[2018] UKFTT 454 (TC)

TC06632

Appeal number: TC/2013/04669

VAT – supply of tuition by one company and supply of printed material by another company in same corporate, but different VAT, group – whether Notes (2) and (3) of Group 3 Sch 8 apply to remove printed material from zero rate – not on facts – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BPP UNIVERSITY COLLEGE OF PROFESSIONAL STUDIES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Taylor House, Rosebery Avenue, London on 4 May 2018

Mr S Grodzinski QC, instructed by Simmons & Simmons LLP, for the Appellant

DECISION

1. A short outline of the dispute the subject of the appeal, and a rather fuller history of the procedural history of the appeal, was set out at §§2-14 of my interim decision dated 1 July 2014 and reported at [2014] UKFTT 644 (TC). My interim decision was to bar HMRC from taking further part in the proceedings.

2. That decision was appealed and ultimately reached the Supreme Court who on 26 July 2017 issued their decision, reported at [2017] UKSC 55, upholding my decision to bar HMRC from this appeal under Rule 8(3)(a) combined with Rule 8(7). HMRC had also applied in 2014 to be reinstated but the application was refused and not appealed.

The effect of the bar

Summary determination?

3. Rule 8(8) provides that:

> If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent.

4. I understand a summary determination of the appeal to be one where the Tribunal does not consider the evidence or representations of either party but simply allows the appeal. I was referred to my own decision in *Whitehill Pelham Ltd* [2017] UKFTT 781 (TC) where I had done just that.

5. In *Whitehill Pelham* HMRC had failed to serve any statement of case and indeed had failed to communicate with the Tribunal over the appeal at all. It seemed appropriate to treat that as a case where the respondent had chosen to offer no defence to the appeal and summarily allow the appeal without requiring the appellant to make out its case.

6. The same is not true here. HMRC had served a statement of case and a Reply (albeit they were found my me in 2014 to be inadequate to set out HMRC's case). HMRC had also sought to remedy the defects in their statement of case in the skeleton argument served for the interim hearing in 2014 (§§67-70 of my 2014 decision). This was not a case where HMRC had chosen to offer no defence.

7. Moreover, BPP did not invite me to summarily allow its appeal. Mr Grodzinski explained that it was an HMRC decision rather than an assessment which was under appeal: since the decision was issued, the appellant has complied with it and accounted for VAT. Its concern is that if I summarily determine the appeal against the decision, HMRC might nevertheless refuse to repay the appellant's voluntary disclosures reclaiming the VAT, on the basis (I presume) they would be separate decisions. Mr Grodzinski did not accept that HMRC would be right to take that view

but the appellant did not wish to be involved in a legal dispute over the matter. It therefore invited me not to summarily determine any of the issues but to let it make out its case (if it could).

8. It seems to me, for the above reasons, appropriate to determine the appeal after considering the appellant's case. I do not therefore summarily determine the appeal. But to what extent should I consider HMRC's representations?

HMRC's representations

9. Rule 8 says '…the Tribunal need not consider any response or other submissions made by that respondent …..' where the respondent was barred. At first glance, this rule might seem to give the Tribunal power to permit HMRC to make submissions, even though they have been barred.

10. Neither party suggested that this is how the provision should be read. Both parties presumed that being barred meant that HMRC had no right to be represented at the hearing and I agree. The order was to bar the respondent from taking further part in the proceedings so permitting the respondents to make representations after they were barred would run contrary to the order.

11. What I think Rule 8(8) means is that the Tribunal has the right to ignore any submissions or representations (such as a statement of case) which HMRC had made *before* they were barred.

12. At the hearing, the appellant did not invite me to ignore any representations made by HMRC before it was barred: its position was that HMRC's statement of case and Reply failed (as I said at §§53-54 of my 2014 decision) to state its case and therefore did not really contain any representations. At the 2018 hearing before me, no reference was made to the skeleton served by Mr Singh before the 2014 hearing (see §6).

