TC06854

Appeal number: TC/2016/04972

PROCEDURE – reference to the CJEU – parties given the opportunity to comment in accordance with the Tribunal's directions – Appellant failing to comply with directions – reference finalised and submitted – Appellant's application that (a) the Tribunal ask the CJEU to return the reference and (b) the returned reference be amended to include changes proposed by the Appellant – application refused.

FIRST-TIER TRIBUNAL
TAX CHAMBER

HEALTHSPAN LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

The Application was determined on 7 and 8 December 2018 in Chambers without a hearing, having considered the submissions made by PricewaterhouseCoopers for the Appellant and by the Solicitor's Office of HM Revenue and Customs for the Respondents.

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DECISION

1. On 14 November 2018, Healthspan Limited ("Healthspan") made an application ("the Amendment Application") asking the Tribunal to withdraw a reference already made to the Court of Justice of the European Union ("the CJEU"), and replace that reference with one containing amendments which, in Healthspan's view, should have been included in the submitted reference.

2. I refuse the Amendment Application, for the reasons set out below.

Background

3. Healthspan sells non-prescription health products to retail customers who place their orders using the internet, phone and mail order. Between 1 April 2012 and 31 January 2016, the overwhelming majority of Healthspan's products ("the goods") were despatched from a warehouse in the Netherlands and delivered to customers in the UK.

4. HMRC decided that Article 33 of the Principal VAT Directive ("the PVD") applied, because the goods had been delivered "by or on behalf of the supplier", and that Healthspan was therefore required to be VAT registered in the UK with effect from 1 April 2012. HMRC also assessed Healthspan to VAT of £27,399,190 (subsequently reduced to £27,303,658). Healthspan appealed to the Tribunal.

The hearing and the Decision

5. I heard the appeal on 19 and 20 February 2018. Healthspan's position was that Article 33 did not apply and therefore the meaning of "on behalf of" did not need to be referred to the CJEU. Instead, the Tribunal should allow the appeal. However, if the Tribunal decided to make a reference, it should be delayed and joined to a reference in *SportsDirect.com Retail v HMRC; SDI (Brooks EU) v HMRC* ("*SportsDirect*").

6. HMRC's primary position was that the meaning of "on behalf of" in Article 33 was unclear, and it was necessary to make a reference; furthermore, that reference should be made after the hearing rather than being joined to a reference in *SportsDirect*. HMRC's secondary position was that the goods had been supplied "on behalf of" Healthspan, and so came within Article 33.

7. The decision was issued on 27 April 2018 under reference [2018] UKFTT 0241 (TC) ("the Decision"). By the Decision:

(1) I decided that goods ordered by phone, and those delivered by courier, I were delivered "on behalf of" Healthspan, so that Article 33 applied. In relation to those supplies, the Decision was final; and

(2) in relation to goods supplied to internet and mail order customers by post, I decided a reference to the CJEU was necessary, to obtain a ruling on the meaning of the phrase "by or on behalf of the supplier" in Article 33. I also decided not to delay the making of that reference behind *SportsDirect* for the reasons explained at [268]-[274] of the Decision.

The Directions

8. Also on 27 April 2018, I sent a draft reference ("the Draft Reference") to the parties, together with the following directions ("the Directions"):

> (1) by one calendar month from the date of the Directions, the parties shall either provide comments on the Draft Reference, or inform the Tribunal that they have no comments.
>
> (2) The parties have permission to provide comments on the following matters only:
>
> > (a) any findings of fact made in the Decision not included in the Draft Reference, but which the party considers should have been included, cross-referenced to the relevant paragraph(s) of the Decision and the Draft Reference;
> >
> > (b) any findings of fact made in the Decision which are included in the Draft Reference, which the party considers should not have been included, cross-referenced to the relevant paragraph(s) of the Decision and the Draft Reference;
> >
> > (c) any case law or legal provisions which are not included in the Draft Reference, which the party considers should have been included, with reasons;
> >
> > (d) any case law or legal provisions which are included in the Draft Reference, which the party considers should not have been included, and
> >
> > (e) any comments on the wording and/or scope of the questions asked in the Draft Reference, with alternative wording where relevant.

9. On 15 May 2018, in compliance with the time limit set out in the Directions, HMRC emailed the Tribunal saying:

> "Pursuant to paragraph 1 of the Directions, HM Revenue and Customs are content with the draft reference which accompanied the Directions and save for an indication of our approval we have no comments to make in relation to it."

10. Healthspan did not respond to the Directions. Neither did they ask for an extension of time.

The phone/courier PTA Application

11. As already noted, the Decision was final in relation to goods ordered by phone and those delivered by courier. On 24 May 2018 Healthspan applied under Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") for permission to appeal to the Upper Tribunal ("the UT") against the Decision, to the extent that it related to those supplies ("the phone/courier PTA Application").

12. The phone/courier PTA Application contained four grounds. Ground (ii) was that:

> "the FTT erred in law in concluding that there was no contract between PostDirect and the customer in respect of goods delivered to phone customers and goods sent by courier and that accordingly such supplies were dispatched or transported 'on behalf of' the Appellant."

13. On 14 June 2018 I gave permission to appeal on that ground, and on grounds (i) and (iii), which were linked to ground (ii). I refused permission on ground (iv), which was headed "miscellaneous findings of fact", because the threshold set in *Edwards v Bairstow* (1955) 36 TC 207 and related case law had not been met.

The Stay Application

14. Also on 24 May 2018, Healthspan applied for the reference to be stayed ("the Stay Application"), pending resolution of its appeal to the Upper Tribunal in relation to goods ordered by phone and those delivered by courier.

15. On 30 May 2018, HMRC objected to the Stay Application. Points (i), (ii), (iii), (v) and (vi) of their grounds of objection were, in summary, that:

(1) Healthspan had not sought to appeal the FTT's finding that a reference to the CJEU was "necessary" to decide the appeal;

(2) none of the questions the FTT had proposed to refer in its draft reference would be affected in any way, even were Healthspan's appeal to the UT to succeed; and

(3) the issue to be referred is one of general importance across the EU.

16. On 15 June 2018, I refused the Stay Application for the reasons given at points (i), (ii), (iii), (v) and (vi) of HMRC's Notice of Objection. I also said that there was "no good reason to delay the reference". I extended the deadline for the parties to make comments on the draft application to 29 June 2018.

