* (Case C-425/06 [2008] ECR I-897, para 51, *RLRE Tellmar Property* (para 18), *Don Bosco Onroerend Goed BV v Staatssecretaris van Financien* (C-461/08) [2010] STC 476, para 36 and *Everything Everywhere* (para 23))."

The ECJ went on to hold, at [31]:

> "… the fact that, in other circumstances, the elements in issue can be or are supplied separately is of no importance, given that that possibility is inherent in the concept of a single composite transaction, as is apparent from paragraph 27 of the present order".

56. In *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* [2012] STC 1951. the ECJ again considered that there may be a single supply both in circumstances where a principal/ancillary relationship existed between elements (at [19]), and where two or more elements are so closely linked that they form, objectively, a single indivisible economic supply (at [21]).

57. The Court observed:

> "24. It is true that those two elements of the portfolio management service may be provided separately. A client investor may wish only for an advisory service and prefer to decide on and make the investments himself. Conversely, a client investor who prefers to take the decisions on investments in securities and, more generally, to structure and monitor his assets himself, without making purchases or sales, may call on an intermediary for the latter type of transaction.
>
> 25. However, the average client investor, in the context of a portfolio management service such as that performed by Deutsche Bank in the main proceedings, seeks precisely a combination of those two elements.
>
> 26. As the Advocate General stated at point 30 of her Opinion, to decide on the best approach to the purchase, sale or retention of securities would be pointless for investors within the context of a portfolio management service if no effect were given to that approach. Likewise, to make – or not, as the case may be – sales and purchases without expertise and without a prior analysis of the market would also be pointless.

27. In the context of the portfolio management service at issue in the main proceedings, those two elements are therefore not only inseparable, but must also be placed on the same footing. They are both indispensable in carrying out the service as a whole, with the result that it is not possible to take the view that one must be regarded as the principal service and the other as the ancillary service.

28. Consequently, those elements must be considered to be so closely linked that they form, objectively, a single economic supply, which it would be artificial to split."

58. In *Field Fisher Waterhouse LLP v HMRC* [2012] EUECJ C-392/11 the ECJ noted:

14. It should be recalled, as a preliminary point, that for VAT purposes every supply must normally be regarded as distinct and independent, as follows from the second subparagraph of Article 1(2) of the VAT Directive (see, to that effect, Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraph 22; Case C-461/08 *Don Bosco Onroerend Goed* [2009] ECR I-11079, paragraph 35; and Case C-276/09 *Everything Everywhere* [2010] ECR I-12359, paragraph 21).

15. Where, however, a transaction comprises several elements, the question arises whether it is to be regarded as consisting of a single supply or of several distinct and independent supplies which must be assessed separately from the point of view of VAT. According to the Court's case-law, in certain circumstances several formally distinct services, which could be supplied separately and thus give rise, in turn, to taxation or exemption, must be considered to be a single transaction when they are not independent (Case C-425/06 *Part Service* [2008] ECR I-897, paragraph 51).

16. In that regard, the Court has held that a supply must be regarded as a single supply where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (see, to that effect, Case C-41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433, paragraph 22, and *Everything Everywhere*, paragraphs 24 and 25).

17. Moreover, that is also the case where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which share the tax treatment of the principal supply. In particular, a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied (see, to that effect, Case C-349/96 *CPP* [1999] ECR I-973, paragraph 30; *Part Service*, paragraph 52; and Joined Cases C-497/09, C-499/09, C-501/09 and C-502/09 *Bog and Others* [2011] ECR I-0000, paragraph 54).

18. In view of the two circumstances that, first, every supply must normally be regarded as distinct and independent and, secondly, a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning

> of the VAT system, the characteristic elements of the transaction concerned must be examined in order to determine whether the supplies constitute several distinct principal supplies or one single supply (see, to that effect, *CPP*, paragraph 29; *Levob Verzekeringen and OV Bank*, paragraph 20; *Aktiebolaget NN*, paragraph 22; *Everything Everywhere*, paragraphs 21 and 22; and *Bog and Others*, paragraph 53).
>
> 19. None the less, there is no absolute rule for determining the extent of a supply from the point of view of VAT, and consequently, to determine the extent of a supply, all the circumstances must be taken into consideration (see *CPP*, paragraph 27).

59. The most recent of the European cases cited to us, *BGZ Leasing sp z.o.o. v Dyrektor Skarbowej Warszawie* [2013] EUECJ C-224/11, concerned the issue of whether the supply of leasing services and of insurance of the leased item was a single supply to which a single rate of VAT applied or whether they were independent transactions to be assessed separately as regards whether they were subject to VAT.