13. After the 2018 hearing, I asked the appellant for a copy of Mr Singh's skeleton and the appellant's representations on whether or not I should consider it. I did not ask HMRC for representations on whether it should be considered for the reason set out at §10. By letter of 29 May 2018, the appellant stated that it did not think I should take Mr Singh's skeleton into account. It gave three reasons:

> (a) HMRC made assertions of fact in it which do not (of themselves) amount to evidence and are unsupported by any evidence;
>
> (b) The skeleton referred to 2 authorities which the appellant considered irrelevant and had not referred to in its submissions to me at the hearing;
>
> (c) It would be wrong as a matter of principle to take HMRC's case into account once it had been barred.

14. Dealing with (c) first, Mr Singh's skeleton was, having been served before the hearing in 2014, served *before* HMRC were barred and in my view, could be taken into account under Rule 8. The matter is discretionary. As the appellant has not

invited the Tribunal to make summary judgment, but has opted to prove its case, I am inclined to exercise my discretion to take into account HMRC's legal case in so far as it was explained in Mr Singh's 2014 skeleton.

15. However, dealing with (a), I agree with the appellant that statements of fact made in a skeleton argument are no more than assertions of what HMRC intended to prove. They are not themselves evidence. I should and will ignore any assertions of fact made by HMRC in Mr Singh's skeleton argument.

16. Dealing with (b), I agree with the appellant that, if I thought either extra authority referred to by HMRC was potentially determinative of the issue against the appellant, I should give them an opportunity for further submissions before deciding the appeal. In this case, I agree with the appellant that the two extra cases do not assist HMRC's position for the reasons set out below, and so I have not given the appellant a further opportunity to make submissions on them.

17. In conclusion, I have chosen in my discretion to consider HMRC's skeleton argument produced for the interim hearing in so far as it stated HMRC's case on the substantive appeal (their Statement of Case and Reply having failed to do so).

18. Therefore, I now proceed to consider the merits of the appellant's appeal, bearing in mind that the burden of proof lies on the appellant. I note in passing that the Tribunal (with the appellant's consent) did permit HMRC to appoint a transcript writer to take a full note of the hearing. And I return at the end of this decision to the question of the effect of a barring order when considering what appeal rights HMRC might have against this decision.

The facts

19. Recognising that the burden of proof in this appeal lies on the appellant, it was at first glance surprising to me that the appellant chose to call no evidence. I was referred neither to documentary nor witness evidence.

20. Mr Grodzinski explained to me that, firstly, the procedural history of this appeal has been so extended that BPP no longer employs anyone who could give first hand evidence of the factual position at the period covered by HMRC's decision. Secondly, he explained that in the week in 2014 between the hearing of the barring application and the issue of my decision by the Tribunal, HMRC and the appellant had agreed a statement of facts. It was his opinion that the statement of agreed facts ('SOAF') was sufficient to prove the appellant's case.

21. Reverting to what I said at §§12-14 above, it seems to me that I am entitled to take into account representations made by HMRC before they were barred and therefore I am entitled to accept as facts all the matters which (by agreeing to the SOAF on 27 June 2014) HMRC had accepted were facts that they would not dispute.

22. I note in particular that the SOAF post-dated Mr Singh's skeleton argument; so to the extent that any of the facts asserted by Mr Singh in that skeleton were

inconsistent with the SOAF, I have to presume that by the date of the SOAF HMRC had changed their mind. In any event, as I have said, the facts in the skeleton argument were not evidence but unsupported assertions by counsel: the SOAF contained what both parties agreed were the facts.

23. Therefore, I find as fact the matters set out in the SOAF and as summarised below.

24. BPP Learning Media Limited ('LM') was, at the period covered by the decision at issue in this appeal, a member of a VAT group of which BPP University College of Professional Studies Limited ('BPP') was the representative member. LM made the supplies at issue in this appeal, but its membership of the VAT group explains why the appeal was brought in the name of BPP.

25. Both LM and BPP were part of a corporate group which included other companies, some of which belonged to a different VAT group to the one of which BPP was representative member. In particular, BPP Professional Education Limited ('PE') was a member of a different VAT group to that of BPP and LM.

26. When the business of the corporate group was first established, it comprised the provision of tuition courses for professional examinations (such as those for the ICAEW) and the production of study texts and tuition material for use with the tuition courses. A group reorganisation in 2006 resulted in LM taking over the publishing side of the business while PE took over the tuition side of the business.