The Stay PTA

17. On 27 June 2018, Healthspan applied for permission to appeal my refusal of the Stay Application ("the Stay PTA"). On 8 August 2018, I refused the Stay PTA. At the end of that refusal decision, I informed Healthspan of its right to make a further PTA application to the UT, and said:

> "Pending any such further application, and (if made) its resolution, I have stayed the CJEU reference. The parties are directed to inform the FTT as to whether any such applications are made to the Upper Tribunal and if so, the outcome of that or those applications."

The Upper Tribunal

18. As noted above, I had given Healthspan permission to appeal on Grounds (i) to (iii) of the phone/courier PTA, but refused permission on Ground (iv). On 27 June 2018, Healthspan made an application to the UT for permission to appeal on Ground (iv).

19. On 13 July 2018, the UT (Judge Berner) refused Healthspan permission to appeal on Ground (iv). On 25 July 2018, Healthspan applied for that decision to be reconsidered at an oral hearing

20. On 17 August 2018 Healthspan applied to the UT for permission to appeal my decision on the Stay Application. On 12 September 2018, the UT (Judge Berner) refused that application on the papers. On 25 September 2018, Healthspan applied for that decision to be reconsidered at an oral hearing.

21. The two applications – for permission to appeal on Ground (iv) and for permission to appeal my refusal to stay the reference – were joined and heard together before Judge Berner on 23 October 2018. Ms Nicola Shaw QC represented Healthspan and Mr Andrew Macnab of Counsel represented HMRC.

22. On 29 October 2018 Judge Berner made his decision ("the UT Decision"), refusing both applications. He first set out the background, and then dealt with the Ground (iv) PTA, saying:

> [12] …the FTT identified two different categories of supply. One, which I shall call 'the Appeal Category' (the goods ordered by phone and those delivered by courier), was where it was found that there was no contract between the customer and PostDirect and that consequently, without any need to explore further the EU law on the meaning, in Article 33, of 'on behalf of', the FTT considered that it was able to conclude that such supplies by Healthspan fell within Article 33 and that the place of those supplies was in accordingly in the UK. The other category, which I shall describe as 'the Reference Category' (goods ordered by internet or mail order), could not be determined in that way, as the FTT found that in those cases there was a contract for delivery between the customer and PostDirect. The FTT was unable to determine the place of supply for that category of supply without first seeking guidance from the CJEU.
>
> It was apparent in the hearing from Ms Shaw's submissions that the real issue for Healthspan in respect of Ground (iv) is not directly related to the Appeal Category of supplies but is more specifically directed at the findings of fact that are included in the FTT's draft Schedule for the Order for Reference to the CJEU. Ms Shaw spent some time identifying for me where the findings which Healthspan seeks to impugn in its appeal appear in that Schedule. Healthspan may have arguable concerns as to those findings, but it does not seem to me that those concerns can properly form a ground of appeal in relation to the Appeal Category of supplies when the reference relates not to that category of supplies but to a different category, namely the Reference Category of supplies."

23. In relation to the Stay PTA, Judge Berner first considered Healthspan's argument that the reference should be stayed until after the determination of its appeal in relation to the goods delivered by post/courier. He said at [18]:

> "whether a reference should not be made until it is possible for the facts to be fully reflected, is essentially a matter of judgement. That

> judgement must be exercised in the context of the particular circumstances of the case and the nature of the reference which is intended to be made to the CJEU. There can be no hard and fast rule that a reference should not be made whilst there remains an element of factual dispute that might require to be resolved on appeal."

24. He continued at [21]:

> "It is common ground [between the parties] that the CJEU is being called upon to provide guidance on the interpretation of Article 33… the nature of the reference is such that the interpretative guidance which is thereby sought from the CJEU will be capable of being applied to a number of factual circumstances, including but not limited to those arising in the present case. As a matter of principle, in laying down those guiding principles, the CJEU will not be making a definitive decision on the facts of this or any other case; that will be a matter for the national court."

25. He concluded this part of his decision by saying at [28]: "I am not persuaded that there is any arguable error of law in the FTT Stay Decision".

26. He then considered a further submission, which had not been made as part of Healthspan's Stay Application or its Stay PTA. This was that the reference should be stayed because Healthspan had subsequently become aware of a reference from Hungary in Case C-276/18 *KrakVet Marek Batko sp. K v Nemzeti Adó-é Vámhivatal Fellebbviteli Igazgatósága* ("*KrakVet*"), which also concerns the interpretation of Article 33. Judge Berner said:

> "[29] On an application for permission to appeal a decision of the FTT, the question for this Tribunal is whether there is any arguable error of law in that decision. As Mr Macnab submitted, it cannot be argued in this case that the FTT's decision not to stay the reference was wrong in law for having failed to take account of a matter which did not enter the public domain until after the FTT had made its decision. Nor does this Tribunal have any jurisdiction itself to stay the reference even if it were persuaded that such was the proper course. The proper course for Healthspan to have adopted in that respect, if it were so advised, would have been to re-apply to the FTT for a further direction on the ground that the publication of the reference in *KrakVet* had given rise to a material change in circumstances…
>
> [31] …Even if the *KrakVet* reference had been taken into account by the FTT, it would have been the case, in my view, that the decision of the FTT not to stay its own reference would have been one that would have been open to it, and it would not arguably have displayed any error of law."

The finalisation of the reference

27. As already noted, on 8 August 2018, at the end of my refusal of the Stay PTA, I directed the parties to "inform the FTT as to whether any [PTA] applications are made to the Upper Tribunal and if so, the outcome of that or those applications". In compliance with that direction, on 5 November 2018 HMRC sent the Tribunal a copy

of the UT Decision, which the parties had received on 3 November 2018; HMRC asked that the reference now be made as a matter of urgency.

28. Later the same day, Healthspan's representative, PricewaterhouseCoopers ("PwC"), emailed the Tribunal and copied HMRC, saying:

> "With respect, we contend that the Respondents' request is premature. Specifically, the Appellant is yet to comment on the draft order for reference, which it had abstained from doing given the application for the reference to be stayed.
>
> The Appellant makes reference to paragraph 13 of Judge Berner's decision dated 3 November 2018, where he acknowledges that the Appellant may have arguable concerns about some of the findings of fact contained in the draft order. With respect, the Appellant does not consider that a reference should be made on the basis of an order which the Upper Tribunal has noted may require further consideration.
>
> Instructions are currently being sought from the Appellant with regards a timetable for comments on the draft order. We therefore respectfully request a short period of time, until Friday 16 November 2018, in which to confirm instructions. I look forward to hearing from the Tribunal."

