[2018] UKFTT 369 (TC)

TC06583

Appeal numbers: TC/2014/00917 and TC/2014/06772

VAT – operation of salary sacrifice scheme to provide travel and subsistence payments to employees – whether supply for VAT purposes – whether economic activity – no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PERTEMPS LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE ASHLEY GREENBANK

Sitting in public at Birmingham on 3, 4 and 5 January 2018 and after receiving further written submissions from the parties in response to a request from the Tribunal dated 24 May 2018

Timothy Brennan QC, instructed by Anthony Collins Solicitors LLP, for the Appellant

James Puzey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. These are appeals by the appellant, Pertemps Limited ("Pertemps"), against two decisions of the respondents, the Commissioners for Her Majesty's Revenue and Customs ("HMRC"):

(1) the first was contained in a letter dated 17 April 2013 and confirmed, following a review, in a letter dated 17 January 2014 and is reflected in a notice of assessment dated 6 December 2013 for value added tax ("VAT") in the amount of £529,574 for the periods 07/09 to 01/13;

(2) the second was contained in a letter dated 4 December 2014, in which HMRC notified Pertemps of an assessment to VAT of £186,344 for the periods 04/13 to 07/14.

2. There are further assessments standing behind these appeals.

3. The decisions relate to the operation by Pertemps of a scheme for the provision of travel and subsistence expenses to employees. The scheme was known as the "Mobile Advantage Plan" or "MAP".

4. There are three issues before the Tribunal. I have described them in more detail below, but, in summary, they are:

(1) whether or not the operation of MAP involved a supply of services for VAT purposes by Pertemps to participating employees;

(2) if so, whether or not the supply was an exempt supply falling within item 1 of Group 5 of Schedule 9 to the Value Added Tax Act 1994 ("VATA");

(3) if Pertemps made a taxable supply, whether HMRC was entitled to collect the tax or whether it was precluded from doing so by the issue of Business Brief 28/11 for periods to which it applied as a result of application of its powers of collection and management.

The hearing and the evidence

5. I was presented with an agreed bundle of documents for the hearing.

6. The bundle contained two witness statements on behalf of Pertemps:

(1) a statement of Ms Tracy Evans, Group HR and Quality Director of Pertemps; and

(2) a statement of Mr Spencer Jones, who was Group Tax Director of Pertemps in the period to February 2012 and thereafter Group Finance Director of Pertemps.

7. The bundle also contained two witness statements on behalf of HMRC:

(1) a statement of Mr Richard Pratt, officer of HMRC, responsible for direct tax compliance matters;

(2) a statement of Mr Mark Summers, officer of HMRC, a member of HMRC's Fraud Investigation Service responsible for VAT compliance.

8. All of the witnesses gave oral evidence and were cross–examined on their statements. Much of the witness evidence related to a further ground of appeal (related to the issue that I have described at [4](3) above) – namely whether or not HMRC had agreed to forgo collection of the tax in the course of its handling of the enquiries in relation to the operation of MAP or in giving the direct tax dispensation to which I refer below. This ground was withdrawn by Pertemps in the course of the hearing.

9. Following the hearing, and before I had issued the decision notice, the Court of Appeal handed down its decision in *Wakefield College v Revenue and Customs Commissioners* [2018] EWCA 952 ("*Wakefield College*"). The decision in that case was of some relevance to the first issue before the Tribunal and so I requested submissions from the parties on the extent to which their arguments on the first issue as advanced at the hearing might be affected by the decision in the *Wakefield College* case. Both parties made written submissions, which are reflected in my summary of the parties' arguments at [103] to [126] below, and which I have taken into account in this decision.

Facts

10. I have set out in the following paragraphs my findings of fact.

11. I will first set out a summary of MAP and the direct tax consequences as they provide the context for the remainder of the factual background to these appeals. I will then describe the contractual arrangements, the practical operation of MAP, before moving on to the background as to how the VAT issues arose. For the most part, there is little or no dispute between the parties on these matters.

Background

12. Pertemps is the representative member of a group VAT registration. Members of the group carry on business as a recruitment agency which provides temporary and permanent workers to clients.

13. The issues before the Tribunal relate to the provision of temporary workers by Pertemps and its subsidiary companies to clients.

14. Some of the transactions referred to in this decision notice were entered into by subsidiaries of Pertemps which were members of the VAT group of which Pertemps was the representative member. For ease of explanation, I have referred to these transactions as being carried out by Pertemps. No issue arises from the fact that transactions were carried out by separate members of the group.

A summary of MAP

15. As I have mentioned, these appeals relate to workers who were working on temporary assignments for clients. The typical worker would work for a short period

for one client of Pertemps at that client's premises before moving to another assignment with another client at that client's premises.

16. In all relevant periods, these workers were employees of Pertemps; they were engaged on indefinite contracts of employment with Pertemps which continued even if there was a gap between the assignments with different clients. In this decision notice, I have referred to these workers as "flexible employees", as this was the term employed by Pertemps.

17. The contracts of employment of flexible employees guaranteed a minimum number of hours of work each year. For the periods in question, that minimum number was typically 336 hours, approximately 7 hours per week.

18. Flexible employees were offered the opportunity to participate in MAP. Under MAP, a flexible employee agreed to a reduction in the wage which he or she would earn. In return, Pertemps agreed to make a payment to the employee of an amount of travel and subsistence expenses. The amount of the reduction applied to the employee's wages was equal to the amount of the expenses payment plus a fixed amount.

19. The fixed amount was at different times in the periods in question 50p or £1 per shift. The parties referred to the fixed amount as the "MAP adjustment". I have used the same term in this decision notice.

20. Although the total amount of the payments (before tax and national insurance contributions) to which an employee was entitled from Pertemps under MAP was less than that to which he or she would have been entitled if he or she had not elected to participate in MAP (by the amount of 50p or £1 per shift), the operation of MAP did provide some benefits to flexible employees. These are described in more detail below, but, in summary, the employee obtained a cash flow benefit because the payment of the expenses was not subject to deduction of income tax or national insurance contributions.

21. Steps were taken to ensure that employees for whom MAP was not suitable – for example, those for whom a reduction in wages would breach the national minimum wage requirements – did not participate in MAP or were unable to do so.

The effect of MAP for income tax and national insurance purposes

22. The benefits of MAP are derived from the treatment of the payment of expenses for income tax and national insurance purposes. It requires a little explanation.

23. A payment of expenses made by an employer to an employee is usually treated as earnings from employment for the tax year in which the payment is made by virtue of s72(1) Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). An amount treated as earnings under s72(1) is taxed as employment income. However, the fact that an amount is treated as employment income does not prevent an employee from claiming a deduction for those expenses if relief is available under certain specific provisions of ITEPA (s72(2) ITEPA).

24. The relevant provisions are listed in s72(3) ITEPA. They include expenses falling within s336 ITEPA, which allows for deduction of expenses which are "incurred wholly, exclusively and necessarily" in the performance of the duties of the employment. They also include expenses falling within s338(1) ITEPA, which allows a deduction for travel expenses "attributable to the employee's necessary attendance at any place of performance of the duties of the employment".

25. There is an exception from s338(1) for expenses of "ordinary commuting" which is defined in s338(3) as travel between the employee's home and a "permanent workplace" or between a place that is not a workplace and a permanent workplace.

26. A "permanent workplace" is defined in s339 ITEPA. In summary, a permanent workplace is any workplace that is not a "temporary workplace". For the periods in question, s339 set out the criteria for determining whether a workplace was a temporary workplace. These included, in s339(5), that a workplace would not be treated as temporary if the employee's attendance there was either "in the course of a continuous period of work at that place lasting more than 24 months" or "at a time when it is reasonable to assume that it will be in the course of such a period".

27. There are similar reliefs from the obligations to account for primary and secondary Class 1 national insurance contributions. They are described in similar terms in paragraph 3 of Schedule 3 to the Social Security (Contributions) Regulations 2001 SI2001/1004.

28. The conditions for the payment of expenses within MAP follow those required to benefit from a deduction from income tax (under s336 and s338 ITEPA) and to qualify for relief from national insurance contributions. In particular, MAP was designed to ensure that payments of expenses could only be made to employees of Pertemps who were assigned to work for clients at "temporary workplaces" within the meaning of s339 ITEPA as that term was defined for the periods in question.

29. Under s65 ITEPA, an officer of HMRC must give a dispensation to an employer if he or she is satisfied that no additional tax is payable on the payments or benefits specified in the dispensation by virtue of certain "listed provisions". The listed provisions are set out in s216(4) ITEPA and include s72 ITEPA.

30. When a dispensation is given, the payments or benefits covered by the dispensation are taken out of the charge to tax. In the context of a payment of expenses by an employer to an employee, the employee does not have to include the expenses within his or her taxable income for income tax purposes and then claim the relevant deduction (for example, under s336 or s338 ITEPA); the employer is not required to deduct or account for PAYE income tax and national insurance contributions in respect of the payment; and the employer does not have to include the payment in any return to HMRC of benefits provided to the employee.

31. In all relevant periods, a dispensation under s65 ITEPA was in place for payments of expenses made under MAP.

32. The effect of MAP for direct tax purposes was therefore that the employee's taxable salary was reduced by an amount equal to the amount of the payment of the travel and subsistence expenses paid to the employee plus the MAP adjustment of 50p per shift (for periods before 6 April 2011) or £1 per shift (for periods on or after 6 April 2011).