27. At the time at issue in the appeal, LM's business was to develop, produce, publish and distribute learning materials in print and in electronic format. It sold its products to students and tuition providers (such as Universities) and it sold them wholesale to retailers such as Amazon, Waterstones and other bookshops. It also sells licences to print its tuition materials.

28. A student purchasing a tuition course from PE would almost invariably purchase learning materials to accompany the tuition course, but would not necessarily purchase them from LM. PE did not require its students to buy the tuition materials from LM. While PE's students could purchase the printed materials from LM (with the invoice stating that PE acted as an agent for LM), they could purchase them for the same price from retailers such as Amazon and Waterstones. Alternatively, they might purchase second hand copies (and there was an online secondary market in LM's learning materials on Ebay and Amazon).

29. A person could also choose to purchase the tuition materials from LM *without* purchasing a tuition course from PE. The price of the tuition materials was unaffected by whether or not the customer was also buying a tuition course from PE. In 2012/13 approximately 40% of LM's turnover was derived from sales of materials to persons who had not also purchased a course from PE.

30. When the change (discussed below) was made to the provisions relating to zero rating of books came into effect on 19 July 2011, there was no material change to the way in which PE and LM carried on their businesses.

The dispute

31. As explained in my 2014 decision, HMRC had assessed BPP for VAT on the learning materials sold by LM in periods before 19 July 2011. Ultimately HMRC accepted (as reported at §14 of my 2014 decision) that these assessments were wrong and they were withdrawn.

32. As it made clear from letters passing between the parties, BPP had been concerned that the change in law on 19 July 2011 made it liable to account for VAT on LM's supplies and for that reason it had commenced to account for such VAT: its query of the position with HMRC led to the decision on 6 December 2012 which was the subject of this appeal. That decision was that with effect from 19 July 2011, BPP was liable to account for VAT on LM's supplies of learning materials.

The law

33. Group 3 of Schedule 8 of VATA sets out the zero rating application to 'Books, etc' as follows in so far as relevant:

> **Item No**
>
> **1.** Books, booklets, brochures, pamphlets and leaflets.
>
> **2.** Newspapers, journals and periodicals.
>
> ....

34. The SOAF stated that LM's business was the publication and sale of learning materials *in print* and electronic format. I find, subject to the exception discussed below, that in so far as the learning materials were printed they would fall within Item No 1. In so far as the materials were electronic, obviously they would not: this was not in dispute.

35. LM only supplied learning materials. It did not supply the tuition courses to which the learning materials related: they were supplied by PE. The decision of the Court of Appeal in *Telewest* [2005] EWCA Civ 102 was that even where the provision of multiple goods and/or services would have been (for VAT purposes) a single supply if supplied by the same supplier, there can be no single supply where the provision of the multiple goods and/or services is by different suppliers. This explains why HMRC no longer maintained the assessments for the periods before the change in the law (or at least once they accepted, as it appears they did, the decision in *Kumon Educational UK Co Ltd* [2014] UKFTT 109 (TC) that there was no *Halifax*-type abuse).

36. The effect of the changes in the law made on 19 July 2011 was to remove zero rating from supplies of books in circumstances such as those in the case of *Telewest*. In summary, after that date, a supply of books or other printed material would no longer be zero rated where VAT law would have treated it as being part of a single supply together with other goods and/or services had they all been supplied by the same supplier. This did not overturn *Telewest* in law (as it did not deem a supply by

different suppliers to be a single supply) but it did do so in practice because it removed zero rating from the supply of the books/publications in such circumstances.

37. The actual provisions were as follows. Group 3 of Schedule 8 was amended by s 75 Finance Act 2011 ("FA 11") to introduce Notes (2) and (3) into Group 3. These notes provided as follows:

> (2) Items 1 to 6 do not include goods in circumstances where –
>
> (a) the supply of the goods is connected with a supply of services, and
>
> (b) those connected supplies are made by different suppliers.
>
> (3) For the purposes of Note (2) a supply of goods is connected with a supply of services if, had those two supplies been made by a single supplier –
>
> (a) they would have been treated as a single supply of services, and
>
> (b) that single supply would have been a taxable supply (other than a zero-rated supply) or an exempt supply."