60. The ECJ stated:

> 29. It must be recalled that, for VAT purposes every supply must normally be regarded as distinct and independent, as follows from the second subparagraph of Article 1(2) of the VAT Directive (Case C-392/11 *Field Fisher Waterhouse* [2012] ECR I-0000, paragraph 14 and the case-law cited).
>
> 30. Nevertheless, it is clear from the case-law of the Court that, in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise in turn to taxation or exemption, must be considered to be a single transaction when they are not independent (see Case C-425/06 *Part Service* [2008] ECR I-897, paragraph 51, Case C-276/09 *Everything Everywhere* [2010] ECR I-12359, paragraph 23). There is a single supply where two or more elements or acts supplied by the taxable person to the customer are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (Case C-41/04 *Levob Verzekeringen and OV Bank* [2005] ECR I-9433 paragraph 22, and Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraph 23). Such is the case 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 (Case C-349/96 *CPP* [1999] ECR I-973, paragraph 30, and *Part Service*, paragraph 52).
>
> 31. Thus, the Court has held not only that every supply of a service must normally be regarded as distinct and independent, but 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 (see, to that effect, *CPP*, paragraph 29, and Case C-242/08 *Swiss Re Germany Holding* [2009] ECR I-10099, paragraph 51).

> 32. In order to determine whether the services supplied constitute independent services or a single service, it is necessary to examine the characteristic elements of the transaction concerned (see, to that effect, *CPP*, paragraph 29, *Levob Verzekeringen and OV Bank*, paragraph 20, and *Field Fisher Waterhouse*, paragraph 18). However, it must be recalled that there is no absolute rule for determining the extent of a service for VAT purposes, and there, in order to determine the extent of a supply of a service and, therefore, in order to determine the extent, all the circumstances in which the transaction concerned takes place must be taken into account (see, to that effect, *CPP*, paragraphs 27 and 28).

61. The principles enunciated by the ECJ in these cases have been applied by the Courts in United Kingdom.

62. *Beynon*, concerned a partnership of doctors who administered prescription drugs directly to their patients. As their patients were located in a rural area where they were not in easy reach of a pharmacy, the doctors, in addition also dispensed the drugs to their patients under a regulatory exception (regulation 20 National Health Service) Pharmaceutical Services Regulations 1992). The issue raised in the case was, as summarised by Lord Hoffmann, at [3]:

> "… whether the doctor is making a single supply of medical services to which the provision of the drug is merely ancillary or whether he is also supplying goods when, for example, the injected drug passes through the needle into the patient's arm."

63. Lord Hoffmann LJ was not persuaded by the fact that when a doctor administered a drug to any patient he (the doctor) had made out a prescription for it saying:

> "29. In my opinion this exaggerates the significance of writing prescriptions for personally administered drugs. The sole purpose is to enable the doctor to vouch his claim for payment by the NHS. It is true that this shows that, at least from the point of view of the NHS, there is a separate payment for the drugs. But, as Lord Hope of Craighead said in the British Telecommunications Plc. case, at p1385, the fact that a price for the supply in question can be separately identified is not determinative. The fundamental distinction made by the Pharmaceutical Regulations between the administration and dispensing of drugs remains. The doctor does the first as part of the ordinary services which he provides. He can do the second only with special authorisation under regulation 20.
>
> 30. Aldous LJ acknowledged, at para 37, that "at a particular level of generality" it could be said that there was one transaction. But he said, at para 49, that when a doctor administered a drug to a patient he was "in reality dispensing the drug to the patient and then administering it". Chadwick LJ likewise divided the transaction into three elements: first, the consultation and diagnosis, secondly the supply of the drug for the purposes of treatment and thirdly its administration. The first stage, he said, was "dissociable" from the second and third and constituted a separate supply. Although there might be some medical skill involved

at the third stage, the dominant element was the supply of the drug and it was therefore to be classified as a supply of goods.

31. Besides raising the question of what authority a doctor would have to dispense drugs to patients who were not regulation 20 patients, this approach seems to me to involve the kind of artificial dissection of the transaction which the Court of Justice warned against in para 29 of its judgment in the *Card Protection* case [1999] 2 AC 601. In my opinion the level of generality which corresponds with social and economic reality is to regard the transaction as the patient's visit to the doctor for treatment and not to split it into smaller units. If one takes this view, then in my opinion the correct classification is that which the NHS has always taken of the personal administration of drugs to non-regulation 20 patients, namely that there is a single supply of services.