33. The employee paid income tax and employee national insurance contributions on this reduced amount. Pertemps deducted PAYE income tax and employee national insurance contributions from the reduced amount of salary and was required to account for employer's national insurance contributions by reference to it.

34. The employee then received a payment of expenses. The payment of expenses was referred to by the parties as a "MAP payment" or a "MAP allowance". I have adopted the same terminology in this decision notice. By virtue of the dispensation under s65 ITEPA, the MAP payment was free of income tax and national insurance contributions and Pertemps was not required to deduct PAYE income tax and national insurance contributions from it. In this way, the flexible employee who opted to participate in MAP was better off in cash terms than one who did not participate in MAP, but this assumes that the flexible employee would not have made a claim for a deduction for the expenses on his or her self-assessment tax return.

35. We should be clear, however, that the main benefits from the operation of the MAP scheme accrued to Pertemps: the cash amounts paid to flexible employees were reduced by the MAP adjustment; Pertemps did not have to account for employer's national insurance contributions on the MAP payment; and Pertemps was not required to include the MAP payment in its returns of benefits provided to employees.

36. There is no dispute between the parties about the effect of MAP for income tax and national insurance purposes in the relevant periods. I should however note at this stage that the definition of "temporary workplace" was amended by s14 Finance Act 2016. With effect from 6 April 2016, s14 introduced a new s339A ITEPA which deemed each assignment through an employment intermediary, such as Pertemps, to be a permanent (and not a temporary) workplace. This provision removed the benefit of MAP on payments of expenses to flexible employees.

Contracts of employment

37. I was provided with a copy of a sample contract of employment for a typical flexible employee. The most relevant provisions, for present purposes, are set out below.

38. Clause 3 is headed "Remuneration". Clause 3.1 provides:

> "3.1 Whilst on Assignment you will be entitled to be paid in respect of the hours that you work. Payment will be made weekly in arrears directly into your bank account subject to deduction of tax and National Insurance in respect of hours worked in the preceding week. You have no entitlement to pay in respect for any period when you are not on assignment."

39. Clause 4 is headed "Expenses". It provides:

> "4.1 You will be reimbursed for any expenses properly incurred in connection with your duties in accordance with the Company's expenses policy as amended from time to time.
>
> 4.2 You may be entitled to a payment of a travel and food allowance ("MAP") which will be paid weekly in arrears directly into your bank account and will not be subject to deduction of tax and National Insurance (see Employee Handbook for further information and details of eligibility). The Company reserves the right not to pay a travel and food allowance ("MAP") if the Client advises us not to do so."

40. Clause 5 contains the provisions which deal with hours of work. Clause 5.1 provides, so far as relevant:

> "5.1 The Company guarantees to offer you a minimum of 336 hours in each successive 12 month period of continuous employment paid at a rate at least equivalent to the National Minimum Wage currently in force…"

41. Clause 18 is headed "Changes to Terms of Employment". It provides:

> "18.1 The Company reserves the absolute right to vary or change any of your terms and conditions of employment.
>
> 18.2 You will be given not less than one month's written notice of any significant changes which may be given by way of an individual or general notice. You will be deemed to have accepted those changes at the expiry of the notice period. If you object to the changes then you must notify the Company accordingly in writing before the expiry of the notice period, however the Company's right to vary or change terms and conditions remains absolute."

42. Clause 19 is headed "Previous Contracts". It provides:

> "19 Any contract of employment which was previously issued to you by the Company will cease to have any effect on the date upon which you commence work under this contract. This contract will supersede any previous contract, whether of employment or for services."

The employee handbook

43. The contract of employment for flexible employees is supplemented by the Flexible Employee Handbook. I was provided with the Flexible Employee Handbook as at October 2015. I am told that it is in the same terms so far as material as would have been in force for the periods in question. This was not challenged by HMRC.

44. The Flexible Employee Handbook contains a section which describes the operation of MAP. The description includes details of the criteria which employees must satisfy in order to take part in MAP. These criteria are based on the criteria which must be met in order to obtain a dispensation to pay expenses free of deduction of income tax and national insurance contributions. It also contains details of the benchmark scale rates which were agreed with HMRC.

45. This section of the Flexible Employee Handbook includes answers to "Frequently Asked Questions", which are designed to help employees understand the workings of MAP. I have set out below some (not all) of these paragraphs. These are the paragraphs to which the parties referred in argument.

> "**What is the Mobile Advantage Plan?**
>
> …
>
> In taking part in MAP, you agree to give up some of your gross taxable pay – this is sometimes referred to as a "salary sacrifice" (see below). But the addition of your tax/NIC free MAP allowance means that your take home money increases."
>
> "**What is salary sacrifice?**
>
> Salary sacrifice is an increasingly common arrangement, recognised by HMRC, whereby you give up some taxable pay. Typically you receive some other benefit instead. In the case of MAP, you will be paid a tax/NIC free allowance as explained above. Because this allowance is tax/NIC free, this means that you actually take home more money.
>
> You will always be able to keep track of your pay and MAP payments. Your original pay and the amount you sacrifice will be clearly shown on your payslip. Your additional tax/NIC free MAP payment will also be shown on your payslip. Finally, the net take home amount shown on your payslip will include the benefit you obtained by taking part in MAP."
>
> "**How will I benefit from MAP?**
>
> At the moment you pay for your own food costs and your travel costs to and from work. You do not receive any allowances to cover this daily expenditure. However, once you join the plan, you will be entitled to claim a tax free allowance which will help towards paying these costs."
>
> "**How will my pay and MAP allowance be calculated?**
>
> If you are eligible and qualify for MAP, your payslips will show a MAP payment for each qualifying shift (a "day" or "night" worked). The [MAP adjustment][1] will be £1 per shift more than the MAP payment, and is intended to offset the cost to the company of running MAP. However, the tax and NIC savings should exceed the additional £1 adjustment. If you do not receive your MAP allowance, your pay will not be adjusted."
>
> "**What happens if I am expected to work at the same client for over two years?**
>
> If you are expected to work at the same client site for more than two years (24 months), you will not be eligible for MAP from the moment it

[1] The term "MAP adjustment" in this paragraph refers to the entire amount of the deduction from salary i.e. the amount of the expenses claimed plus the fixed amount of 50p or £1 per shift. This is not consistent with the use of "MAP adjustment" in the remainder of this decision notice, where that term refers to the fixed amount of 50p or £1 per shift itself. See [18] and [19] above.

is expected that you will exceed the 24 month limit (as you will not be classified as a Mobile Employee from that time)."

"**Do I have to keep receipts for my subsistence (meal) costs in order to receive MAP?**

Yes, you must keep your receipts as Pertemps are required by HMRC to carry out random checks on the expenses incurred. We will give you an Expenses Record Form to help keep track and record your weekly claims and receipts."

"**Do I have to submit the receipts for my travel costs in order to receive MAP?**

Yes, you must keep your receipts if you travel by Public Transport as Pertemps are required by HMRC to carry out random checks on the expenses incurred. We will give you an Expenses Record Form to help keep track and record your weekly claims and receipts."

"**Do I have to join?**

The plan is an optional benefit for you, so you do not have to join. However, if you don't join, you will not benefit from more take home money that MAP provides, so please do ensure that you understand how you could benefit!"

"**If I don't join now, can I join later?**

It is not intended that people will be able to opt in or out of MAP at any time. You will be able to join now or at formal assessment date at which your Pertemps Consultant will discuss your eligibility or following certain changes in your personal circumstances."

"**If I join and change my mind, can I leave the plan?**

You can leave MAP on the assessment dates (6 months after starting, 12 months, 18 months and 24 months), or if your personal circumstances change which will affect your participation in MAP. All you have to do is let us know in writing. Your records will be updated accordingly, you will stop receiving your MAP payment and your take home money will reduce to the level it would be without MAP."

"**What happens if I leave Pertemps?**

Your MAP allowance is an optional benefit available when you work on assignments through the Company. It is not available once you leave Pertemps."

Other contractual arrangements

46. A flexible employee was not required to join MAP. Upon accepting an assignment, a flexible employee would be provided with a contract of employment and a copy of the Flexible Employee Handbook which included details of the MAP scheme. Employees were also provided with a set of answers to the "Frequently Asked Questions". These questions and answers were substantially in the form of the text that was contained in the Flexible Employee Handbook and to which I have referred above.

47. Employees were asked to sign their contracts of employment and also to sign a confirmation form to acknowledge receipt of the contract of employment and Flexible Employee Handbook.

48. Once the employee had accepted the contract of employment, he or she would be invited to join MAP. Employees who wished to participate in MAP were asked to sign a separate agreement form. It stated:

> "I [ ], agree to sign up to Pertemps' Mobile Advantage Plan ("MAP"). I understand that Pertemps will assess my eligibility for MAP dependent upon my tax and NI status and work assignments with Pertemps."

Practical operation of MAP

49. Most of the details of the operation of the MAP scheme are evident from the contractual arrangements that I have described above. However, there were some points regarding the practical operation of MAP which emerged from the witness evidence, principally from the evidence of Ms Evans, which I have accepted and that I should record.

50. From February 2007, all flexible employees were employed on contracts of employment offering guaranteed hours of employment rather than on agency worker contracts for services. This was the case irrespective of whether or not the employee elected to participate in MAP.

51. A flexible employee claimed a MAP payment by filing a claim form either manually or electronically. These claims were filed weekly.