29. On 6 November 2018, I finalised the Order and the attached Schedule and asked the Tribunal Service to inform the parties. Early the following day, the Tribunal posted the reference. That final version is identical to the draft previously provided to the parties, with the addition of a further paragraph referring to *KrakVet,* and it is attached as an Appendix to this decision.

30. On 7 November 2018 PwC emailed the Tribunal saying:

> "we acknowledge that the reference is to proceed. However having now checked with Leading Counsel's clerk, we require until 30 November 2018 in which to provide comments on the draft order allowing for her availability. We consider this a reasonable request and the Respondents' protestations unfounded. There has been no unreasonable delay in this case."

31. That email crossed with the communication from the Tribunals Service informing the parties that I had decided to finalise and submit the reference, and attaching the final copy.

The Amendment Application

32. On 14 November 2018, Healthspan made the Amendment Application, and attached an amended text of the reference. The Amendment Application asked the Tribunal to direct that:

(1) Healthspan be allowed to make comments on the reference;

(2) the reference be amended in accordance with Healthspan's amended text; and

(3) the Tribunal contact the CJEU registry to ask that the reference as submitted be retracted and replaced by that amended text.

33. The grounds of the Amendment Application were that:

(1) It is contrary to the principles of natural justice for the reference to have been made without first allowing Healthspan an appropriate opportunity to provide comments, particularly given the correspondence of 5 November indicating that Healthspan was still considering the draft.

(2) Healthspan had understood that it would have adequate opportunity to comment and the Tribunal's conduct supported that understanding.

(3) It is wholly unreasonable and in contravention of Rule 2 as a whole and, in particular Rule 2(2)(c), for the Tribunal to have sent the order without first allowing the Appellant adequate opportunity to make comments.

(4) In the UT Decision, Judge Berner said at [13] that Healthspan "may have arguable concerns" about the Tribunal's findings of fact, and in Healthspan's submission it was thus "especially important" that it be allowed to provide comments on the reference.

(5) The reference should have included questions about*:*

(a) the application of HMRC's policy and Healthspan's compliance with that policy;

(b) the ruling given to Healthspan by the Dutch tax authorities; and

(c) the collection of tax in accordance with that ruling and HMRC's policy.

(6) In that context, Healthspan has requested sight of the relevant policy documents from HMRC, but these have not been provided;

(7) PwC emailed the Tribunal on 7 November 2018 saying that Healthspan would provide comments on the reference by 30 November 2018, and this was "more than ample time" for it to be made by 29 March 2019, the date on which the UK is scheduled to leave the EU.

(8) The UK's impending exit from the EU is not a sufficient basis for expedition.

34. Healthspan's proposed amendments to the reference were, in summary:

(1) the removal of certain findings of fact made by the Tribunal in the Decision, with which it disagrees. By way of footnote to each of these changes, Healthspan says "The UT agreed that the Appellant had 'arguable concerns' over this finding of fact";

(2) the removal of a sentence in what was originally paragraph 40 of the draft reference (now paragraph 41 of the final reference). That paragraph refers Directive 2017/2455 ("the New Directive") which amends Article 33 from 1 January 2021. The sentence proposed for deletion reads "both parties agreed that Healthspan had intervened indirectly in the transport of the goods".

Healthspan sought the deletion of that sentence on the basis that it does not accept that it "intervened" within the meaning of Article 2(1) of the New Directive;

(3) the inclusion of a section headed "the Appellant's arguments in outline" and space for a similar section headed "HMRC's arguments in outline";

(4) extensive changes to the questions for reference; and

(5) the addition of further questions about the extent to which reliance can be placed on a ruling given by one EU country as to the operation of Article 33, see further §64 below.

35. On 19 November 2018, HMRC objected to the Amendment Application on the following grounds:

(1) the draft reference accurately reflected the findings of fact made by the Tribunal, whereas Healthspan, contrary to the Tribunal's express direction that the parties were not to go behind those findings, now attempts to amend those findings in its favour, and then use those amended findings to revise the questions for reference;

(2) there is no justification for Healthspan's proposed amendment to para 41 of the reference;

(3) there is no requirement for an outline of the parties' arguments to be included;

(4) the questions as originally drafted accurately reflect the findings of fact made in the Decision, and are neutral, relevant and clear. Healthspan's suggested revisions attempt to slant the wording and introduce caveats in its favour; and

(5) because the Tribunal's original draft is to be preferred to that now put forward by Healthspan, and because Healthspan has not established any good reason for that original draft to be amended, there is no need for the final reference to be recalled from the CJEU.

Reasons for refusing the Amendment Application

36. The decision as to whether or not to make a reference, and the content of that reference, is a matter for the judge, not for the parties. This is clear from the legislation and from the case law.

37. Article 267 of the Treaty on the Functioning of the European Union ("the TFEU") states[1]:

> "The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a

[1] All underlining by way of emphases in the following citations is mine.

> question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

38. In *Bulmer v Bollinger* [1974] 2 All ER 1226, Lord Denning considered the earlier version of this provision, at Article 177(2) and (3) of the Treaty of Rome, and said (at page 1233):

> "short of the House of Lords, no other English court is bound to refer a question to the European court at Luxembourg. Not even a question on the *interpretation* of the Treaty. Article 177 (2) uses the permissive word 'may' in contrast to 'shall' in article 177 (3). In England the trial judge has complete discretion. If a question arises on the interpretation of the Treaty, an English judge can decide it for himself. He need not refer it to the court at Luxembourg unless he wishes. He can say: 'It will be too costly,' or 'it will take too long to get an answer,' or 'I am well able to decide it myself.' If he does decide it himself, the European court cannot interfere. None of the parties can go off to the European court and complain. The European court would not listen to any party who went moaning to them."

39. He went on to say at p 1234:

> "An English court can only refer the matter to the European Court 'if it considers that a decision on the question is necessary to enable it to give judgment'. Note the words 'if it considers'. That is, 'if the English court considers'. On this point again the opinion of the English courts is final, just as it is on the matter of discretion. An English judge can say either: 'I consider it necessary', or 'I do not consider it necessary'. His discretion in that respect is final."