32. It is true that in some cases, the nature of the drug which is administered will assume a greater importance than in other cases. It is easy to think of examples in which the element of skill on the part of the doctor is at a minimum and what matters is that the patient should receive, for example, a particular injection for travel to a foreign country. But in applying the classifications required by VAT, it is essential for practical reasons to have a rule which applies to all transactions of a certain kind. For example, in the case of the restaurant meals for which the Court of Justice laid down a general rule in *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94) [1996] ECR I-2395, one could imagine cases in which the services provided by the restaurant were insignificant compared with the value of the food or wine. It would however be administratively impossible to deal with each meal on a case by case basis. It is essential to have a rule which applies across the board."

64. In the *College of Estate Management v Customs and Excise Commissioners* [2005] 4 All ER 933 the issue before the House Lords was whether the supply of printed materials from the College, an incorporated charity which taught professional skills by distance-learning (providing its students with specially-prepared written material for them to study on their own), was a separate from the supply of educational services. An average student was expected to spend about 94% of their time using the study material provided, 4.5% of their time in face-to-face teaching and 1.5% in sitting examinations which, Lord Rodger observed, at [11], made the contention, advanced on behalf of the College, that the written material was 'ancillary' "hard to swallow".

65. Lord Walker, with whom the other Law Lords agreed, said [at 30]:

"In the course of this appeal there has been much discussion of para 30 of the ECJ's judgment [in CPP]. 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 (as Ward LJ rightly observed at [2004] STC 1471, 1482, para 39) subservient, subordinate and ministering to something else. It was an entirely apposite term in the discussion in *British*

Telecommunications (where the delivery of the car was subordinate to its sale) and in *Card Protection Plan* 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, 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 services (*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*)."

He continued:

"31. This is the only point on which I can find any significant error in the approach of the Tribunal. The evaluative findings which the Tribunal made at paras 61-64 of its decision, set out above, were conclusions which were open to it on the evidence. The only error was the addition, in para 68, of the statement that the written materials were ancillary to the provision of education. The Tribunal may have thought that authority required it to make this additional finding. In my view it was not necessary, nor (on any sensible use of the word "ancillary") was it correct. But it did not invalidate the Tribunal's earlier conclusions, which were determinative of the matter.

32. Lightman J perceived this difficulty and sought to deal with it in para 34 of his judgment, which I have already quoted. But he seems, with respect, to have been hindered by the same perception that every case had to be squeezed into a matrix of what was "principal" and what was "ancillary". What the judge called "a component part of a single supply" may be (in the fullest sense) essential to it—a restaurant with no food is almost a contradiction in terms, and could not supply its customers with anything—and yet the economic reality is that the restaurateur provides a single supply of services. Without the need to resort to gnomic utterances such as "the medium is the message", the same sort of relationship exists between the educational services which the College provides to a student who takes one of its distance-learning courses and the written materials which it provides to the student.

33. Where ancillary goods or services are relevant to the analysis, Lightman J's description of them as "add-on" may be helpful, so long as it is borne in mind that they may be optional extras (such as in-flight catering on some but not all airlines) or goods or services which, although undoubtedly subsidiary, are for practical purposes indispensable (the ignition key of a car being a simple example). Experience (and the authority of the ECJ in *Card Protection Plan* at para 27) both indicate that this is an area in which it is unwise to attempt any exhaustive schematic analysis."

66. *HMRC v Weight Watchers (UK) Ltd* [2008] STC 2313, involved a weight-loss programme with classes and printed matter. Sir Andrew Morritt C, giving the judgment of the Court of Appeal observed at [17] that:

> "… the court must have regard to all the circumstances. It must apply the relevant test on an objective basis. There are various formulations of what the relevant test is in *Card Protection Plan* para 29, *Levob* para 22 and *Levob* ruling 1. 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."

67. Like *Weight Watchers*, *HMRC v David Baxendale Ltd* [2009] STC 2578 also involved a weight-loss programme. However, in this case food packs with counselling and advice were provided in weekly group sessions. The participants paid for the food packs, but made no specific payment for the support services provided by the group sessions. It was accepted that neither the provision of the food packs or the supply of the support services could properly be regarded merely as ancillary to one or other.