52. The employee was not required to supply copies of invoices and receipts with the claim. The employee was, however, required to keep receipts and other evidence of expenses that had been claimed and to produce them if required.

53. Following the assurance visits by HMRC in 2009 and the agreement of the arrangements with HMRC for the further dispensation in 2011 to which I refer below, Pertemps engaged in a significant audit exercise to ensure that the conditions for the dispensation were met. This included sampling exercises to ensure that claims met the conditions for the dispensation to apply, that employees had the supporting evidence (including receipts) to support their claims, and that employees met the eligibility criteria to receive payments of expenses without deduction of tax and national insurance contributions. For example, Pertemps made regular checks on whether or not assignments were likely to breach the 24 month rule which formed part of the definition of a "temporary workplace".

54. Although it was the employee's decision to participate in MAP, even if an employee elected to participate in the scheme, Pertemps retained the ability to exclude employees from the scheme, if they ceased to be eligible or if the salary sacrifice would result in a wage which was less than the national minimum wage.

55. MAP payments were shown on payslips. The payslip would show a gross notional pay from which would be deducted the "MAP reduction" (i.e. the total amount of the expenses claim plus the MAP adjustment of 50p or £1 per shift) to give the taxable gross pay. Income tax and national insurance were calculated by reference to this amount. The MAP payment was then shown on the payslip as a tax free payment.

Other points from witness evidence.

56. The MAP adjustment is described in the Flexible Employee Handbook as "intended to offset the cost to the company of running MAP". Mr Jones accepted in cross-examination that this was an accurate description of the MAP adjustment. However, the evidence of Mr Jones was that the company did not perform any scientific calculation of the amount of the MAP adjustment by reference to the costs of running the scheme. The MAP adjustment helped to reduce the costs of providing workers to clients. He described the MAP adjustment as "a bit of additional profit" for Pertemps. I accept Mr Jones's evidence on these points.

57. Mr Jones said that the decision to increase the MAP adjustment to £1 per shift in April 2011 was a decision made by the Pertemps board. Once again, the increase did not reflect the costs of running the scheme, it was a business decision designed to ensure that Pertemps's rates charged to its clients remained competitive. Mr Jones says, and I accept his evidence, that other agencies, made a larger adjustment.

58. The evidence (both written and oral) was not entirely clear about the number of employees who benefitted from MAP in the relevant periods. However, the evidence before the Tribunal would suggest that over 10,000 employees each week claimed the benefit of a MAP payment in the relevant periods.

59. Mr Jones gave evidence, which again I accept, that the MAP adjustment could not be identified separately in the accounts of Pertemps. It was simply reflected in the lower cost of providing employees to clients and so in increased profit for Pertemps. However, the level of HMRC's assessments which are the subject of these appeals would suggest that the total amount of MAP adjustments in each month in the relevant periods varied between £52,000 and £74,000 per month.

60. Mr Jones was questioned on whether or not employees were informed that they could make claims for deductions for expenses themselves through their self-assessment returns if they did not participate in MAP. He responded that he assumed that employees were made aware of this. However, there is no evidence in the written documentation that employees were told that they could make claims personally. I find that the employees were not made aware that they could have refused to participate in MAP and achieved the same benefit by making a claim for a deduction for the expenses under s336 and/or s338 ITEPA and, in fact, would have been better off in cash terms by the amount of the MAP adjustment (albeit that they would have received the benefit some time later).

61. In any event, Mr Jones maintained that there was a cash flow benefit to employees as the dispensation allowed MAP payments to be made to them free of tax and national insurance. MAP also provided a benefit to employees in that it provided relief at source

for employees who would find the process of making claims through self-assessment difficult to follow.

The background to this dispute

62. MAP originated from a salary sacrifice scheme first introduced in 2004.

63. In July 2004, Pertemps reached an agreement with HMRC under which Pertemps was permitted to make payments of travel and subsistence expenses to qualifying employees without deduction of PAYE income tax and national insurance contributions. This agreement was recorded in a letter dated 7 July 2004 from HMRC.

64. This agreement was not a dispensation within s65 ITEPA. It is referred to in later correspondence as a "local office agreement" and was entered into by HMRC under its collection and management powers. The agreement related to payments within specified scale rates. Although it permitted payments to be made to employees without deduction of income tax and national insurance contributions, other reporting requirements continued. For example, under this arrangement, Pertemps was required to include payments of travel and subsistence expenses within end of year returns.

65. A pilot salary sacrifice scheme was introduced for temporary workers in October 2004. It was operated by a subsidiary of Pertemps, Pertemps Recruitment Partnerships Limited. It operated in a manner similar to MAP. In particular, the salary sacrifice made by employees was greater than the travel and subsistence expenses to which they were entitled by a fixed amount of 50p per shift.

66. At this stage, temporary workers who had previously been engaged on agency worker contracts became employees under contracts of employment. These contracts were initially "zero hour" contracts.

67. In February 2007, all such workers were engaged on contracts of employment with guaranteed minimum hours. These contracts guaranteed employees a minimum of 336 hours of employment per year. At this point, therefore, this group of workers became "flexible employees" as I have referred to them in this decision notice.

68. With effect from 6 April 2007, a dispensation under s65 ITEPA 2003 was put in place for payments of travel and subsistence expenses for flexible employees participating in MAP. A copy of this dispensation was not available to the Tribunal. However, it was referred to in subsequent correspondence and the parties agreed that a formal dispensation was in place from this point in time.

69. In February 2009, HMRC requested an assurance visit in relation to the operation of MAP. Following this visit, various meetings took place and various aspects of the operation of MAP were discussed. It is in these meetings that the VAT issues were first raised.

70. On 3 June 2010, Pertemps wrote to HMRC to request certain changes to MAP. It asked for a new dispensation under s65 ITEPA 2003 which it hoped could apply from 1 January 2011. In particular, it suggested new benchmark scale rates for subsistence

expenses and new travel allowances to cover both public transport and transport in a private vehicle.

71. Between June 2010 and January 2011, Pertemps was engaged in discussions with HMRC about the terms of a new dispensation. These included detailed discussions about the systems that Pertemps would put in place in order to monitor compliance with the relevant conditions. A new dispensation was put in place with effect from 6 April 2011. The previous dispensation terminated on 5 April 2011. From 6 April 2011, the fixed amount deducted from wages as part of MAP (the MAP adjustment) was increased from 50p to £1.

72. During this period, the VAT issues were raised from time to time. It was one of the grounds of Pertemps's appeal that during this period, whether as part of the closure of HMRC's enquiries into the operation of MAP or as part of the grant of the new dispensation in April 2011, HMRC had agreed that Pertemps's treatment of MAP for VAT purposes was correct and so had forgone any right to make a further assessment of the VAT. However, as I have mentioned above, this ground was withdrawn during the hearing.

73. What is clear is that HMRC's enquiries into the VAT issues surrounding the operation of MAP were revitalized as part of a managing complex risk review which began with a meeting between HMRC and Pertemps on 17 October 2011.

74. At that meeting, HMRC raised the question of the VAT treatment of the MAP adjustment. Pertemps asserted in the meeting and in subsequent correspondence with HMRC that information regarding the VAT treatment of MAP had been provided to HMRC in response to earlier enquiries and either no response had been forthcoming or that the VAT treatment of MAP had been agreed with HMRC as part of HMRC's those enquiries.

75. HMRC's position, as reflected in a letter to Pertemps dated 16 December 2011, was that, while the VAT issues had been raised and, perhaps, not followed through as promptly as might have been desirable, the question of the VAT treatment of MAP remained open. HMRC did, however, acknowledge in that letter that any disagreement over the VAT treatment was a technical one and that penalties would not be applied if any VAT was found to be chargeable as part of the review.

76. There followed a series of meetings and correspondence between Pertemps and HMRC on the VAT issues. Pertemps co-operated fully with HMRC's enquires.

77. On 17 April 2013, the relevant HMRC officer, Mrs Dianne Roxborough, wrote to Pertemps. In her letter, she set out her conclusion that the MAP adjustment was consideration for a supply made by Pertemps to flexible employees for VAT purposes.

78. That letter was followed by further correspondence between Pertemps and HMRC. On 19 November 2013, Pertemps requested an independent review of the decision.

79. The decision of Mrs Roxborough was reflected in an assessment issued on 6 December 2013.

80. On 17 January 2014, the HMRC review officer, Mr David O'Neill, confirmed Mrs Roxborough's decision in relation to the VAT periods 07/09 – 01/13.

81. On 10 February 2014, Pertemps gave notice to the Tribunal of its appeal against the assessment.

82. In a letter dated 4 December 2014, HMRC notified Pertemps of an assessment for VAT in relation to the operation of MAP for the VAT periods 04/13 to 07/14.

83. On 18 December 2014, Pertemps gave notice to the Tribunal of its appeal against that assessment.

The grounds of appeal

84. In its notice of appeal against the first assessment dated 10 February 2014, Pertemps gave the following as its grounds of appeal:

> (1) that the salary sacrifice involved in MAP did not involve a supply by Pertemps to participating employees;
>
> (2) that the assessment was not in accordance with Revenue & Customs Brief 28/11, which was in issued by HMRC following the decision of the Court of Justice of the European Union ("CJEU") in *AstraZeneca UK Ltd v Revenue and Customs Commissioners* (Case C-40/09) [2010] STC 2298 ("*AstraZeneca*"), and in which HMRC agreed that it would not seek output tax on taxable supplies made pursuant to salary sacrifice arrangements until 1 January 2012;
>
> (3) that the assessment was contrary to assurances given by HMRC in meetings with Pertemps that no decision would be taken in Pertemps's case until a test case had been finally determined.