40. He then considered the position when the judge decides to make a reference, saying:

> "The European Court will accept his opinion. It will not go into the grounds on which he based it. The European Court so held in *NV Algemene Transport-en Expeditie Onderneming Van Gend en Loos v Nederlandse Tarief-commissie* ([1963] CMLR 105 at 128) and *Albatros v Sopeco* ([1966] CMLR 159 at 177). It will accept the question as he formulates it: *Fratelli Grassi v Amministrazione delle Finanze* ([1973] CMLR 322 at 335). It will not alter it or send it back. Even if it is a faulty question, it will do the best it can with it: see *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Grossmärkte GmbH & Co KG* ([1971] CMLR 631 at 656). The European Court treats it as a matter between the English courts and themselves – to be dealt with in a spirit of cooperation – in which the parties have no place save that they are invited to be heard. It was so held in *Hessische Knappschaft v Maison Singer et Fils* ([1966] CMLR 82 at 94)."

41. The relevant extract from the last of Lord Denning's cited authorities, *Knappshaft v Maison Singer et Fils,* is as follows:

> "Under Article 177 of the Treaty it is for the court or tribunal of a Member State, and not the parties to the main action, to bring a matter before the Court of Justice.
>
> Since the right to determine the questions to be brought before the Court thus devolves upon the court or tribunal of the Member State alone, the parties may not change their tenor or have them declared to be without purpose. Consequently the Court of Justice cannot be compelled at the request of a party to entertain a question when the initiative for referring it to the Court pertains not to the parties but to the court or tribunal of the Member State itself, or to entertain within the particular framework of Article 177 a claim based primarily on Article 184.
>
> Besides, the contrary view fails to recognize that the authors of Article 177 intended to establish direct cooperation between the Court of Justice and the courts and tribunals of the Member States by way of a non-contentious procedure excluding any initiative of the parties, who are merely invited to be heard in the course of that procedure."

42. More recently, in Case C-316/10 *Danske Svineproducenter v Justitsministeriet,* one of the parties and the intervener sought to reformulate the question referred by the national court "in such a way as to extend or define its scope". The CJEU refused, saying at [32]:

> "In that regard, it must be noted that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case before it, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The right to determine the questions to be put to the Court thus devolves upon the national court alone and the parties to the main proceedings may not change their tenor (see, *inter alia*, Case C-138/08 *Hochtief and Linde-Kca-Dresden* [2009] ECR I-9889, paragraphs 20 and 21 and the case-law cited)."

43. The CJEU's "Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings" ("the CJEU's Recommendations") states, under the heading "provisions which apply to all requests for a preliminary ruling", and the subheading "the originator of the request for a preliminary ruling":

> "The jurisdiction of the Court to give a preliminary ruling on the interpretation or validity of EU law is exercised exclusively on the initiative of the national courts and tribunals, whether or not the parties to the main proceedings have expressed the wish that a question be referred to the Court. In so far as it is called upon to assume responsibility for the subsequent judicial decision, it is for the national court or tribunal before which a dispute has been brought – and for that court or tribunal alone – to determine, in the light of the particular

> circumstances of each case, both the need for a request for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court."

44. In summary, the purpose of a reference is to enable the court or tribunal to give judgment. It is the judge, not the parties, which gives judgment. In the instant case, I have decided that a reference is necessary to enable me to decide Healthspan's appeal, and the scope and tenor of the reference is a matter for me.

Adequate opportunity to provide comments?

45. Healthspan complains that it has not been given "an adequate opportunity to provide comments" on the reference, and that this is both a breach of natural justice and fails to comply with the overriding objective, including in particular Rule 2(2)(c). That Rule obliges the Tribunal to ensure "so far as practicable, that the parties are able to participate fully in the proceedings".

46. These submissions are without foundation. Not only is the making of a reference a matter for the trial judge, but the parties had ample opportunity to provide comments:

(1) on 27 April 2018 they were provided with the Draft Reference and directed to provide comment within one calendar month, or to tell the Tribunal they had no comments. Healthspan failed to comply with that direction, and did not request an extension of time; and

(2) on 15 June 2018 I refused the Stay Application, and extended the deadline for comments on the Draft Reference to 29 June 2018. Healthspan did not provide comments, and did not ask for the time limit to be further extended.

Misled by the Tribunal?

47. Healthspan also submits that it was misled by the Tribunal's conduct into thinking that it would be able to provide comments after the stated deadlines. The Amendment Application expands this submission by saying that:

(1) by extending the deadline for comments by two weeks on 15 June 2018, the Tribunal "was thereby appearing to acknowledge that whilst the challenge to the timing of the reference and the substantive decision was ongoing it was inappropriate to finalise the order";

(2) the Tribunal did not finalise the reference at the end of that two week period; and

(3) when the Tribunal refused the Stay PTA on 8 August 2018, the Tribunal "did not indicate that the Appellant would have no further opportunity to provide comments on it should its challenge to the decision not to stay the reference be unsuccessful [before the UT]".

48. These points lack any merit:

(1) on 15 June 2018, the parties were given a specific date by which comments had to be provided. There was no explicit or implicit assurance that this deadline would be further extended;

(2) the reference was not submitted on 29 June 2018 because Healthspan made the Stay PTA Application on 27 June, and it was in the interests of justice to delay making the reference until after I had considered that Application. The staying of the reference and the making of comments on that reference are two separate matters; and

(3) on 8 August I stayed the finalisation and submission of the Draft Reference pending the resolution of the Stay PTA at the UT, but neither then, nor at any subsequent point, was Healthspan told that it would have a further opportunity to comment on the Draft Reference once the UT had decided the Stay PTA. A Tribunal is not required to inform the parties that it will enforce a time limit.

Failure to comply with directions

49. As the Amendment Application does not ask for relief from sanctions, the line of authority which includes *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537 and *Denton v White* [2014] EWCA Civ 906 is not strictly applicable. However, the courts and tribunals have repeatedly emphasised the need for parties to comply with directions. For example, in *McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC) Judge Sinfield held that there was no basis for the UT to "adopt a different, ie more relaxed, approach to compliance with rules, directions and orders than the courts that are subject to the CPR"; that guidance was later endorsed by the Supreme Court in *BPP v HMRC* [2017] UKSC 55 at [25]. In the same judgment, the Supreme Court also approved Ryder LJ's ruling that there was "no justification for a more relaxed approach to compliance with rules and directions in the tribunals". In *Martland v HMRC* [2018] UKUT 0178 (TCC), which concerned an application to make a late appeal, the UT said at [43]:

> "The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for 'litigation to be conducted efficiently and at proportionate cost', and 'to enforce compliance with rules, practice directions and orders'."