38. It was the appellant's case that these provisions did not apply to the supplies made by LM because even if the supplies made by PE and LM had been both made by LM, they would not be treated as a single supply of services.

Legal principles on single complex supplies

39. It is well-known that the CJEU has ruled that there are in effect two types of situation where the provision of a number of different goods and/or services should be seen as a single supply and, in summary they are where:

> (1) One or more elements of the supply comprised a principle element and the other elements were ancillary to it in the sense that they were not an end in themselves but a means of better enjoying the principle element (as per *CPP* C-349/96 [1999] STC 270 at [30]); or
>
> (2) Two or more elements of the supply were so closely linked that objectively they formed a single indivisible supply which it would be artificial to split (as per *Levob* C-41/04 [2006] STC 766.

40. The practical distinction between these two kinds of single supply is that, with the *CPP* type single supply, the nature of that supply is clearly that of the principle element of it; it can be harder to determine the nature of the supply where a *Levob* type supply is concerned, as there is no principle element.

41. It is also convenient to refer to the Upper Tribunal's summary of the law on single and multiple supplies in *Middle Temple* [2013] UKUT 250 (TCC) at [60]:

> The key principles for determining whether a particular transaction should be regarded as a single composite supply or as several independent supplies may be summarised as follows:

> (1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.
>
> (2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.
>
> (3) There is no absolute rule and all the circumstances must be considered in every transaction.
>
> (4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.
>
> (5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.
>
> (6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.
>
> (7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.
>
> (8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.
>
> (9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.
>
> (10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.
>
> (11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.
>
> (12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality.

42. It is perhaps worth considering some of the concepts set out here in a little more detail.

43. Firstly, even though two 'types' of complex single supply are recognised by the CJEU (*Levob* and *CPP)* many of the rules are common to both: what the Upper Tribunal said at (1)-(4) of [60] is equally applicable to both types of complex single supply. That also appears to be true of what the Upper Tribunal said at (10)-(12). What was said at (5)-(7) relates specifically to *Levob* type supplies (although (7)

would appear to apply to any type of complex single supply); what was said at (8)-(9) relates specifically to *CPP* type supplies.

44. It is clear that with either type of complex single supply the focus should be on typical customer perception (see (6) for *Levob* and (10) for *CPP).* This reflects what the CJEU has said: see, for example [32] of *Middle Temple*. Customer perception looks at, in particular, whether the various elements are of any practical use to the consumer if supplied separately:

> [51]....it is necessary to have regard to the economic reason or purpose of the whole transaction from the point of view of the typical customer
>
> *Middle Temple*

For instance, in *Levob* the CJEU pointed out that , the off-the-peg software purchased was 'of no use' (see [24]) to the customer without the customisation which was also a part of the deal.

45. Customer perception also considers whether it is possible and financially practical for the consumer to buy the elements separately. So far as the ability to buy elements of the supposed complex single supply separately is concerned, the CJEU has stressed (for instance at [31] of *Purple Parking*) that the fact the items are supplied separately 'in other circumstances' is 'of no importance'. This clearly implies that if the items are supplied separately *in the same circumstances*, it is relevant to the question of single/mixed supply. This is in any event clear as the CJEU puts emphasis on customer choice. The Upper Tribunal in *Middle Temple* analysed a number of CJEU cases as follows:

> [57] ..... We consider that [the CJEU decision in *BGZ*] indicates that the ability of the customer to choose whether or not to be supplied with a particular element of a transaction is an important factor in determining whether there is a single composite supply or several independent supplies, although it is not decisive. In our view, [the CJEU decision in *BGZ* also] shows that, while the ability to choose is an important factor in determining that there is more than one supply, it must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.
>
> .....
>
> [61]..... In our view, the CJEU cases show that where there is genuine contractual freedom to obtain a service from a third party and, consequently, a separately identified charge is made for the service, this supports the existence of several independent supplies rather than a composite single supply.