85. Pertemps filed amended grounds of appeal on 8 July 2014. The amended grounds of appeal were, in summary:

> (1) that the operation of MAP did not involve a supply of services for a consideration by Pertemps to participating employees;
>
> (2) that HMRC had forgone its right to collect VAT in exercise of its powers of collection and management: first, by the issue of Business Brief 28/11; and second, by closing the enquiry into MAP (which at the time Pertemps alleged encompassed all tax aspects of MAP, including VAT) and that it was an "abuse of power" for HMRC to seek to collect VAT in this case.

86. In its notice of appeal against the second assessment dated 18 December 2014, Pertemps referred to the appeal against the first assessment and noted that its grounds of appeal would be the same. It requested that an appeal against the second assessment should be stayed behind the appeal against the first assessment.

87. Following a hearing on 28 January 2015, the Tribunal (Judge Poole) issued directions on 3 February 2015, inter alia, permitting the amended the grounds of appeal to stand as Pertemps's grounds of appeal in these proceedings.

88. Following the issue of those directions, on 20 March 2015, HMRC made an application to the Tribunal for certain of the grounds of appeal (namely those relating to whether or not HMRC had forgone the right to collect tax by virtue of the exercise of its collection and management powers) to be struck out either on the grounds that the Tribunal had no jurisdiction in relation to that part of the proceedings or that that part of the proceedings had no reasonable prospect of success.

89. The application was heard by the Tribunal (Judge Kempster) on 10 September 2015. Judge Kempster refused HMRC's application.

90. On 9 November 2017, Pertemps filed draft amended grounds of appeal. The draft was substantially in the form of the amended grounds of appeal dated 8 July 2014, but included an additional ground that, if, contrary to Pertemps's argument, the MAP arrangements did involve a supply of services for a consideration, any relevant supply was an exempt supply in accordance within item 1 Group 5 Schedule 9 VATA and was not a taxable supply.

91. HMRC did not object to the introduction of the new ground of appeal and I accepted it.

92. As I have mentioned above, in the course of the hearing, Pertemps withdrew its argument that HMRC was precluded from seeking to recover the tax on the grounds that it had agreed not to do so as part of the discussion surrounding and closure of the enquiries into the operation of MAP for PAYE income tax and national insurance purposes.

93. There remain therefore three issues before the Tribunal. They are:

(1) whether or not the operation of MAP involved a supply of services for consideration by Pertemps to participating employees for VAT purposes;

(2) if so, whether or not the supply was an exempt supply falling within item 1 Group 5 Schedule 9 VATA;

(3) if Pertemps made a taxable supply, whether HMRC was precluded from collecting the tax by the issue of Business Brief 28/11 for periods before 1 January 2012.

94. In relation to the third issue (that relating to the application of Business Brief 28/11), HMRC maintained its argument that the Tribunal does not have jurisdiction to hear an appeal on this point.

The first issue: no supply

95. The first issue is whether or not Pertemps made a supply to participating employees through the operation of MAP.

The relevant legislation

96. The scope of the charge to UK VAT is set out in section 4 VATA. It provides:

> **4. Scope of VAT on taxable supplies**

(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

97. The meaning of the concept of supply is further defined section 5 VATA. It provides so far as relevant:

5. Meaning of supply: alteration by Treasury order

(1) Schedule 4 shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.

(2) Subject to any provision made by that Schedule and to Treasury orders under subsections (3) to (6) below—

(a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.

98. The remainder of section 5 sets out circumstances in which the Treasury may make provision by order regarding the treatment of particular types of transaction. It is not relevant for present purposes.

99. The UK legislation is designed to implement the relevant provisions of Council Directive 2006/112/EC (the "Principal VAT Directive"). The relevant provisions in the present case are article 2 and article 9 of the Principal VAT Directive.

100. Article 2 defines the scope of VAT. It provides, so far as relevant:

Article 2

1. The following transactions shall be subject to VAT:

…

(c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;

…

101. Article 9 contains the definition of "taxable person". It provides:

Article 9

1. "Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.

Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income

> therefrom on a continuing basis shall in particular be regarded as an economic activity.
>
> 2. …

102. The VATA implements the Principal VAT Directive and must therefore be interpreted in accordance with it.

The parties' submissions

103. In response to my request for submissions regarding the effect of the Court of Appeal decision in *Wakefield College*, both parties reformulated their submissions on the first issue. My summary below includes references to points made in their written submissions and the submissions made by the parties at the hearing.

(a) Pertemps's submissions

104. Mr Brennan, for Pertemps, submits that Pertemps does not make a supply to participating employees for VAT purposes through its operation of MAP.

105. The question of whether Pertemps makes a supply to participating employees through its operation of MAP requires the Tribunal to consider two separate questions: first, whether Pertemps makes a supply of services for a consideration within article 2(c) Principal VAT Directive; second, whether the supply is part of an economic activity carried on by Pertemps within article 9 Principal VAT Directive (*Wakefield College* [52]).

106. For there to be a supply of services for a consideration within article 2(c) of the Principal VAT Directive, there must be a legal relationship between Pertemps and the employee pursuant to which there is reciprocal performance whereby the services are supplied in return for a consideration.

107. In relation to this requirement, Mr Brennan's first point is that the relevant legal relationship is that of employment. Under that relationship, the employee performs his or her duties in return for salary and expenses; the employer, Pertemps, does not make a supply to the employee.

108. Pertemps is a taxable person and Pertemps operates a taxable business of supplying staff to clients. As part of that business, it engages employees and pays their salary and expenses. MAP is just part of the system that Pertemps uses to pay salary and expenses to employees, which, in turn, is just part of the internal administration of its business. It does not act as a taxable person in relation to the internal administration of its business. An employer who reimburses to an employee expenses incurred in the performance of his or her duties of employment is not supplying services to the employee, it is simply operating its own business and complying with its obligations to its employees under their contracts of employment.

109. In this respect, in his submissions at the hearing, Mr Brennan distinguished the facts in the present case from those in *AstraZeneca* on which HMRC rely. I will come to the decision in the *AstraZeneca* case later in this decision notice, but, in summary, Mr Brennan says that, in that case, the taxpayer (AstraZeneca) made a separate identifiable

supply of something (a voucher) which was outside the normal employment relationship whereas, in the present case, Pertemps simply carried out the normal administrative functions that would be required of an employer. There was no separate supply to the employee.

110. He made a similar point in his written submissions by reference to the CJEU decisions in in *Commission v Finland* (Case C-246) ("*Finland*"), and *Gemeente Borsele v Staatsecretaris van Financien* (Case C-520/14) [2016] STC 1570 ("*Gemeente Borsele*") and the Court of Appeal decisions in *Longridge on the Thames v Revenue and Customs Commissioners* [2016] EWCA Civ 930, [2016] STC 2362 ("*Longridge*") and *Wakefield College*. All of those cases, Mr Brennan says, involved a taxable person supplying a separate identifiable service to a person who received that service.

111. Mr Brennan's second point is that there can only be a supply for VAT purposes if there is consideration for the supply (s5(2)(a) VATA, article 2(c) Principal VAT Directive). In Pertemps's case, he says, there is no consideration for the supply which HMRC contends is made by the operation of MAP.

112. The reduction in the original salary could not be consideration. There was an effective salary sacrifice. The employee contractually agreed to forgo an amount of salary and to receive a payment of expenses. The original salary never became due to the employee.

113. Mr Brennan says that this analysis is supported by the treatment for direct tax purposes. The dispensation under s65 ITEPA did not just remove the employer's obligations to withhold tax and include the expenses payments in P11Ds. The effect of the dispensation was to take a payment of expenses out of the charge to income tax altogether so that the payment was free of tax. The dispensation could not apply to salary. So the issue of the dispensation was not consistent with an argument that there was any agreement to pay salary which was given up as consideration for some other supply.

114. Furthermore, the MAP adjustment could not be consideration. The MAP adjustment is simply an amount that is taken into account in calculating the amount of salary paid to the employee, it is not a deduction from salary. The employee receives an amount of salary (calculated after taking into account the MAP adjustment) and an amount of expenses to which he or she was entitled. The employee was never entitled to receive the MAP adjustment. Once again, Mr Brennan distinguishes the facts of the *AstraZeneca* case. In that case, he says the employee gave up a clearly identifiable element of salary in order to receive the voucher.

115. In the alternative, Mr Brennan submits that any supply that is made by Pertemps to the employee is not part of an economic activity within article 9 Principal VAT Directive. Whether the supply would form part of an economic activity for VAT purposes requires an assessment of all of the facts and circumstances of the case, but the essential question is whether the supply is made "for the purpose of obtaining income" (*Wakefield College* [55])

116. Mr Brennan points to various factors which, in his submission, suggested that the provision of MAP by Pertemps was not part of an economic activity:

(1) the purpose of the operation of MAP was to reduce national insurance and income tax costs, not to obtain income;

(2) the MAP adjustment bore no relation to the cost of administering the scheme or the value of the service;

(3) the MAP adjustment was more in the nature of a fee than remuneration in the sense required by article 9 (*Finland* [44],[49],[50]);

(4) there was no general market for the services (*Gemeente Borsele* [24], [25], [27], [29]);

(5) the services were internal to Pertemps and incidental to its main business of supplying workers to clients.