50. In the context of that guidance, it is relevant that Healthspan failed both to comply with the original Directions, and failed to comply with the two week extension which expired on 29 June 2018. It was not until 5 November 2018 that PwC first requested "a short period of time, until 16 November 2018" for Healthspan to consult its barrister about the draft reference; their further email of 7 November then stated: "we require until 30 November 2018 in which to provide comments". adding that they considered this to be "a reasonable request".

51. Healthspan's application for an extension of time was therefore not made until over four months after the deadline had expired. This was a serious and significant delay.

52. Although Healthspan assumed it would be allowed to make comments after the UT decided its Stay Application, there was no reasonable basis for that assumption.

53. The Decision was issued on 27 April 2018, and the related reference had already been delayed significantly because of Healthspan's Stay Application and the related Stay PTA. Further delay was not in the interests of justice.

Judge Berner's comments

54. Healthspan seeks to rely on Judge Berner's statement at [13] of the UT Decision that Healthspan "may have arguable concerns" about the Tribunal's findings of fact about the internet/mail order goods which form the subject of the reference. However, it is clear from the context that Judge Berner was not agreeing with Healthspan's concerns, but instead pointing out that any such concerns were irrelevant to the issue over which he had jurisdiction, namely whether to give permission to appeal in relation to Ground (iv) of the phone/courier PTA. That Ground does not relate to the supplies with which the reference is concerned.

55. In the footnotes to its amended draft reference, Healthspan repeatedly states that "the UT agreed that the Appellant had arguable concerns" over specific identified findings of fact made in the Decision. Those footnotes are incorrect because:

(1) Judge Berner made no mention of any specific finding of fact, as is clear from the text of the UT Decision; and

(2) did not agree that Healthspan's concerns were arguable; instead he said they may be arguable.

56. In any event, as Judge Berner himself makes clear, he had no jurisdiction over the making of the reference.

Proposed changes to the findings of fact

57. It is well-established that the role of the First-tier Tribunal under English law is to find the facts. In *Procter & Gamble v HMRC* [2009] EWCA Civ 137 at [7], Jacobs LJ said "…it is the tribunal which is the primary fact finder. It is also the primary maker of a value judgment based on those primary facts".

58. The Decision contains the Tribunal's factual findings, which are complete. It is only questions of law which have been referred to the CJEU. If a party seeks to challenge a finding of fact made by the Tribunal, it must do so by way of an appeal to the UT, and that challenge will only succeed, as Jacob J says later in the same passage, if the Tribunal "has made a legal error…in so doing (eg reached a perverse finding or failed to make a relevant finding or has misconstrued the statutory test)". A party cannot enter into debate with the Tribunal and with the other party about findings of fact which have already been made, by making amendments to a draft reference, as Healthspan now seeks to do.

59. Neither does the CJEU provide a forum in which parties can challenge findings of fact. The CJEU's Recommendations say at paragraph 8 that "A request for a

preliminary ruling must concern the interpretation or validity of EU law, not…issues of fact raised in the main proceedings."

60. In any event, when the CJEU makes a ruling on EU law, it does not apply that ruling to the facts of the case. The CJEU Recommendations say paragraph 11:

> "…although, in order to deliver its decision, the Court necessarily takes into account the legal and factual context of the dispute in the main proceedings, as defined by the referring court or tribunal in its request for a preliminary ruling, it does not itself apply EU law to that dispute. When ruling on the interpretation or validity of EU law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute in the main proceedings, but it is for the referring court or tribunal to draw case-specific conclusions...

61. Moreover, in the case of the Healthspan reference, I have taken care to draft the questions so that the CJEU's judgment can be easily applied to a wide range of circumstances. In particular, Question 2 lists a number of factors and asks the CJEU to rule on whether the existence of one of those factors means that Article 33 applies.

62. If, on appeal, the UT were to decide that one of the Tribunal's factual findings was erroneous as a matter of law, and the CJEU had ruled that the existence of that fact was necessary for Article 33 to apply, it would be simple and straightforward to apply the CJEU's judgment to Healthspan.

63. Judge Berner summarises the position at [21] of the UT Decision:

> "It is common ground that the CJEU is being called upon to provide guidance on the interpretation of Article 33, and not…to clarify the application of established principles in the particular circumstances of this case…the nature of the reference is such that the interpretative guidance which is thereby sought from the CJEU will be capable of being applied to a number of factual circumstances, including but not limited to those arising in the present case. As a matter of principle, in laying down those guiding principles, the CJEU will not be making a definitive decision on the facts of this or any other case; that will be a matter for the national court."

The further questions

64. Healthspan seeks to amend the reference to include the following questions:

> "To what extent is it relevant to the proper meaning and application of Article 33 that the approach adopted by one Member State differs to that adopted in another Member State, leading to double taxation of the same transaction? Does the response to this question depend upon whether:
>
> (a) a binding ruling on the application of Article 33 has been provided by the other Member State and/or tax has been collected by the other Member State pursuant to this ruling?; or

> (b) the Appellant has acted in accordance with the policy of interpreting Article 33 adopted in a Member State and/or tax has been collected by a Member State pursuant to this policy."

65. This issue was not raised during the hearing. Neither party suggested that guidance needed to be obtained from the CJEU on these points. There was also no evidence before the Tribunal that Healthspan would suffer double taxation, but rather the contrary: the Dutch VAT authorities informed Deloitte on 15 January 2016 that the VAT paid by Healthspan to the Netherlands could be refunded if the UK levied VAT in respect of the same supplies, see the Decision at [104(2)].

66. A decision on these additional questions was therefore not "necessary to enable [the Tribunal] to give judgment", see Article 267 of the TFEU. Essentially similar questions have, however, been raised in *Krakvet.* The CJEU will therefore consider these points in any event, and may also decide to join that case with Healthspan's, as I suggest at paragraph 9 of the reference.

HMRC's policy

67. The Amendment Application also refers to HMRC's failure to provide certain policy documents. As far as I am aware, there was no application to the Tribunal before or during the hearing of the appeal for HMRC to disclose policy documents. I am therefore unable to understand the basis for this submission.