68. Patten LJ, with whom the other members of the Court of Appeal agreed, said, at [43]:

> "I agree with the Judge [Morgan J] that, on the facts found by the Tribunal, the proper conclusion is that what the typical customer purchases is a single package of food packs and support services which he wishes to use in combination with each other and which, in the context of the transaction, are not economically divisible. The Judge (borrowing the language of the Chancellor in *Weight Watchers*) described them as re-enforcing each other which is what they are intended to do. They are, so to speak, to be taken together and are purchased on that basis. The evidence is that the typical consumer regards them as complementing each other and values them both. The product is promoted on the basis that the customer will be supported in his or her slimming endeavours through the counselling services provided and, as mentioned earlier, these are an essential aid in re-enforcing the diet. In these circumstances it would, in my judgment, be artificial to split up what anyone wishing to use the programme would regard as a single economic supply..

69. In *Healthcare at Home Ltd v HMRC* [2007] UKVAT V20379 the VAT and Duties Tribunal (Chairman Colin Bishopp) considered whether the administration by nurses of drugs prescribed for patients, to those patients in their own homes were zero-rated supplies of drugs or exempt supplies of medical services. The Tribunal found, at [14]:

> "It was clear that, in this case, what the patient wanted was the drug. He or she had already had the benefit of the doctor's diagnosis and prescription, and was not making a "visit to the doctor", as Lord Hoffman put it in *Beynon*. The patient was receiving the drug which the doctor had prescribed. The fact that the nurse had, in some cases, to administer the drug and in others to show the patient or his or her carer how it should be administered did not alter the essential characteristic of what was supplied, namely the drug. He accepted, as Lord Hoffman said, that "it is essential for practical reasons to have a rule which applies to all transactions of a certain kind", but the Commissioners' reliance on *Beynon* as an indication that all medical services were to be treated as exempt, whether or not drugs were also supplied, was misplaced. One could not apply a blanket approach to any supply with a medical element; it was necessary to analyse what was being supplied before determining the correct tax treatment of that supply. The Respondents' approach took consistency too far."

70. We now consider *Wellington* in the light of the above authorities.

Wellington

71. In *Wellington* the issue before the Court of Appeal (on appeal from Jowitt J) was, as in the present case, whether drugs and prostheses provided to in-patients in private hospitals were zero-rated supplies for VAT under items 1 and 2, Group 14, Schedule 5, VATA, or a component element of a single composite supply of hospital and medical services.

72. In the Court of Appeal the lead judgment was given by Millet LJ (Hutchinson LJ agreeing with him and Kennedy LJ dissenting) who recited the facts of the case which show a striking similarity to those in the present appeal. Millett LJ, at 450, noted that although some of BUPA's patients were admitted to hospital to undergo fixed price surgery, such that the cost to the patients did not depend on the nature or quantity of the drugs administered to them, it was common ground that it made no difference to the outcome of the appeals whether the supplies were made under a fixed price contract or were charged for individually.

73. After setting out the legislative background Millett LJ turned to the single versus multiple supply issue saying, at 462:

> "I am not convinced that there is necessary a single approach which is appropriate in all circumstances. The risk in canonising one particular method is that it disguises the true nature of the inquiry, which is essentially one of statutory construction. But I accept the appellants' submission that Jowitt J asked himself the wrong question. The issue is not whether one element of a complex commercial transaction is ancillary or incidental to, or even a necessary or integral part of, the whole, but whether one element of the transaction is merely ancillary or incidental to, or a necessary or integral part of, any other element of the transaction. The issue is not whether one element of a complex commercial transaction is ancillary or incidental to, or even a necessary or integral part of the whole, but whether one element of the

> transaction is merely ancillary or incidental to, or a necessary or integral part of, any other element of the transaction. The reason why the former is the wrong question is that it leaves the real issue unresolved; whether there is a single or a multiple supply. The proper inquiry is whether one element of the transaction is so dominated by another element as to lose any separate identity as a supply for fiscal purposes, leaving the latter, the dominant element of the transaction, as the only supply. If the elements of the transaction are not in this relationship with each other, each remains as a supply in its own right with its own separate fiscal consequences.
>
> In determining whether what would otherwise be two supplies should be regarded as a single supply the court has to ask itself whether one element is an 'integral part' of the other, or is 'ancillary' or 'incidental' to the other; or (in the decisions of the Court of Justice) whether the two elements are 'physically and economically dissociable.'… In order to answer this further question, the court must consider 'what is the true and substantial nature of the consideration given for the payment' (see the Bophuthatswana case (at 708) per Nolan LJ)."

74. With respect to Millet LJ, in view of the subsequent decisions of the ECJ in *Levob*, *Aktiebolaget*, *Deutsche Bank*, *Field Fisher Waterhouse* and the House of Lords in *Beynon* and *College of Estate Management* we consider that his "proper inquiry", namely "whether one element of the transaction is so dominated by another element as to lose any separate identity as a supply for fiscal purposes, leaving the latter, the dominant element of the transaction, as the only supply" can no longer be regarded as correct.