(b) HMRC's submissions

117. Mr Puzey, for HMRC, says that there is clearly a supply made by Pertemps to employees through the operation of MAP.

118. The test in article 2 Principal VAT Directive - whether a supply is made for consideration - presents a relatively low hurdle. This is clear from the analysis of David Richards LJ in *Wakefield College* (see, for example, [28] where he considers the CJEU decision in *Gemeente Borsele*).

119. A distinct legal relationship exists between the employer, Pertemps, and those employees who participate in the MAP scheme. That agreement is different to that which exists between Pertemps and employees who do not participate in MAP.

120. Under that legal relationship, there is a supply. The supply is the administration of the MAP scheme. The supply provides real benefits to participating employees who are spared the administration required to make a claim under the self-assessment regime in order to obtain a cash flow benefit.

121. There is reciprocal performance: the employee forgoes an amount of salary (the MAP adjustment) per shift in return for obtaining the benefit of having his or her employer administer the MAP scheme. The MAP adjustment is the consideration for the supply.

122. It is not correct to say that the employee is never entitled to the amount of the MAP adjustment. The employee is entitled to that amount unless he or she joins the MAP scheme and submits a valid claim. The employee decides to pay the MAP adjustment in order to enjoy the benefit of the service. That is the way in which the MAP scheme is presented to the employees in the literature provided to them (principally the Flexible Employee Handbook and the Frequently Asked Questions).

123. There is no requirement for there to be a direct payment of the consideration. Giving up part of an employee's remuneration can be consideration for a supply (see

AstraZeneca [24]). All that is required is that the consideration is expressed in money and that there is a direct link between the consideration and the service.

124. In reply to Mr Brennan's other submissions, Mr Puzey says as follows:

(1) The administration of the MAP scheme is not just part of the Pertemps's internal administration of its own business. It ensures that the participating employee can receive expenses tax free in return for forgoing an amount of salary per shift.

(2) Pertemps is a taxable person in relation to such a scheme in the same way that company in the *AstraZeneca* case was a taxable person in relation to the provision of vouchers to its employees (see *AstraZeneca* [22] – [28]).

(3) It is not possible to distinguish *AstraZeneca* on the basis that the employer in that case was making a clearly identifiable separate supply to employees. Pertemps was providing a separate identifiable service to employees who participated in MAP in form of the administration of MAP. Its own documents (the Flexible Employee Handbook and the Frequently Asked Questions) acknowledged this.

(4) The income tax treatment does not affect the VAT treatment. The existence of the dispensation for expenses under s65 ITEPA is just the means by which the benefit is provided.

125. As regards the test in article 9 Principal VAT Directive as to whether or not the putative supply forms part of an economic activity, Mr Puzey refers to David Richards LJ's comments in *Wakefield College* to the effect that this test requires a wide-ranging enquiry in which all the objective facts and circumstances should be taken into account. The vocabulary used in some of the earlier cases concerning whether or not consideration for a supply is "sufficient" or "direct" should be treated as no more than shorthand for a broad enquiry as to whether the putative supply is made for the purpose of obtaining income (*Wakefield College* [58]).

126. In response to Mr Brennan's submissions on this issue. He makes the following points.

(1) The enquiry is an objective one. Pertemps's claim, which, in any event, HMRC contests, that it did not provide the MAP scheme in order to obtain income, is not relevant.

(2) There are various statements made in the Flexible Employee Handbook and the Frequently Asked Questions that are provided to employees to the effect that the MAP adjustment is intended to reimburse the employer for the cost of administering the scheme. These statements show that the MAP adjustment is remuneration for the operation of MAP.

(3) Pertemps has never disclosed the costs of running the MAP scheme. Whether or not the MAP adjustment covered the costs is irrelevant (*Wakefield College* [28]).

(4) The definition of economic activity is very wide. In *AstraZeneca*, the company's principal business was not one of providing vouchers to its staff, but that did not prevent the issue of vouchers to employees amounting to an economic activity.

(5) The MAP adjustment is not a "fee" as Mr Brennan contends. It is remuneration for the service. MAP was similar in form to the type of scheme operated by as many of Pertemps's competitors. The amount of the MAP adjustment was set at board level and with the arrangements operated by competitors in mind.

(6) The MAP adjustment is determined by reference to the number of shifts worked and therefore by reference to the number of claims that the employee makes and the employer has to process. The CJEU cases of *Finland* and *Gemeente Borsele* do not assist Pertemps. In the *Finland* case, the contribution to legal aid costs was set by reference to means of the applicant and not by reference to the level of the service that was provided. In *Gemeente Borsele*, there was no correlation between the contribution made by parents to school transport and the level of the service that was provided.

(7) As the *Wakefield College* case makes clear, the fact that the sum received is a very small part of total turnover is one factor to be considered but it is not determinative.

(8) The MAP scheme was an activity that was pursued on a large scale over a long period of time and was of a type undertaken by other similar businesses. It resulted in substantial sums being received by the Pertemps.

Discussion

127. Before I turn to the treatment of MAP for VAT purposes, I will first address the issues arising from the interpretation of the contractual arrangements which govern the relationship between a flexible employee and Pertemps.

(a) The contractual relationship

128. When the employee signed the form to become a participant in MAP, the terms of the Flexible Employee Handbook relating to MAP were effectively incorporated into the contract of employment between the flexible employee and Pertemps. The employees and Pertemps acted in accordance with those terms.

129. The changes to the contract of employment would operate until the employee chose not to participate in MAP or ceased to be an employee of Pertemps. However, it was not possible for an employee to opt in and out of MAP at will. As described in the Flexible Employee Handbook (see [45] above), an employee could only choose to join or leave MAP at an assessment date (which were generally at six month intervals) or following a material change in the employee's personal circumstances.

130. Once a flexible employee chose to participate in MAP, the effect of the contract was clear. If, in any week, the employee made a valid claim for expenses, he or she was entitled to receive a reduced payment of salary (being his or her original salary less the full amount of the expenses claimed and the MAP adjustment) and a further

payment of expenses. If, in any week the employee did not make a valid claim, the employee was entitled to receive his or her original salary and was not entitled to receive the payment of expenses.

131. Pertemps staff determined whether or not a valid claim had been made, but this did not affect the entitlement of the employee who made a valid claim. The provisions of the contract (clause 4.2) also allowed Pertemps to refuse to operate MAP where a client of Pertemps advised Pertemps not to do so. However, I heard no evidence to suggest one way or another whether this provision was ever operated. In any event, as I have mentioned, it was not in Pertemps's interest to reject an otherwise valid claim.

132. An employee who was participating in MAP could, in effect, elect not to receive a MAP payment by simply not filing a claim. Once again, I heard no evidence to suggest one way or another whether this was a common occurrence. However, it was not in the interests of the employee not to file a claim (assuming that it was unlikely that the employee was going to make a claim in his or her self-assessment return) and it is clear that the entire administrative apparatus put in place by Pertemps, no doubt at some expense, was designed to ensure that claims were made wherever possible.

133. So, in summary, once the employee had chosen to participate in MAP, the employee had a choice whether or not to file a claim (although it was likely that he or she would do so if he or she had relevant expenses), but, once a claim had been made (and before the employee became entitled to receive a payment), the employee was only entitled to receive the reduced amount of salary and the expenses payment and was not entitled to receive his or her original salary. As Mr Brennan points out, this analysis is reflected in the treatment of MAP for income tax purposes, which was accepted by HMRC by the issue of the dispensation.

(b) The relevant questions in context

134. The question at issue on this first ground is whether or not Pertemps makes a supply to employees through the operation of MAP.

135. It is instructive to set that question in its statutory context. There are two elements. This is most easily seen in the structure of the Principal VAT Directive.

(1) First, it is necessary to show that the operation of MAP involves a supply of services for a consideration for the purposes of article 2(c) Principal VAT Directive. I have referred to this issue as the "article 2 question". In the UK legislation, this wording is reflected in Section 5(2) VATA.

(2) Second, the supply must be made by a "taxable person acting as such" (also in article 2(c)). A taxable person is a person who carries out an "economic activity" within article 9 of the Principal VAT Directive. I have referred to this issue as the "article 9 question". The equivalent phrase in the UK legislation is "in the course or further into the business" in s4(1) VATA.

(c) The case law authorities

136. I will now turn to the case law authorities. In the course of the hearing, I was referred by the parties to various cases before the CJEU and the UK courts and tribunals.

The parties referred in particular to the decisions of the Court of Appeal in *Longridge* and to the decisions of the CJEU in *AstraZeneca*, *Finland* and *Gemeente Borsele.* Following the hearing, and as I have mentioned above, the Court of Appeal issued its decision in *Wakefield College*. I asked the parties for written submissions on the extent to which the decision in the *Wakefield College* case affected their arguments on this first ground of appeal.

137. I will begin with the Court of Appeal decision in the *Wakefield College* case. I do so for two reasons: first, in his judgment in the *Wakefield College* case, David Richards LJ summarizes and draws the relevant principles from the decisions in *Finland*, *Gemeente Borsele* and *Longridge* and so this approach will allow me to refer to these decisions more succinctly; and second, although the decision in the *Wakefield College* case primarily involves consideration of the article 9 question, in his judgment, David Richards LJ sets out the structure of the enquiry which is to be undertaken in this type of case.