Para 41 of the reference

68. The Amendment Application seeks the deletion of paragraph 41 of the reference, on the basis that Healthspan does not accept that it "intervened" within the meaning of Article 2(1) of the New Directive.

69. One of the issues considered during the hearing of the appeal was whether the New Directive had changed the law, or whether it simply restated the existing law (see [232] and [235] of the Decision). The Tribunal's understanding, from the submissions made by Ms Shaw, was that Healthspan accepted that it had intervened indirectly in the supply of the goods within the meaning of the New Directive. For example, in Reply she said that it was "offensive" and "not permissible" to apply the New Directive "retrospectively"; that submission makes little sense unless Healthspan accepted that it would fall within the revised wording of Article 33.

70. Moreover, I am unable to see any basis on which Healthspan could refuse to accept that it had intervened indirectly within the meaning of the New Directive, and the Amendment Application does not put forward any reasoning to explain or support the position now being taken.

The parties' arguments

71. Healthspan's amended draft reference includes a section headed "the Appellant's arguments in outline" and space for a similar section headed "HMRC's arguments in outline". No reason is given for the inclusion of these additional paragraphs, other than a footnote which states it is "usual practice".

72. The CJEU's Recommendations say at paragraph 16 (my emphasis) "The request should include, if need be, a brief summary of the relevant arguments of the parties to the main proceedings". In their objection to the Amendment Application, HMRC say that the inclusion of the parties' arguments is unnecessary, and I agree. The purpose of the reference is to obtain guidance as to the scope and application of Article 33, and the questions are drafted to achieve this. As paragraph 14 of the CJEU's Recommendations says, references must "be drafted simply, clearly and precisely…avoiding superfluous detail".

73. Moreover, three of the points which Healthspan seeks to include under that heading are well established legal principles on which no guidance is necessary. The final point concerns *Lebara v HMRC* Case C-520/10, which is already covered at paragraphs 38-39 of the reference.

Brexit

74. The Amendment Application submits that "the UK's impending exit from the EU is not a sufficient basis for expedition". Brexit was not a relevant factor in my decision to finalise and send the reference.

Appeal rights

75. This document contains full findings of fact and reasons for the decision. If Healthspan is dissatisfied with this decision, it 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 10 DECEMBER 2018

SCHEDULE TO THE ORDER FOR REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

Introduction

1. This reference for a preliminary ruling is made in the context of an appeal in the Tax Chamber of the First-tier Tribunal of the United Kingdom ("the referring tribunal").

2. The Appellant is Healthspan Limited, represented by PricewaterhouseCoopers LLP.

3. The Respondents are Her Majesty's Revenue and Customs ("HMRC"), represented by HMRC's Solicitor's Office. HMRC are the national authority responsible for the administration and collection of Value Added Tax ("VAT") in the United Kingdom.

The subject matter of the dispute

4. Healthspan is a Guernsey registered company which sells non-prescription health products using the internet, phone and mail order. Between 1 April 2012 and 31 January 2016 ("the relevant period"), the overwhelming majority of Healthspan's products were dispatched from a warehouse in the Netherlands and delivered to retail customers in the UK.

5. The reference concerns only products ordered by UK customers by internet or mail order during the relevant period, which were then delivered by post ("the goods"). Those customers had contracted with a separate company for delivery of the goods. That company was "Wial Computer and Data Services" ("Wial CDS"), trading as "PostDirect"; it was a subsidiary of a Netherlands company called Wial BV ("Wial").

6. HMRC decided that the goods had been supplied in the UK, on the basis that they were despatched or transported "by or on behalf of the supplier" and so came within Article 33 of Directive 2006/112/EC (the Principal VAT Directive or "the PVD"). implemented in the UK by Value Added Tax Act 1994 ("VATA"), s 7(4). HMRC did not seek to argue that the arrangements constituted an abusive practice (see *Halifax* C-255/02).

7. Healthspan appealed, on the basis that PostDirect was acting "on behalf of" the customers, not on behalf of Healthspan.

8. The referring tribunal heard Healthspan's appeal on 19 and 20 February 2018. On 27 April 2018 the Tribunal issued its decision, staying proceedings pending the judgment of the CJEU on the questions referred. These are set out at the end of this Schedule.

9. The referring Tribunal notes that the Court has recently received a reference from Hungary in Case C-276/18 *KrakVet Marek Batko sp. K v Nemzeti Adó-é Vámhivatal Fellebbviteli Igazgatósága* ("*KrakVet*"); this also raises questions concerning the interpretation of Article 33 of the PVD. The Court may wish to join the questions for determination raised by the referring Tribunal, with those raised in Case C-276/18.

Findings of fact made by the referring court

10. Prior to 1 April 2012, Healthspan sold its goods from the Channel Islands under the Low Value Consignment Relief ("LVCR") provisions, under which VAT was not due on importation to the UK, provided value of each consignment was below a prescribed limit. During that period, Healthspan not only sold the goods, but warehoused, despatched and delivered them; they were supplied to customers without any delivery charge being added to the order.

11. In June 2011, the UK Government announced that it was reviewing the LVCR. Healthspan decided to look into reorganising and relocating its business, primarily to reduce the VAT charged to customers.

12. On October 27 2011, Healthspan received confirmation from the Netherlands VAT authorities that, because customers who purchased Healthspan's goods would contract separately with a Dutch company for delivery of those goods, the VAT distance selling rules would not apply. Instead, the goods would be supplied in the Netherlands under Article 32.

13. Healthspan was advised by Deloitte Belastingadviseurs BV ("Deloitte") and by G3 Worldwide Mail NV, an international delivery and logistics provider and broker trading as "Spring". Deloitte drafted a document setting out the proposed arrangements ("the Briefing Paper"). Healthspan issued the Briefing Paper to five possible fulfilment houses. The Briefing Paper set out the structure of the arrangements which were later put in place as between Healthspan, PostDirect and the customers. Under "Impact", the Briefing Paper included this passage:

> "[fulfilment house] will be in the same position financially as if it had entered into a contract with Healthspan. Payment will flow from Healthspan but Healthspan will be acting in its capacity as collection agent. The only difference is contractual: [fulfilment house] is contracting directly with the customers of Healthspan, and the customers are legally obliged to pay the delivery charge due."