75. We also agree with Mr Thomas that Millett LJ was also incorrect to consider the issue to be only to be a question of the relation between various aspects of the transaction, rather than by consideration of the transaction as a whole as required by *CPP* and *Levob* in which "the essential features of the transaction must in the first place be ascertained in order to determine whether the taxable person is making to the customer, being a typical consumer, several distinct principal supplies or a single supply" *(Levob* at [20] see paragraph 50, above). In that way, a customer at a restaurant is not contracting for a multitude of discrete transactions, some goods, some services; and neither is a student at the College of Estate Management. As Mr Thomas submits, the error in Millett LJ's approach is that it ends up assuming what it is seeking to establish, namely that there are multiple supplies, rather than considering the whole.

Discussion

Nuffields's Primary Case

76. The case advanced by Mrs Brown for Nuffield centres on the premise that there are two suppliers, the consultants and Nuffield. She contends that the circumstances of the case are that patients are receiving medical care from the consultant within the context of the functional infrastructure (hospital care) being provided by Nuffield and submits that if the *CPP* and *Levob* tests are applied, the inevitable conclusion is that

the supply of drugs and prostheses is more closely linked to the medical care provided by the consultant, rather than the hospital care provided by the Appellant.

77. However, we do not agree and prefer the argument advanced by Mr Thomas that it is wrong to restrict medical care to the services provided by the consultants.

78. Article 13(A)(c) of the Sixth Directive (which we have set out at paragraph 38, above) expressly states that the provision of medical care can be in the exercise of the medical and paramedical professions as defined by the Member State concerned and in the United Kingdom this includes those on the register of nurses and midwives.

79. Although there may be a distinction drawn for professional purposes between "medical care" provided by doctors and "nursing care" provided by nurses (and we note that the term "clinical care" is often used to apply to both) the Sixth Directive was not drafted by reference to professionally recognised labels in individual Member States but at a necessarily high degree of generality which translates in the United Kingdom as including qualified nurses and midwives within the scope of medical care. We also note that in *Healthcare at Home* it was not disputed that medical care was provide by the nurses.

80. Mrs Brown also referred us to the following observations of Millett LJ in *Wellington,* at 464-465:

> "The same result can be reached by a simpler and more direct route. The question, as I have already pointed out, is essentially one of statutory construction. The question is not whether the supply of drugs and other items to hospital in-patients in the course of treatment *is* a separate supply of goods, but *whether Parliament has treated it as such*. If, as the commissioners contend, such supplies form part of '[t]he provision of care or medical or surgical treatment' within item 4 in Group 7 of Sch 6 to the 1983 Act, then the additional words 'and, in connection with it, the supply of any goods' are empty of content. The position taken by the United Kingdom government in *EC Commission v United Kingdom* shows that it considered these same words in item 1(a) to cover goods not subsumed in the supply of medical services to outpatients, and Parliament's agreement to delete the words in order to comply with the Court of Justice's ruling shows that it accepted the government's interpretation. By deleting the words in item 1(a) and leaving them in item 4, in my opinion, Parliament must be taken to have recognised that drugs and other items supplied to hospital in-patients in the course of treatment constituted a separate exempt supply not already covered by the provision of treatment."

She contends that Item 4, Group 7, schedule 6, VATA (dealing with exempt supplies, which we have set out at paragraph 42, above) uses wording that specifically contemplates that when "*care or medical or surgical treatment*" is provided in hospital, there will "*in connection with it*" be goods supplied to the patient and relies on the comments of Millett LJ, that if in general the supply of items in the course of hospital treatment is to be viewed as subsumed within that hospital treatment, the words "*and in connection with it, the supply of any goods*" would be otiose.

81. Based on the words of the statute, Mrs Brown contends that the starting point should be that the supply of the goods in such circumstances constitutes a separate supply.

82. However, as Mr Thomas contends, we consider that the exemption in Item 4, Group 7, schedule 6, VATA or Article 13A(1)(b) of the Sixth Directive from which the domestic legislation is derived applies to hospital and medical care and should be read as a single exempt supply of services where both hospital care and medical care and activities are provided by the same person.

83. In *Diagnostiko & Therapeftiko Kentro Anthinon-Ygeia AE v Ipourgos Ikonomikon C-394/04* ("*Ygeia*") [2006] STC 1349 the ECJ considered whether the provision of telephone services and the hiring out of televisions to in-patients were activities closely related to hospital and medical care.