138. The *Wakefield College* case involved a charity, the college, which provided courses for students. The majority of these courses were provided to students on the basis of a fixed fee subsidized from the college's other sources of finance. A small proportion of students were charged a full unsubsidized fee.

139. The college was seeking to establish that construction services provided to the college in the course of the construction of a new building could be zero rated under Group 5 Schedule 8 VATA on the grounds that the building was intended for use solely for "relevant charitable purposes" within the meaning of Note (6) to Group 5 Schedule 8. The building could only be intended for use for a relevant charitable purpose if it was intended for use "otherwise than in the course or further into the business" (Note (6) to Group 5 Schedule 8). The case therefore turned on the meaning of "economic activity" as used in article 9 Principal VAT Directive.

140. The First-tier Tribunal found that the construction services could be zero rated. That decision was reversed on appeal by the Upper Tribunal. The Court of Appeal dismissed the college's appeal finding that the provision of courses by the college, albeit on a subsidized basis, was an economic activity within the terms of the Principal VAT Directive.

141. The leading judgment was given by David Richards LJ. As I have mentioned, this is a case primarily concerning the meaning of "economic activity" in the Principal VAT Directive and so it is directly relevant to the article 9 question. However, in his judgment, David Richards LJ reviews the cases which consider the application of the tests in both article 2 and article 9 and sets out the appropriate structure for an enquiry as to whether or not an activity involves a supply for VAT purposes.

142. Having reviewed the decisions in *Gemeente Borsele*, *Finland* and *Longridge*, David Richards LJ says this on the interaction of article 9 and article 2 (at [52] to [55]).

> "**52** Whether there is a supply of goods or services for consideration for the purposes of article 2 and whether that supply constitutes economic activity within article 9 are separate questions. A supply for

> consideration is a necessary but not sufficient condition for an economic activity. It is therefore logically the first question to address. It requires a legal relationship between the supplier and the recipient, pursuant to which there is reciprocal performance whereby the goods or services are supplied in return for the consideration provided by the recipient: see, for example, the judgment in *Borsele* at [24]. That is what is meant by "a direct link" between the supply of the goods or services and the consideration provided by the recipient: see *Borsele* at [26] and contrast *Apple and Pear Development Council v Customs and Excise Comrs*. There is no need for the consideration to be equal in value to the goods or services. It is simply the price at which the goods or services are supplied. This requirement was satisfied in both Finland and Borsele.
>
> **53** Satisfaction of the test for a supply for consideration under article 2 does not give rise to a presumption or general rule that the supply constitutes an economic activity. However, as Mr Puzey for HMRC pointed out, the Advocate General remarked in her Opinion in *Borsele* at [49], "the same outcomes may often be expected".
>
> **54** Having concluded that the supply is made for consideration within the meaning of article 2, the court must address whether the supply constitutes an economic activity for the purposes of the definition of "taxable person" in article 9. The issue is whether the supply is made for the purposes of obtaining income therefrom on a continuing basis. For convenience, the CJEU has used the shorthand of asking whether the supply is made "for remuneration". The important point is that "remuneration" here is not the same as "consideration" in the article 2 sense, and in my view it is helpful to keep the two terms separate, using "consideration" in the context of article 2 and "remuneration" in the context of article 9.
>
> **55** Whether article 9 is satisfied requires a wide-ranging, not a narrow, enquiry. All the objective circumstances in which the goods or services are supplied must be examined: see the judgment in *Borsele* at [29]. Nonetheless, it is clear from the CJEU authorities that this does not include subjective factors such as whether the supplier is aiming to make a profit. Although a supply "for the purpose of obtaining income" might in other contexts, by the use of the word "purpose", suggest a subjective test, that is clearly not the case in the context of article 9. It is an entirely objective enquiry."

143. It is therefore clear that this type of question involves a two stage test: first to determine whether or not there is a supply of goods or services for consideration within article 2 Principal VAT Directive; and second, to determine whether that supply is part of an economic activity for the purposes of article 9 Principal VAT Directive. Those two questions are distinct and must be kept so. In particular, a distinction must be made between the concept of "consideration" for the purposes of the article 2 question and the concept of "remuneration" which is often referred to as part of the enquiry into whether or not an activity constitutes an economic activity within article 9.

144. As regards the application of these two tests, I have set out below the key principles that I take from the *Wakefield College* decision and the other cases referred to in David Richards LJ's judgment as well as those referred to by the parties.

145. The first question is whether there is a supply of goods or services for a consideration for the purposes of article 2. As described by David Richards LJ at [52] in *Wakefield College*, this test requires a legal relationship between the supplier and the recipient, pursuant to which there is reciprocal performance whereby the goods or services are supplied in return for the consideration provided by the recipient (see also *Gemeente Borsele* [24] and *Finland* [44]). There is no requirement for the consideration to be equivalent to the value of the supply (*Wakefield College* [52], *Gemeente Borsele* [26]).

146. The second question is whether or not the supply constitutes an economic activity within article 9. As described by David Richards LJ in *Wakefield College* this is a broad enquiry which has to take into account all of the circumstances in which the goods or services are supplied (*Wakefield College* [55]). The essential test is whether the supply is made for the purpose of obtaining income on a continuing basis (*Wakefield College* [54]).

147. David Richards LJ explains references in other cases to whether or not there is a "sufficient" or "direct" "link" between the supply and the remuneration (for the purposes of determining whether the supply constitutes an economic activity) as "shorthand" for this essential test (*Wakefield College* [58]). So, for example, the decision of the CJEU in *Finland* – that the link between the legal aid services provided by the public bodies and the means-tested payments made by recipients was not "sufficiently direct" for those services to be regarded as economic activities – should be understood as a decision that the purpose of the supply was not to obtain continuing income. The same can be said of the provision of school transport by the local authority in *Gemeente Borsele*.

148. For the purposes of the article 9 question, all the circumstances in which the supply is made must be taken into account. The case law authorities are useful in demonstrating some of the factors that may be relevant, but they are no more than examples. What is clear, however, is that the test is an objective one (*Wakefield College* [55], *Longridge* [73]). It is not relevant whether or not the supplier's objective is to make a profit (*Longridge* [94]).

149. The relevant factors can include:

(1) whether or not the service provider is operating in a market where similar services are provided on a commercial basis (*Longridge* [93]);

(2) the structure and the level of the fee income (*Gemeente Borsele*, *Finland*), which may itself demonstrate whether the purpose of the activity is or is not to obtain income;

(3) the existence of a market for the supply (*Wakefield College* [85]);

(4) whether the activity itself is likely to be carried on by a private undertaking in a such a market (see the opinion of Advocate General Poiares Maduro in *Banque Bruxelles Lambert SA v Belgium* (Case C-8/03) [2004] STC 1643 at paragraph [10], referred to by Arden LJ in *Longridge* [68])

(5) whether the activity is one of the principal activities of the entity or ancillary to its main activities (*Wakefield College* [79]).

150. The other case to which I have been referred extensively is the CJEU decision in *AstraZeneca*. HMRC relies in particular on this case.

151. *AstraZeneca* involved the provision by the company of retail vouchers for use in local shops to employees as part of their remuneration package. The remuneration package entitled the employees to a fixed annual remuneration of an amount in cash, but employees were entitled to exchange certain benefits for a reduction in the fixed remuneration. The vouchers were one of the benefits that employees could exchange for part of their cash remuneration. If an employee chose the vouchers as part of his or her remuneration package, the amount of the reduction from the fixed remuneration was equal to the cost to the company of obtaining the voucher, which was less than the face value of the voucher. The employees made the choice of remuneration in advance. The choice would continue to apply to their remuneration in the absence of a material change in personal circumstances.

152. The context in the *AstraZeneca* case is important. The company sought to deduct the input tax that it had incurred on the cost of acquiring the vouchers on the grounds that this cost formed part of its general overheads. It sought to do so even though it did not account for output tax on the provision of the vouchers to its employees. HMRC refused the claim to deduct the input tax on the grounds that the cost incurred on the vouchers was not used as part of a taxable transaction, but, in the alternative, demanded that the company account for output tax on the provision of the vouchers to the employees, if the input tax on the provision of the vouchers were to be deductible.

153. The case came before the CJEU following a reference by the VAT and Duties Tribunal. Three questions were referred to the court. However, the case was decided on the first question which, in summary, was whether, in the circumstances of the case, the company made a supply for VAT purposes by providing the vouchers to the employees.

154. In his opinion, Advocate General Mengozzi expressed the view that the conclusion that the provision of the vouchers to employers was a taxable supply was the preferred interpretation. He came to this view for two main reasons: first, it avoided the need to distinguish between a case in which the company made a profit from the onward supply of the vouchers to the employees and those in which it did not - in *AstraZeneca* the company did not (see, in particular, the opinion of the Advocate General in *AstraZeneca* [44]); second, it was consistent with the principle that the ultimate consumer of the goods purchased with the vouchers (i.e. the employee) should bear the VAT cost (see, in particular, the opinion of the Advocate General in *AstraZeneca* [45]).