The facts of *Middle Temple* itself are a good illustration of the principle discussed here. It was taken as a given that renting land without a water supply was economically useless; and it was found as a fact in that case that only the landlord could supply the water (as for historical reasons the landlord owned the water supply). It was irrelevant that other tenants in other areas could take a water supply direct from

a water company: Middle Temple tenants could not. The supply of the land and water in those circumstances was therefore a single complex supply.

46. The CJEU has always stressed that none of the above tests provides by itself a conclusive answer to the question of whether the supply is single or mixed. All factors have to be considered and a conclusion reached on the overall picture.

47. I was also referred to *Wheels Private Hire* [2017] UKUT 51 (TCC) which adopted what was said in *Middle Temple.* The Tribunal said at [26]:

> [26] ....It appeared to the Tribunal in *Middle Temple* (and we take the same view) that the CJEU cases show that where there is genuine contractual freedom to obtain a service from a third party and, consequently, a separately identified charge is made for the service, this supports the existence of several independent supplies rather than a single composite supply."

In that case, the taxpayer supplied taxis on rental terms to taxi drivers; it also gave the option, for an additional charge, to take out car insurance. It was not a requirement that the taxi driver take out the insurance offered by the taxpayer (although it was obviously a legal requirement that some insurance was held) but most chose to do so as the cost was competitive ([42]). The Upper Tribunal agreed with the FTT that the insurance was a separate supply.

48. This seems to me to be an application of the principles discussed at §45.

49. Mr Grodzinski also referred me to *Harley-Davison Europe Ltd* [2017] UKFTT 873 (TC) where the question was whether members of the Harleys Owners Group paid their subscriptions for a single supply of membership, or a mixed supply of various benefits. There were some 15 distinct benefits listed by the Tribunal, none of which could be bought separately, although all could be used quite separately from the other benefits. The Tribunal concluded that each was an individual supply. This seems to me to be an example of the fact that the CJEU has said that a single price is not decisive of the question.

Cases relied on by HMRC

50. Mr Grodzinski assumed that HMRC, had they been able to present their case, would have relied heavily on the House of Lords' decision in *College of Estate Management* ('CEM') [2005] UKHL 62, and Mr Singh had referred to this case in his skeleton argument. The facts of that case were more similar to those in BPP, but with a number of important differences.

51. CEM provided printed material to its students which was the major element of the 'distance-learning' education which it provided; it also provided teaching (face to face and online) and assessments of the students' work. The printed materials were not available to be purchased separately from the tuition and were found not to be 'an end in themselves for the students'. This appears to refer to the Tribunal's finding that the purpose of the typical consumer in signing up for a course was to gain a valuable

qualification at the end of it (see [13]). The House of Lords did not agree with the Tribunal which had described the printed materials as *ancillary* to the tuition, but said that *CPP*-style ancillary/principle type of single supply was not the only type of single supply, and that the Tribunal had been entitled on the facts to conclude that there was a single supply of education.

52. Mr Grodzinski pointed out that the reasons given by the House of Lords for their ruling in *CEM* were without the benefit of any CJEU decision after *CPP:* in particular the decision pre-dated *Levob.*

53. I find, however, that at [29] Lord Walker, who delivered the leading judgment, did recognise that the tribunal was required to look for the essential purpose of the transaction; Lord Rodger described this as looking at the essential features from the point of view of a typical consumer [12]]; Lord Walker also recognised at [30] (with prescience) that the *CPP*-style ancillary/principle type of single supply was not the only type of single supply (Lord Rodger said the same at [10]); and the question is one of looking at all facts and circumstances [36]. It is therefore difficult to see that the House of Lords would have come to a different conclusion even if they had had the benefit of the later CJEU decisions, although the decision may have been expressed slightly differently.

54. Moreover, as I have said there is some factual overlap between *CEM* and this appeal: in particular, there is no evidence the course offered by PE would be any use to anyone without the study materials. I agree with the appellant, however, that *CEM* is otherwise a very different case factually to this one. In particular, in this case, the printed material is available to be purchased separately and at a price which gives genuine freedom of choice to the consumer: there is no (significant) economic reason why a consumer of a course from PE would buy the printed materials for LM. They might well do so for the sake of convenience, but they had the freedom to pay the same price for new copies from other independent retailers, or to buy second-hand copies for (I presume) less.