14. PostDirect was the selected fulfilment house. The arrangements in the Briefing Paper were implemented, and Healthspan began trading in this way from 1 April 2012. It stored its goods in a warehouse in the Netherlands. PostDirect operated the warehouse, and was required to pick and pack the goods selected by Healthspan's customers from the products stored in the warehouse.

15. PostDirect was also responsible for organising despatch and delivery of the goods. Delivery was carried out not by PostDirect directly but by a succession of third parties intermediated by Spring, which had previously assisted Healthspan to set up in the Netherlands.

The contractual terms

16. Customers agreed to PostDirect's terms and conditions ("PostDirect's T&Cs"), which constituted "a contract of carriage" in relation to the goods.

17. Healthspan and PostDirect signed two contracts, the "Collection of Payment Agreement" ("the Payment Agreement") and the Warehouse Agreement, before any goods were delivered to customers under the arrangements.

18. In addition to the terms of Warehouse Agreement and the Payment Agreement, Healthspan and PostDirect also agreed that PostDirect would make a fixed 6% profit on the delivery services.

19. Under the terms of the Warehouse Agreement and the Payment Agreement:

    a. the amounts to be charged to customers for delivery were agreed;

    b. Healthspan collected the delivery charge from customers and passed it to PostDirect;

    c. the goods were labelled by PostDirect in accordance with Healthspan's instructions;

d. a specialist "sorting machine" was rented from Healthspan. This was needed to comply with requirements imposed by Royal Mail, the designated provider of the Universal Postal Service in the UK.

e. where Healthspan refunded delivery charges to customers, it had the right to recharge those amounts to PostDirect. However, only made recharges during the first four months of the arrangement, when 50% of the refunded amounts were recharged. It was generally not worth the administrative effort of renegotiating PostDirect's 6% fixed profit in order that Healthspan should recover these relatively small amounts of refunded costs.

20. Healthspan's website contained terms and conditions ("Healthspan T&Cs"). Before a customer could complete his order, he had to accept the Healthspan T&Cs. During the relevant period, there were three versions of the Healthspan T&Cs.

a. The first version was dated 28 November 2013 ("the 2013 version"). This applied from the beginning of the relevant period.

b. The second version was in force on 4 September 2014 ("the 2014 version"). The exact date when it replaced the first version was not provided to the referring tribunal.

c. The third version came into force on 26 October 2015 ("the 2015 version"), some three months before the end of the relevant period.

21. All versions of the Healthspan T&Cs provided that Healthspan did not offer delivery; that service was instead provided by PostDirect. The versions differed in three areas:

a. refunds given where the goods were returned by customers;

b. delivery costs when replacement products were sent out by Healthspan; and

c. the passage of title to the goods from Healthspan to the customer.

22. In relation to refunds of delivery costs when goods were returned by the customer:

a. The 2013 version provided that Healthspan did not refund delivery costs.

b. The 2014 version provided that Healthspan did refund delivery costs.

c. The 2015 version provided that Healthspan only refunded delivery costs where the products were returned because they were "faulty or misdescribed".

23. Where goods were damaged during delivery, Healthspan's contract with the customers required that it provide replacement goods. Healthspan had no contractual right to recover the cost of those replacement goods from PostDirect, and did not do so.

24. In relation to the costs of delivering those replacement goods:

a. the 2013 and 2014 versions of the Healthspan T&Cs contained this term:

"although we are not obliged to do so, as a gesture of goodwill we will meet your costs of standard delivery and so will pay PostDirect on your behalf that additional Delivery charge"; but

b. the term was removed from the 2015 version.

25. The customer also had rights under PostDirect's T&Cs relating to delivery problems. However, these rights were significantly limited, being (a) less than the market value of damaged goods, and (b) requiring the customer to prove loss if the goods were delivered late.

26. In relation to title to the goods:

    a. The 2013 version of Healthspan's T&Cs said that title passed to the customer "from the time the Products are made available to PostDirect".

    b. The 2014 and 2015 versions retained that term, but made it conditional on Healthspan having received payment for the goods; a further provision said that title passed "when PostDirect takes physical possession of [the goods] as the person identified by [the customer] to take possession of [the goods]".

Other findings of fact

27. Healthspan gave all customers a discount on the goods. The discount was invariably equal (or slightly above) the cost of delivery. When the delivery price changed, so too did the discount. The two were displayed next to each other on Healthspan's order forms, so customers could see that the delivery charge was cancelled out by the discount. Healthspan's main aim in introducing and managing the discount was to prevent the delivery charge from having any impact on its market share.

28. PostDirect had no contact with the customers. Its T&Cs were made available to customers on Healthspan's website; all complaints about delivery were made to Healthspan; the return address label on the goods was that of Healthspan's UK office, and so any goods returned, including those damaged during delivery, were sent to Healthspan and not to PostDirect.

The VAT Committee and afterwards

29. On 5 May 2015, the UK and Belgium put questions about the operation of Article 33 to the EU's VAT Committee; those questions formed the basis for Working Paper 855 ("the Working Paper"). Attached to the Working Paper was an "example of an actual arrangement resulting in avoidance of the distance selling provisions in Articles 33 and 34 of Directive 2006/112". That example was based on Healthspan's arrangements.

30. The VAT Committee met on 4-5 June 2015, and subsequently published guidelines ("the Guidelines") which agreed with the UK's position in relation to the questions asked, either unanimously or almost unanimously.

31. On 15 January 2016, the Netherlands VAT authorities informed Healthspan that, in the light of the Guidelines, Healthspan's activities "should be regarded as distance sales".

32. From 1 February 2016, Healthspan reorganised its business, moving warehousing, despatch and delivery to the UK. All references to PostDirect were removed from its website and from its printed matter. From then on, UK customers received their goods without a delivery charge, and Healthspan accounted for UK VAT on its sales to UK customers.

The relevant law

33. Article 32 of the PVD reads (emphasis added):

> "Where goods are dispatched or transported by the supplier, or by the customer, or by a third person, the place of supply shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer **begins**."

34. Article 33 provides an exception to that rule. It is subject to conditions, which on the facts of this case were met. It reads, so far as relevant (emphasis added):

> "By way of derogation from Article 32, the place of supply of goods dispatched or transported **by or on behalf of the supplier** from a Member State other than that in

which dispatch or transport of the goods ends shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer **ends**…

35. Article 34 provides that Article 33 does not apply if certain conditions are met. On the facts of this case Article 34 is not relevant.