155. The Advocate General then went on to confirm his preferred interpretation met all the requirements identified by the CJEU case law in order to be treated as a supply. He says this at [51] to [53] of his opinion:

> "51. It should be observed in that connection, first, that AstraZeneca's employees can choose not to receive any part of their remuneration in

> retail vouchers and instead to be paid entirely in cash, in accordance with a more traditional mode of payment. The provision of vouchers to employees can therefore be interpreted as a transaction entered into by the employees in exchange for payment of a given sum of money (that part of their remuneration which, if they did not receive vouchers, they would obtain in money).
>
> 52. Therefore, in the present case, all the conditions identified in the court's case law for establishing the existence of a supply for consideration are met: in particular, there is consideration, expressed in money terms, which is the amount actually received in order to obtain the goods or services. Moreover, if the notion that the provision of vouchers to employees constitutes a supply of services is accepted—as I accept it—there is undoubtedly a direct link between the service provided and the consideration received.
>
> 53. It should also be pointed out that the court has already acknowledged, albeit by implication, that it is possible for part of the remuneration of an employee to be regarded as the consideration given (by the employee) for a supply for consideration (provided by the employer to the employee)."

156. The CJEU came to the same conclusion. The judgment of the CJEU does not, however, follow the approach set out in the decision of the Court of Appeal in *Westminster College*.

157. The CJEU judgment appears to begin by answering the article 9 question. After noting that the scope of the term "economic activity" in article 4(1) of the Sixth Directive (now found in article 9 Principal VAT Directive) is wide and that the term is objective in character (at [23]), the CJEU concludes (at [24]) that the provision of vouchers to employees who forgo an element of their remuneration is an economic activity:

> "24. Having regard to the wide scope of VAT, it must be held that a company such as Astra Zeneca, in so far as it provides retail vouchers to its employees in exchange for them giving up part of their cash remuneration, carries out an economic activity within the meaning of the Sixth Directive."

158. Having concluded (in [25] and [26]) that the provision of vouchers must be a supply of services rather than a supply of goods, the CJEU then addresses the article 2 question. At [27] to [31], the CJEU states:

> "27. As regards determining whether a supply of services such as that at issue in the main proceedings is effected for consideration, it is settled case law that the concept of the "supply of services effected for consideration" within the meaning of art 2(1) of the Sixth Directive requires the existence of a direct link between the service provided and the consideration received (see *Apple and Pear Development Council v Customs and Excise Commissioners* (Case 102/86) [1988] STC 221, [1988] ECR 1443, para 12; *Julius Fillibeck Söhne GmbH & Co KG v Finanzamt Neustadt* (Case C-258/95) [1998] STC 513, [1997] ECR I-

5577, para 12; *Commission v Greece* (para 29); and *Commission v Spain* (para 92)).

28. It is also settled case law that the taxable amount for the supply of goods or services is represented by the consideration actually received for them. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria. In addition, that consideration must be capable of being expressed in money (see *Fillibeck v Finanzamt Neustadt* (paras 13 and 14) and the case law cited).

29. In the case of the transaction at issue in the main proceedings, there is a direct link between the provision of retail vouchers by Astra Zeneca to its employees and the part of the cash remuneration which the employees must give up as consideration for that provision.

30. Instead of receiving all their remuneration in cash, the Astra Zeneca employees who have chosen to receive such vouchers must give up part of that remuneration in exchange for those vouchers, that transaction resulting in a specific deduction from their fund.

31. Moreover, there is no doubt that Astra Zeneca actually receives consideration for the provision of the retail vouchers at issue and that that consideration is expressed in money, since it corresponds to a fraction of the cash remuneration of its employees."

159. The CEU then notes that this interpretation has the benefit of ensuring that the final consumer of the goods (i.e. the employee) bore the VAT on the provision of the voucher.

"32. In addition, as was shown at the hearing, the burden of the VAT on the provision of those vouchers is borne by the final consumer of the goods and/or services which may be bought with those vouchers, namely the employees of Astra Zeneca who receive the vouchers, since the deduction from their remuneration to which that provision gives rise includes the price of the vouchers concerned and all the VAT on them.

33. Therefore, as the Advocate General observed in point 45 of his opinion, when an employee wishes to use such vouchers, he simply has to hand over the vouchers, which include VAT, to the retailer or the provider of the services concerned and receives, in exchange, the goods or services of his choice, it being understood that the price of those goods or those services, VAT included, was paid by that employee at the time when he chose to receive the retail vouchers concerned in return for giving up part of his remuneration and that it is only when those vouchers are used by that employee that the retailer or service provider will pay the VAT on those goods or services to the tax authorities."

160. This decision is essentially a decision on the application of article 2. The key points are that, in determining whether a supply is made for a consideration: there must be a direct link between the supply and the consideration (i.e. reciprocal performance); the value of the consideration must be determined subjectively; and the value of the consideration must be capable of being expressed in monetary terms (*AstraZeneca* [28]). In *AstraZeneca*, the employees' giving up part of their remuneration fund

represented consideration in monetary terms for the provision of the vouchers (*AstraZeneca* [29] – [31]).

(d) Application to the present case

161. I must now apply those principles to the present case.

The article 2 question

162. I will begin with the article 2 question, namely whether there is a supply of goods or services for a consideration.

163. The article 2 question requires a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the consideration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (*Gemeente Borsele* [24]). The value of the consideration is determined subjectively and must be capable of being expressed in monetary terms (*AstraZeneca* [28]).

164. There is clearly a legal relationship between Pertemps and the flexible employee in this case. The next issue is to determine whether Pertemps makes a supply to the employee pursuant to that relationship and if so if that supply is made for a consideration which is provided by the employee.

165. Mr Brennan says that the only relevant supply that is being made under that relationship is the supply by the employee to Pertemps of his or her labour in return for remuneration which may take the form simply of payment of salary or a payment of both salary and expenses. That is not a supply for VAT purposes. There is no supply made by Pertemps. In particular, there is no supply made by Pertemps through the operation of MAP. The operation of MAP is just part of the internal administration of the business of Pertemps of providing workers to clients.

166. As regards, the consideration for any supply, Mr Brennan perhaps not surprisingly says there is no consideration provided by the employee for any supply made by Pertemps. When a flexible employee makes a valid claim, he or she is only ever entitled to a reduced payment of salary and to a payment of expenses. Those payments are consideration for the work of the employee. The MAP adjustment is simply an element in the calculation of the amount of salary to which the employee is entitled.

167. Mr Puzey, for HMRC, starts from a rather different position. He says that the relevant supply is the operation of MAP itself, which provides a benefit to employees in cash flow terms and in relieving them of the need to file returns to obtain a repayment of income tax and national insurance contributions.

168. He says that the employee clearly gives up part of his or her original salary when he or she makes a claim for a MAP payment. That amount of salary forgone, the MAP adjustment, is, in accordance with the CJEU decision in *AstraZeneca*, consideration for a supply. It meets the requirements set out in *AstraZeneca* that the consideration must be capable of being expressed in monetary terms.

169. Mr Puzey says that there is the requisite element of reciprocal performance in this case. The consideration is clearly linked to that supply both in the manner in which it is expressed in the contractual documents and the manner in which it is tied to the number of claims that are made by the employee.

170. For my own part, it does seem to me that the criteria in the case law for there to be a supply of goods or services for a consideration within article 2 are met. I have set out my reasons below.

(1) There is a legal relationship between Pertemps and the flexible employee expressed in the contract of employment incorporating relevant terms of the Flexible Employee Handbook.

(2) Pursuant to that legal relationship, the employee exchanges a right to receive a payment of salary for a right to receive a payment of expenses for a consideration. This is clear from the contractual position that I have described above. The two payments (salary and expenses) have different characteristics for tax and national insurance purposes. That exchange potentially involves the supply of a service.

(3) Pursuant to that relationship, the employee provides an identifiable consideration, the MAP adjustment. It is expressed in monetary terms. It does not matter that the employee does not become entitled to the payment (and so no income tax charge arises in relation to that amount). This is clear from the *AstraZeneca* case. It is sufficient that the employee forgoes part of what could be his or her remuneration as part of a bargain in exchange for the service.

(4) There is reciprocal performance. The consideration is directly referable to the supply: it is only incurred by those employees who make claims under the MAP scheme; and the amount of the charge is proportionate to the number of claims that are made.

171. In my view the article 2 question has to be answered in the affirmative: the provision of MAP does involve a supply for a consideration.

172. Before I move on to the article 9 question, I should first address a few of the points raised in argument.

173. As I have described, part of Mr Brennan's argument was that an employee who files a valid claim never becomes entitled to a payment of original salary which he or she exchanges for a right to receive a payment of both salary and expenses. Mr Brennan made this point in two contexts: one in support of his argument that there was no separate supply made by Pertemps through the operation of MAP independent from the work/wage bargain that forms the essential requirement of the employment relationship; and the other in support of his submission that there was no consideration provided by the employee for any supply.

174. Whilst I appreciated the force of Mr Brennan's argument, I agree with Mr Puzey that this point places too much emphasis on the income tax treatment. The difficulty with it is that the employees in *AstraZeneca* were in much the same position. The

employees elected in advance to receive vouchers instead of a part of their salary; those employees were never entitled to receive the cash payment in respect of that part of their salary. Nonetheless, the CJEU found that for VAT purposes there was a supply of the vouchers for VAT purposes and that the cash salary forgone by the employees could constitute consideration for that supply. I have to accept therefore that, within the employment relationship, it is possible for a separate supply to be made by the employer to the employee, which forms part of the provision of the reward for the employee's work and that the employee's giving up of part of his or her original salary can constitute the consideration for that supply.