55. The cases on which HMRC additionally relied in Mr Singh's skeleton were those of *Weight Watchers (UK) Ltd* [2008] EWCA Civ 715 and *David Baxendale* [2009] STC 2578.

56. In *Baxendale*, customers purchased food packs from the taxpayer who provided them with 'free' weight loss counselling at the same time. The Court said:

> [37] ....it is unrealistic in my view to regard them as other than part of a continuous programme of dieting and weight stabilisation designed to achieve the permanent reduction of the customer's weight. The inclusion of the support service in the price paid for the food packs, whilst not conclusive in itself, seems to me consistent with this being what the taxpayer offers and, more particularly, what the consumer wishes and intends to purchase and receive. The support services are integral to the achievement of the customer's needs.....
>
> [40] ....The LighterLife food packs are not sold other than as part of a package which includes the support services nor are they bought on

> any other basis by the typical customers of this taxpayer. The fact that other types of low calorie diets can be bought over the counter for personal use does not therefore assist the court in determining the correct tax treatment of the transaction in question....

The Court decided that there was a single complex supply of services so the food packs could not be zero rated. This case again seems to be an example of the principles discussed at §45: while the food packs might have been of use to the taxpayers by themselves, they could not in practice be bought separately.

57. In *Weight Watchers (UK)* Ltd, the taxpayer provided, for a single price, weight-loss classes together with printed materials. There was evidence that the class could be of use without the printed material. Moreover, the taxpayer also had other members who did not attend the classes and received their printed material through the post or online and who paid a different price and had different terms of membership. It was not possible, however, to attend the classes without paying the single price that also entitled the customer to the publications. The Court of Appeal held that the supply to the members for a single price of the classes and printed material was a single supply of a weight loss programme.

58. What do these principles mean for the supplies at issue in this appeal?

59. The appellant has satisfied me that the supplies by PE and LM should not be seen as a single supply from an economic point of view, even if I assumed that they were supplied by the same taxpayer. Looked at from the point of view of a typical consumer, a significant number of LM's customers buy the printed material *without* buying tuition from PE. The facts do not make it clear whether this is because consumer intends to purchase tuition from someone else, or whether the purchaser intends to use the printed materials other than in combination with a tuition course. I do not consider it matters. It is clear that so far as the transaction between LM and the typical consumer is concerned, for a significant number of them the printed material is an end in itself. This factor is a major distinction with *CEM* where the printed material was found not to be an end in itself but always purchased with the view to obtaining the qualification offered by CEM.

60. Moreover, the supply of tuition and the supply of the printed materials were independent of each other for the reasons given in the previous paragraph. A student could take a PE course without making a purchase of printed materials from LM; and consumers could purchase LM's printed materials without purchasing a course from PE.

61. While it is true that the LM's printed material appeared to be intended specifically to support PE's tuition course so that purchasing both would allow the consumer to pass an exam or gain a qualification (as with *CEM)* this is not enough by itself to mean they are a single, indivisible economic supply which it would be artificial to split. This is the point I referred to in respect of *Middle Temple*: a building is useless without a water supply but that by itself does not make a supply of land with water a single *economically* indivisible supply. The question is influenced by choice: can the consumer obtain the water and land separately? In *Middle Temple*

the consumer could not: similarly in *CEM, Baxendale* and *Weight Watchers* the two elements of the supply could not be obtained separately. In this case, however, the consumer could buy the course from PE without the printed material from LM, or s/he could buy the printed material from LM without the course from PE.

62. I find LM and PE's supplies were not equally inseparable and indispensable, because the consumer could obtain each element separately. This was not a case where it could merely be said that it was only in other circumstances that the course and the printed material could be supplied separately by third parties: here it was right to say that in the circumstances at issue in the appeal the course and/or printed material could be supplied separately by third parties. There was genuine freedom of choice because the price of the tuition from PE, and the price of the printed materials from LM, did not alter whether purchased separately or together.