36. Articles 32 and 33 were implemented by the UK as VATA s 7. The parties agreed that it was possible to interpret these provisions consistently with the PVD. VATA, s7 reads, again so far as relevant:

"(1) This section shall apply…for determining, for the purposes of this Act, whether goods are supplied in the United Kingdom.

(2) Subject to the following provisions of this section, if the supply of any goods does not involve their removal from or to the United Kingdom they shall be treated as supplied in the United Kingdom if they are in the United Kingdom and otherwise shall be treated as supplied outside the United Kingdom.

(3) …

(4) Goods whose place of supply is not determined under any of the preceding provisions of this section shall be treated as supplied in the United Kingdom where–

(a) the supply involves the removal of the goods to the United Kingdom by or under the directions of the person who supplies them;…"

37. Neither party relied on, or referred to Directive 97/7/EC, entitled "on the protection of consumers in respect of distance contracts", in force until 13 June 2014, or the subsequent Directive 2011/83/EU.

38. As regards relevant case law, the Appellant submitted that in *Lebara v HMRC* Case C-520/10 ("*Lebara*") at [14] the CJEU had found that "on behalf of" meant "acting as agent". However, the referring tribunal did not accept that submission, finding that the CJEU in *Lebara* was instead simply citing from the order for reference.

39. The referring tribunal did however note that the CJEU had found in *Lebara* that that the distributors were not acting "on behalf of" Lebara, in part because they "neither knew nor controlled the resale price charged by the distributors or by the other intermediaries". In contrast, Healthspan and PostDirect agreed the delivery charge between them. The decision in *Lebara* was however insufficient, in the view of the referring tribunal, for it decide the case. No other relevant case law has been identified.

The grounds for the reference

40. The reference has been made for the following reasons:

a. The meaning of the words "on behalf of" has already been the subject of discussion at the VAT Committee, with the Commission services putting forward two possible meanings for the term. It described one of those meanings as described as a "literal interpretation" which essentially considered only the contractual relationships between the parties, and the other was a "broader interpretation" which took into account the economic reality.

b. The meaning of "on behalf of" is relevant not only to the VAT position in Member States **to which** goods have been sent, but also to Member States **from which** they have been sent. The question is therefore of general importance and one where the CJEU's ruling is likely to promote the uniform application of the law throughout the EU.

c. On 1 December 2016, the EU Commission issued a Proposal for a Council Directive amending the Articles of the PVD which related to "certain value added tax obligations for supplies of services and to distance sales of goods" ("the Proposal"). The Proposal said that a new directive would be issued which would add a new definition to the PVD and "clarifies Article 33(1) in line with the guidelines of the VAT Committee". On 5 December 2017, Directive 2017/2455 was published. So far as relevant to the issue in dispute, the Directive is effective from 2021.

d. Recital 6 to Directive 2017/2455 states that there had been "explosive growth" in distance selling; that the PVD "should be adapted to this evolution" and that the term "intra-Community distance sales of goods" should be defined. That definition is at Article 2(1) of the Directive, and reads :

> "'intra-Community distance sales of goods' means supplies of goods dispatched or transported by or on behalf of the supplier, including where the supplier intervenes indirectly in the transport or dispatch of the goods, from a Member State other than that in which dispatch or transport of the goods to the customer ends."

41. Both parties agreed that Healthspan had intervened indirectly in the transport of the goods. The Appellant's position is that the new definition takes effect only from 2021 and that until then Article 33 does not apply where (as here) there is a contract for delivery between the customer and a third party company. The Respondent's position is that Article 33 has always applied "where the supplier intervenes directly or indirectly in the transport or dispatch of the goods".

The view of the referring tribunal

42. The referring court's view is that the PostDirect acted "on behalf of" Healthspan in providing the delivery services, because: the customer could not choose to use another delivery company; pricing was agreed between PostDirect and Healthspan; Healthspan (and not PostDirect) dealt with all complaints about delivery, and when there was a problem with delivery for most of the period it was Healthspan which bore the cost of refunding customers. As a matter of economic reality, PostDirect was acting on behalf of Healthspan, even though customers entered into a separate contract of carriage with PostDirect.

The questions referred

43. The questions referred are here set out:

Question 1

Where the customer contracts (a) with the supplier to purchase the goods, and (b) with a third party delivery company ("the delivery company") for despatch and delivery, are the goods deemed to be supplied from the place where they are located at the time dispatch or transport of the goods to the customer begins, so that Article 32 (and not Article 33) always applies?

Question 2

If the answer to Question 1 is no, are goods transported "by or on behalf of the supplier" where the customer contracts with the delivery company and **one** of the following applies, and if so, which one(s):

(a) The customer has no practical alternative but to use the delivery company.

(b) The customer has contact only with the supplier and not with the delivery company.

(c) The supplier and the delivery company agree the price to be charged by the delivery company with no input from the customer.

(d) The supplier rebates the delivery charge to the customer by way of a discount on the price of the goods.

(e) The supplier collects the delivery charges from the customer and remits it the third party delivery company.

(f) The contractual terms which set out when title to the goods passes to the customer do not make commercial sense, but this does not matter in practice, because the supplier makes good to the customer the cost of any damage to the goods during delivery.

(g) In relation to delivery charges where there is a problem with the original delivery:

(i) under its contract with the customer the supplier is obliged to refund the charges already paid by the customer;

(ii) under its contract with the customer the supplier is not obliged to refund those charges, but does so as a matter of practice;

(iii) in either case, the supplier (and not the delivery company) bears the cost of these refunds; and/or

(iv) under its contract with the customer the supplier is obliged to pay *both* the costs of sending replacement goods, and the related delivery charge; or

(v) under its contract with the customer the supplier is obliged to pay the cost of sending replacement goods, but not for their delivery, but does so as a matter of practice.

Question 3

If the answer to question 2 is no, does the delivery company act on behalf of the supplier if **more than one** of the above points are satisfied? If so, which factors must be taken into account and what weight is to be given to each factor?

Question 4

If the answer to either Question 2 or Question 3 is yes, does the delivery company act on behalf of the supplier where the supplier intervenes directly or indirectly in the transport or dispatch of the goods, as will be the case from 2021 under Directive 2017/2455? In other words, do the changes introduced by that Directive simply express in clearer language the meaning of Article 33 in its current form?