84. The ECJ held that:

> "24. The hospital and medical care envisaged by this provision is, according to the case law, that which has as its purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (*Dornier* [2005] STC 228)
>
> 25. Accordingly, taking account of the objective by the exemption provided for in art 13A(1)(b) of the Sixth Directive, it follows that only the supply of services which are logically part of the provision and medical-care services, and which constitute an indispensable stage in the process of the supply of those services to achieve their therapeutic objectives, is capable of amounting to 'closely related activities' within the meaning of that provision", such that the provision of the services in question did not, as a general rule, qualify for the exemption."

85. As *Ygeia* requires that an activity must be "logically part of the provision and medical-care services, and which constitute an indispensable stage in the process", and given the case law of *CPP* and *Levob*, where the supplier is the same person we agree with Mr Thomas that it must follow that the "closely related activity" would be properly analysed as a constituent part of the single exempt supply, that supply being described as "hospital and medical care and closely related activities".

86. Such an analysis is consistent with the ECJ decision in *Christoph-Dornier-Stiftung für Klinische Psychologie v Finanzamt Gießen* C-45/01 [2005] STC 228 to which the Court referred in *Ygeia*.

87. In *Dornier* the ECJ was asked "Does psychotherapeutic treatment, given in an out-patient facility provided by a foundation (charitable establishment) employing qualified psychologists who are licensed under the Heilpraktikergesetz but who are not registered as doctors, qualify as "*closely related activities*" to hospital and medical care within the meaning of art 13A(1)(b) of the Sixth Directive?". It accepted a submission from the Commission expressly relying on *CPP*, at [32] and continued:

> "33. As stated by the Court of Justice in para 22 of *EC Commission v France* [2001] ECR I-249, cited above, art 13A(1)(b) of the Sixth

> Directive does not include any definition of the concept of activities closely related to hospital and medical care. None the less, it is apparent from the very terms of that provision that it does not envisage services which are unrelated to hospital care for the patients receiving those services or to any medical care which they might receive.
>
> 34. In this case, it is common ground that the psychotherapeutic treatment given in Dornier's out-patient facility by qualified psychologists generally constitutes services provided to the patients as an end in themselves and not as a means of better enjoying other types of services. In so far as that treatment is not ancillary to hospital or medical care, it is not an activity closely related to services exempted under art 13A(1)(b) of the Sixth Directive.
>
> 35. Accordingly, the Court of Justice finds that psychotherapeutic treatment given in an out-patient facility of a foundation governed by private law by qualified psychologists who are not doctors is an activity closely related to hospital or medical care within the meaning of art 13A(1)(b) of the Sixth Directive only when such treatment is actually given as a service ancillary to the hospital or medical care received by the patients in question and constituting the principal service."

88. As such, "an activity closely related" for the purposes of Article 13A(1)(b) of the Sixth Directive must be one that is ancillary, under *CPP* principles to the hospital or medical care and it follows that where both the hospital or medical care and the closely related activity are undertaken by the same person, there will be a single supply.

89. However, the position would be different in situations where the closely related activity is performed by a distinct person to the hospital and medical care as can be seen from the decision of the ECJ in *Commission v France* C-76/99 [2001] ECR I-249 ('French laboratories'). In that case a specialist laboratory undertook medical analysis of a sample; a different laboratory took and transmitted the sample to the specialist laboratory. The ECJ at [30] concluded that the taking and transmission of the sample constituted "*services which were closely related to the analysis*", such as to be exempt. There was therefore a supplier of "closely related activities" alone, proof that that Article 13A(1)(b) of the Sixth Directive is not redundant.

90. In our judgment as the phrase "*…in connection with it, the supply of any goods…*" in item 4, group 7, schedule 6 VATA is derived from Article 13A(1)(b) of the Sixth Directive the above analysis applies. The word 'supply' still has a utility in a scenario akin to the French Laboratories case where there are two suppliers and the involvement of one of which is limited to making a supply of goods alone.

91. Also we do not agree that, as Millet LJ implies "the supply of any goods" in item 4 must always refer to a separate supply even if that supply is made by the same person supplying medical and hospital care as it would extend the scope of the exemption beyond that provided by the Sixth Directive.