175. In rejecting Mr Brennan's argument in relation to the article 2 question, I am mindful that the article 2 question sets a relatively low hurdle. As was identified by David Richards LJ in *Wakefield College* (at [52]), the CJEU appears to have reached the conclusion that there was a supply for a consideration within article 2 in the cases of *Finland* and *Gemeente Borsele* even if the CJEU then came to the conclusion that the relevant supply was not a supply for VAT purposes because it did not form part of an economic activity within article 9.

176. Although I have accepted Mr Puzey's argument that the provision of MAP potentially involved a supply for the purposes of article 2, in [170] above, I have expressed the form of that potential supply rather differently from Mr Puzey. Mr Puzey's central submission was that that the supply is the provision of the operation of the MAP scheme itself and that the consideration for that supply is the MAP adjustment. As I have set out above, to my mind, the potential supply is better expressed as the exchange by the employee of a right to receive salary for a right to receive a payment of expenses for a consideration, the MAP adjustment.

177. It seems to me that this better reflects the essential bargain between Pertemps and a flexible employee who makes a claim for a MAP payment as set out in the contractual documents and in economic reality. The flexible employee is not paying for the operation of the scheme. The description of the MAP adjustment in some of the documentation as a contribution towards the operation of MAP is just a means of justifying the charge. The flexible employee forgoes an element of salary in order to obtain the tax-free payment of expenses. It is only the employee who makes a valid claim, who makes the exchange, receives the benefit, and pays the consideration.

178. The operation of the scheme itself, is, as Mr Brennan puts it, part of the internal administration of Pertemps. The employee has little interest in it other than as means of providing what he or she has bargained for – the tax-free payment.

The article 9 question

179. I will now turn to the article 9 question, namely whether or not that supply constitutes an economic activity.

180. As I have described above, the essential test for determining whether a supply of goods or services constitutes an economic activity is whether the supply is made for the purpose of obtaining income on a continuing basis. This is, however, a broad enquiry.

The tribunal should take into account all of the circumstances in which the goods or services are supplied.

181. Having considered the arguments put forward by the parties and facts of this case, I have reached the conclusion that the operation of the MAP scheme by Pertemps was not an economic activity within the meaning of article 9.

(1) The operation of MAP does not provide an income stream to Pertemps. It reduces the cost to Pertemps of employing its workers and accordingly increases the profits which Pertemps makes from its business of providing those workers to its clients.

(2) MAP is not a service that could be provided by a third party supplier. The MAP scheme relies upon the issue of the dispensation by HMRC to the employer. It can only be operated by a person who is the employer. It is not "an activity likely to be carried on by a private undertaking on a market, organized within a professional framework generally performed in the interest of generating profit" (*Banque Bruxelles Lambert SA v Belgium*, per Advocate General Poiares Maduro at [10]).

(3) In a similar vein, this is a supply that is being made pursuant to the employment relationship. The principal supply that is being made in the context of that relationship is the supply by the employees of their labour in consideration for the remuneration and benefits provided by Pertemps. The same was, of course, true in the *AstraZeneca* case. But this supply is, in my view, too ancillary to the fundamental elements of the employment relationship. This is not a case – as in *AstraZeneca* – where the employer also makes available to the employee goods or a separate service (the voucher in the *AstraZeneca* case) which could have been provided by a third person outside the obligations normally performed by the employer as part of the employment relationship.

(4) This is also not a case in which it is necessary to impose a charge to VAT in order to ensure that the coherence of the VAT system is maintained or to ensure that a level playing field is maintained between participants in a market. This was a factor in the *AstraZeneca* case. It is not so here.

182. I am confirmed in my conclusion by the approach in the *AstraZeneca* case. As I have mentioned, the CJEU began by addressing the article 9 question first. This approach seems to acknowledge that it was necessary clearly to demonstrate that there was a supply that would otherwise constitute an economic activity given the background of the employment relationship.

Conclusions on the first issue

183. I accept that there will be cases in which any one or more of these factors may be present and the relevant activity might still be regarded as an economic activity for the purposes of article 9 Principal VAT Directive. However, having taken them all into account, my conclusion is that the operation of MAP in itself is not an economic activity within article 9. For that reason the operation of MAP was not a taxable supply for the purposes of section 4 VATA.

The second issue: exempt supply

184.I shall deal briefly with the second ground of appeal.

185.My conclusion on the first ground decides these appeals in favour of the appellant and so I do not need to determine the other issues. I have, however, heard full argument on this ground and so I will briefly set out my conclusions in case this matter proceeds further.

186. The second ground of appeal was that any supply by Pertemps from the operation of MAP was an exempt supply within item 1 Group 5 Schedule 9 VATA.

The relevant legislation

187.Item 1 Group 5 Schedule 9 VATA. Item 1 Group 5 Schedule 9 VATA includes:

> "The issue, transfer or receipt of, or any dealing with, money, any security for money or any note or order for the payment of money."

188.Item 1 Group 5 Schedule 9 VATA is intended to implement article 135(1) of the Principal VAT Directive. It provides that member states shall exempt, so far as is relevant for present purposes:

> "(c) the negotiation of or any dealings in … any other security for money …;
>
> (d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection;
>
> (e) transactions, including negotiation, concerning currency, bank notes and coins used as legal tender…;"

The parties' submissions

189.Mr Brennan, for Pertemps, says that any supply made by Pertemps through the operation of MAP involves the conversion by the employee of a right to receive money in one form (taxable earnings) into a right to receive money in another form (non-taxable expenses). That, he says, is an exempt supply within item 1 Group 5 Schedule 9 VATA (relying on the decision of the Upper Tribunal in *Coinstar Limited v Revenue & Customs Commissioners* [2017] UKUT 256 (TCC), [2017] STC 1519).

190.In particular, he says, that the conversion of a right to receive money in one form into a right to receive money in another more attractive form is a relevant change in the legal and financial situation of the parties as required by the CJEU case law (see *National Exhibition Centre Ltd v Revenue & Customs Commissioners* (Case C–130/15), [2016] STC 2132 at [33] ("*NEC*")).

191.Mr Puzey, for HMRC, essentially relies on his argument on the first issue. He says the operation of MAP involves a taxable supply of the provision of administrative service. He relies on the CJEU case law in support of a submission that the exemptions in Group 5 Schedule 9 are limited to transactions involving movements in money (see

in *Sparekassernes Datacenter v Skatteministeriet* (Case – 2/95) [1997] ECR I-3017 ("*SDC*") at [65] to [66], and *NEC* at [49] – [51]).

Discussion

192. If I am wrong on the first issue and the operation of MAP does involve a form of supply by Pertemps to the employee, then I agree with Mr Brennan that any supply is an exempt supply within item 1 Group 5 Schedule 9.

193. As I have described above in the context of the first issue, if there is a supply, it seems to me that the economic reality is that it involves an exchange by the employee of the employee's right to the payment of part of his or her original salary for a right to receive an expenses payment of a lower amount. For that exchange, the employee pays a consideration in the form of the MAP adjustment.

194. That is a transaction in a right to receive a payment of money and, to my mind, is a "dealing in money" within item 1 Group 5 Schedule 9.

195. The transaction does involve a change in the legal and financial position between the parties as required by the CJEU case law (in particular, *SDC* at [53]). It involves the exchange by the employee of a right to receive a payment with certain characteristics for a right to receive a payment with certain other characteristics: the employee gives up a right to receive a payment from the employer for his or her work; the employee receives from the employer a right to reimbursement of certain expenses that the employee has incurred. The different nature of those payments has different tax consequences. Furthermore, the amount of the payment due from the employer is reduced.

Conclusions on the second issue

196. I do not need to decide this point, but if I had to do so, for these reasons, I would say that is an exempt supply within item 1 Group 5.

The third issue: collection and management

197. The third issue is whether HMRC was precluded from collecting the tax by the issue of Business Brief 28/11 for periods before 1 January 2012. This issue is only relevant if I am wrong in my analysis on both the first issue and the second issue.

198. As I mentioned at [94] above, HMRC maintained its argument that this Tribunal does not have jurisdiction to determine this issue because, in essence, it is a public law matter that should be dealt with by judicial review.

199. It will be necessary to determine that jurisdictional issue before reaching a conclusion on the substantive point that Pertemps raises namely whether HMRC is precluded from collecting the tax because of the assurances given by HMRC in Business Brief 28/11.

200. The determination of the jurisdictional issue would require me to express a view on the scope of the jurisdiction of the Tribunal under s83 VATA. I am aware that this is a contentious matter on which different views have been expressed in the cases. Against

that background, I have decided that it would not be appropriate for me to express a view given that I do not need to decide this matter in order to deal with these appeals.

201. The jurisdictional point is a matter of law which, if this matter were to proceed, a higher court or tribunal could determine without the need for any additional findings of fact if it were to decide that I had reached the wrong conclusion on the first and second issues.

202. Furthermore, although I was asked by Pertemps to make findings of fact as to whether the MAP scheme would fall within the terms of Business Brief 28/11, I shall resist the temptation to do so. If this matter were to proceed and if a higher court or tribunal were to find that I was wrong on the first and second issues, and if that court or tribunal were to decide that this Tribunal has jurisdiction in this matter, the findings of fact that I have made concerning the operation of MAP should enable it to reach a conclusion on that issue. I do not need to determine it now and I do not do so.

Decision

203. I allow these appeals.

Rights of appeal

204. 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.

ASHLEY GREENBANK
TRIBUNAL JUDGE

RELEASE DATE: 06 July 2018