63. The case of *Wheels* offers a useful comparison because in that case most consumers chose to take the insurance with the car but nevertheless the Upper Tribunal found the car and insurance comprised separate supplies because they were economically divisible; there was genuine freedom of choice albeit many chose to take both elements from the taxpayer. Here many consumers take both the course and materials from PE/LM but that appears to be for the sake of convenience as they did have genuine freedom of choice.

64. While separate prices and invoicing is relevant, it is not decisive: here there were separate prices which supports the conclusion that the supplies were separate. Where the consumer chose to take both the learning materials and tuition course, it appears (§28) there was a single invoice from PE but one which made it clear that in so far as the learning materials were concerned, PE was acting as agent for LM. In my view that does not detract from the conclusion that the supplies were separate when seen in the overall context.

65. In conclusion, the appellant has satisfied me that if LM had supplied both the tuition and the printed materials, under exactly the same conditions as they were supplied by PE and LM, there would have been two separate supplies, one of tuition and one of printed materials. Therefore, so far as Notes (2) and (3) of Group (3) of the zero rating provisions are concerned, the supply of the printed materials by LM was not 'connected' with the supply of tuition by PE because, if those two supplies had been made by a single supplier they would <u>not</u> have been treated as a single supply of services. I do not have to determine whether, if I had reached the opposite conclusion, that supply would have been standard rated, but it seems, following *CEM,* it would have been because it would have been a supply of services.

66. The appeal is therefore allowed.

The appellant's alternate legal arguments

67. The appellant had two alternate arguments in case its appeal failed on its primary ground that Notes (2) and (3) did not apply on the facts of its case. The two alternate arguments were:

(1) The law as amended breaches fiscal neutrality because (if HMRC were right) the supply of printed materials by LM would be standard rated but the supply of the identical printed materials by another supplier (such as Amazon or Waterstones) would be zero rated;

(2) The Tribunal should apply a 'muscular' statutory construction of Notes (2) and (3) in order to be consistent with EU law principles as explained in cases such as *Telewest* and hold that those notes only apply where there is abuse in the sense meant by the CJEU in *Halifax* (which is not alleged here).

68. I was asked not to make a ruling on these alternative cases if the appellant succeeded on its primary grounds. I agree that, as it is unnecessary to do so in order to determine this appeal, it is much better for me not to make a ruling on these two legal arguments in the absence of submissions from HMRC and so I do not do so.

Appeal rights

69. The Rules require that, when the Tribunal issues its decision on the substantive appeal, it also notifies the parties 'of any right of appeal against the decision....' (Rule 35(2)(b). HMRC have already made it clear that they intend to apply for permission to appeal against my decision if it goes against them (as it has); the appellant has already indicated that it does not accept that HMRC has any right to make an application for permission to appeal.

70. In the absence of detailed representations from either party on this matter, I am reluctant to pre-judge, before any application for permission to appeal has been made, the question of whether HMRC even have a right to apply for permission to appeal. My own reflections on the subject suggest to me that the answer is perhaps not as obvious as it might at first appear.

71. And while the Tribunal has wide case management powers, it is far from clear that I have the power to suspend the effect of that part of Rule 35(2)(b) and issue my decision without notifying appeal rights. Nevertheless, it seems to me that that is what I should do, relying on Rule 7(1) the effect of which is that the issue of this decision is nevertheless effective even if not fully compliant with Rule 35(2)(b).

72. The notification is therefore that this document contains full findings of fact and reasons for the decision. If HMRC is dissatisfied with this decision they may have 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. Such an application must be received by this Tribunal not later than 56 days after this decision is sent to that party, and if made, it must address the issue of whether there is a right for HMRC to make an application for permission to appeal.

73. I appreciate that under Rule 8 HMRC are barred from taking further part in the proceedings, which may not only mean that they have no right to apply for permission to appeal but in addition may mean that they are not even permitted to make representations on the subject of whether they have a right to apply for permission to appeal. If they do make an application for permission to appeal, the appellant will be

given the opportunity to make representations on the extent if any to which the Tribunal should consider it.

74. 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.

Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE: 21 June 2018