92. Turning to the question of whether the provision of drugs and prosthesis are a separate supply from the care provided by Nuffield, it is clear from the decision of the ECJ and House of Lords that:

> (1) we must first have regard to all the circumstances in which that transaction takes place (*CPP*);
>
> (2) every transaction must normally be regarded as distinct and independent and, secondly, that a transaction which comprises a single supply 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 in the first place be ascertained in order to determine whether the taxable person is making to the customer, being a typical consumer, several distinct principal supplies or a single supply (*Levob*);
>
> (3) in certain circumstances, several formally distinct services, which could be supplied separately and thus give rise in turn to taxation or exemption, must be considered to be a single transaction when they are not independent (*BGZ Leasing*); and
>
> (4) 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. In that regard we note that food is not ancillary to restaurant services; it is of central and indispensable importance to them; nevertheless there is a single supply of services (*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*)." (*College of Estate Management*).

93. The essential features of transactions with which we are concerned are the provision of drugs and prosthesis to Nuffield's private in-patients. It is common ground that these drugs and prosthesis are provided by Nuffield, albeit on the prescription or instruction of the relevant consultants.

94. Having regard to all the circumstances we consider that for a patient, there is no meaningful separation of the supply of drugs and prosthesis from elements of the care and treatment they receive in hospital and, as such, find that there was a single supply of exempt health care by Nuffield. All the elements of Nuffield's supply are not independent but closely linked and integral in the sense that they are part of a package of services with an overall therapeutic aim as part of a patient's clinical plan in the light of his condition and the treatment needed. Also, they are all supplied in a hospital setting answering a single description of hospital and medical care, a category of transaction specifically recognised in the VAT directives, as opposed to being supplies of a distinct nature such as leasing and cleaning services.

95. It is not the patient who determines the nature or quantity of the drugs he is provided with, even if this is separately itemised on an invoice. We find that in the absence of any significant element of choice in relation to the volume or nature of drugs provided, the economic reality is that that provision is not dissociable from all the other elements that Nuffield provides as part of a single supply of medical and

hospital care. Similarly in the case of the prostheses any element of patient choice is subject to the overall clinical judgment as to the identification of the patient's needs and the appropriate appliance.

96. In our view if the provision of drugs or prostheses were separate supplies of goods, it would follow that the provision of other goods used, such as needles, drips, tubes etc. as itemised on an invoice should also be treated as separate supplies which, in our judgment, would be wholly artificial split of leading to a potential distortion of the functioning of the VAT system.

97. Having concluded that there was a single supply of exempt health care we now turn to Nuffield's alternative argument.

Nuffield's Alternative Case

98. In essence, Nuffield's alternative case is that the provision of drugs and prosthesis, although, as we have found, a single composite supply it should nevertheless be treated as zero-rated to preserve the independent character of each of the elements of the supply.

99. Mrs Brown contends this argument is supported by the wording of the relevant statutes; the fact that the zero-rate takes precedence over the exemption; and subsequent ECJ cases such as *Talacre* and the French Undertakers case as supported by the application of such principles in the recent First-tier Tribunal ("FTT") cases of *W M Morrisons Supermarkets Ltd v HMRC* [2012] UKFTT 366 ("*Morrisons*") and *Colaingrove Limited v HMRC* [2013] UKFTT 116 TC ("*Colaingrove*"), both of which are under appeal to the Tax and Chancery Chamber of the Upper Tribunal.

100. We consider each of these elements in turn.

101. In relation to the words used in Item 4, Group 7, schedule 6 VATA Mrs Brown essentially repeats her submissions, which we have previously considered (at paragraphs 80-91, above) in relation to Nuffield's primary case, contending that the starting point should be that the supply of the goods in such circumstances constitutes a separate supply even if a composite supply on general principles. However, the reasons we did not accept these submissions in respect of its primary case apply equally to the alternative case, and we do not accept them here either.

102. With regard to the primacy of zero-rating over exemption, it is not disputed that if a separate supply is both zero-rated and exempt, zero-rating takes precedence. However, in our judgment this is dependent on whether there is a separate supply or not, as is as is clear from the obiter comments of Lord Walker in the *College of Estate Management*, cited by Mrs Brown, where he said, at [37]:

> "This raises the possibility that the written materials (if they had constituted a separate supply at all) might be both zero-rated and exempt. In such a case zero-rating trumps exemption, because of the wording of section 30(1) of VATA 1994: see the judgment of Millett

> LJ in *Commissioners of Customs & Excise v Wellington Private Hospital Ltd* [1997] STC 445, 449."

In this we agree with Mr Thomas who submitted that Lord Walker is certainly not saying that irrespective of whether the written materials were a separate supply or not, they would be zero-rated, quite the reverse.

103. Turning to the cases on which Mrs Brown relies, *Talacre*, the French Undertakers case, *Morrisons* and *Colaingrove* we note that in each the issue of dual rating has arisen.

104. *Talacre* concerned the sale of fitted non-mobile residential caravans with contents. Although the caravans themselves were zero-rated, the contents included items that were specifically excluded from the zero-rate by the legislation. The ECJ held that the fact that the supply of the caravan and its contents was a single supply did not prevent the UK levying VAT at the standard rate on the supply of the excluded items ie a legislative "carve out" that treated the contents of the caravan as taxable.

105. We accept the submissions of Mr Thomas in relation to *Talacre*.

106. It is distinguishable on the facts from the present case and there is no explicit exclusion of drugs and/or prostheses in the legislation such that although the provision of drugs and prostheses were part of a single exempt supply, they could not be treated as such for the purposes of taxation. Also, because of that explicit exclusion, *Talacre* concerned giving one aspect of a taxable supply a different rating to another whereas the argument advanced on behalf of Nuffield is that part of a non-taxable supply should be taxable.

107. In addition *Talacre* is not, in our view, authority for stating that, simply because particular elements might otherwise be zero-rated if supplied in isolation, those elements must therefore be zero-rated despite being part of a single exempt supply as this is contrary to Lord Walker's observation in *College of Estate Management.*

108. Mrs Brown also referred us to a legislative carve out in the French Undertakers case where, although the provisions of funeral services was standard rated, French national legislation provided for the transportation of a body and passengers following the hearse to be subject to a reduced rate. In that case the ECJ observed that if a member state decided to use the possibility for a reduced rate (under article 98 of Directive 2006/112) then it can limit the application of that reduced rate to "concrete and specific aspects" of the category of supply at issue, and must comply with the principle of fiscal neutrality.

109. At [33], the ECJ observed that the *CPP* criteria:

> "… 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".

110. However, we agree with Mr Thomas that the facts of the French Undertakers case are distinct and, as such, it cannot be authority for the proposition that Mrs Brown seeks to establish. First, it relates to the discretion left to member states under article 98 of Directive 2006/112 to apply reduced rates which is different and distinct from the operation of zero-rating. Secondly, like *Talacre* it involved the express differential rating of an element of a taxable supply unlike the present case in which Nuffield is seeking to carve out an element from a non-taxable supply where no such express requirement can be found in the domestic legislation.

111. In *Morrisons* which concerned the supply of a disposable barbecue which consisted of a metal tray on which there was charcoal covered by a grill it was argued, applying *Talacre* and the French Undertakers case, that the reduced rate of VAT was payable on the sale of the charcoal element of the supply with the remainder of the supply being subject to the standard rate. Counsel for Morrisons identified seven principles that he considered could be identified from the authorities. The first six of these, which were accepted by counsel for HMRC, as set out at [35] of the decision are as follows:

> (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 [ECJ] 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.

We agree with the FTT (Judge Cannan and Miss Stott), which, although it accepted these principles considered, at [45], that:

> "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."

112. In *Colaingrove*, the FTT (Judge Walters QC and Mr Robinson), in applying the principle from the French Undertakers case and closely examining the relevant statute, concluded that the supply of gas or electricity in whatever quantity for use in self-catering holiday accommodation or a caravan would be accorded a reduced rate

even though when applying *CPP* principles, there was a single composite supply. The FTT found:

> "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.

113. In the light of the principles identified in *Morrisions* and, as the FTT observed in *Colaingrove,* we consider that the legislative carve out in the French Undertakers case can 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".

114. We are unable to find anything in Article 13A(1)(b) of the Sixth Directive or Item 4, Group 7 Item of schedule 6 VATA which suggests that *CPP* jurisprudence should not apply to the present case. Indeed as made clear in *Dornier*, the reference to "closely related activities" in fact reflects a *CPP* analysis of the relationship between "hospital or medical care" and "closely related activities", and therefore we consider the reverse to be true and that the *CPP* analysis should apply. Accordingly it must follow that Nuffield's alternative case cannot succeed either.

Decision

115. We therefore dismiss the appeal.

Costs

116. As the appeal was allocated to the Complex case category under rule 23 of the Tribunal Rules and no written request from Nuffield has been received to exclude the costs regime the Tribunal may make an order in respect of costs under rule 10(1)(c) of the Tribunal Rules

117. As we have not heard submissions on costs we direct that that, given our decision and if advised to do so, HMRC may either file and serve written submissions in support of an application for costs on the Tribunal and Nuffield (to which the it may respond within 28 days of receipt) within 28 days of release of this decision or alternatively make an application for an oral hearing within that time. In the absence of any application for an oral hearing and should HMRC apply for costs, we will decide the matter on the basis of written representations.

Right to Apply for Permission to Appeal

118. 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 BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 8 May 2013