[2019] UKFTT 43 (TC)

TC06939

Appeal number: TC/2015/05100

VALUE ADDED TAX – zero-rating under paragraph 2A of Group 8 to Schedule 8 of the Value Added Tax Act 1994 for supplies of aircraft engine parts – whether the Appellant has sufficient evidence to establish that the conditions for zero-rating under that provision have been met - yes, in relation to some of the supplies but not all of them

FIRST-TIER TRIBUNAL
TAX CHAMBER

MCBRAIDA PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 26 to 28 November 2018

Ms Valentina Sloane, instructed by BDO LLP, for the Appellant

Mr Howard Watkinson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

TABLE OF CONTENTS

I BACKGROUND

1. This decision relates to three consolidated appeals against two assessments to VAT, together with interest and a related penalty assessment.

2. The first VAT assessment relates to the VAT periods 03/11 to 12/14, with the exception of the VAT period 03/13, and was issued on 26 March 2015. The aggregate amount of the assessment is £2,380,521. That assessment was upheld by a review decision of the Respondents of 31 July 2015 and the Appellant notified its appeal against that decision to the First-tier Tribunal on 25 August 2015.

3. The second VAT assessment relates to the VAT period 03/13 and was issued on 24 September 2015. The amount of the assessment is £177,865. The Appellant declined the Respondents' offer of a review of that assessment dated 24 September 2015 and instead notified its appeal against that assessment to the First-tier Tribunal on 23 October 2015.

4. The penalty assessment relates to both of the VAT assessments and was issued by the Respondents by way of letters of 26 February 2016 and 7 March 2016. The amount of the assessment is £389,578.05. That assessment was upheld by a review

decision of the Respondents of 7 July 2016 and the Appellant notified its appeal against that decision to the First-tier Tribunal on 27 July 2016.

5. The Appellant manufactures and supplies parts for aircraft engines. It makes those supplies to a number of different customers although two of its most significant customers are Rolls-Royce Deutschland Ltd & Co KG ("RR") and Rolls-Royce Singapore Pte Ltd ("Rolls-Royce Singapore"), both of which are non-UK resident subsidiaries of Rolls-Royce plc ("Rolls-Royce") and which assemble aircraft engines. One of the confusing features of the conduct of the appeals to date is that, in many cases, one or both of the parties have been referring in their communications solely to supplies to members of the Rolls-Royce group when supplies to customers other than those two entities are also relevant to the assessments.

6. The grounds on which the Appellant made its appeal against the first review decision were that the Appellant had had in its possession, since the time of each relevant supply, sufficient evidence of export to satisfy the conditions for zero-rating set out in Section 30(8) Value Added Tax Act 1994 (the "VATA"), Regulation 134 of the Value Added Tax Regulations 1995 (the "VAT Regulations") and VAT Public Notice 725, some parts of which have statutory effect.

7. The grounds of appeal set out in the notice of appeal to the First-tier Tribunal referred only to supplies to members of the Rolls-Royce group and not to the other supplies made by the Appellant which had led to the first assessment. This is odd in that the Respondents' letter of 26 March 2015 had made it clear that the first assessment related to supplies to customers other than members of the Rolls-Royce group as well as supplies to those members – see the paragraph on page 2 of that letter starting "The assessment has been calculated…". Another oddity is that, whereas the aggregate amount of VAT set out in the Respondents' letter of 26 March 2015 (which was upheld by the review decision of 31 July 2015) was £2,380,521 and the individual figures set out in the notice of appeal were identical to those set out in that letter, the aggregate amount which is stated to be in issue in the notice of appeal to the First-tier Tribunal is the higher amount of £2,528,414.09.

8. On the same day as the Appellant submitted its notice of appeal against the first assessment to the First-tier Tribunal (that is to say, 25 August 2015), its adviser, BDO LLP ("BDO") raised with the Respondents an alternative basis for vacating the relevant assessment – namely, that the parts in question were of a kind ordinarily installed or incorporated in, and had in fact been installed or incorporated in, a "qualifying aircraft", as defined in paragraph 2A of Group 8 to Schedule 8 of the VATA ("paragraph 2A") so that the supplies qualified for zero-rating pursuant to that paragraph. In keeping with the approach adopted in the notice of appeal – which, as noted in paragraph 7 above, referred only to supplies to members of the Rolls-Royce group - BDO's letter referred only to supplies which the Appellant had made to RR.

9. In its response to that letter of 24 September 2015, the Respondents rejected that basis for claiming zero-rating because it alleged that the Appellant did not know at the time of each relevant supply that the parts in question were certain to be installed or incorporated in a "qualifying aircraft". In the same letter, the Respondents offered the

Appellant the right to have that decision reviewed. They also informed the Appellant that they had raised an assessment in respect of the VAT period 03/13.

10. The Appellant did not accept the offer of review which was set out in the Respondents' letter of 24 September 2015. Instead, it proceeded to give a second notice of appeal to the First-tier Tribunal. The grounds of appeal set out in the second notice of appeal were that the parts which were the subject of the supplies in question were of a kind ordinarily installed or incorporated in, and had in fact been installed or incorporated in, a "qualifying aircraft" so that the supplies qualified for zero-rating pursuant to paragraph 2A.

11. Unlike the Appellant's first notice of appeal to the First-tier Tribunal, the grounds of appeal set out in the second notice of appeal to the First-tier Tribunal did not expressly refer to members of the Rolls-Royce group although one might infer from the terms of the BDO letter of 25 August 2015 and the Respondents' response to that letter on 24 September 2015 that only the supplies to RR were in contemplation in formulating the grounds of appeal.

12. One odd feature of the second notice of appeal to the First-tier Tribunal is that the amount of tax which is stated to be in issue in the appeal is not the £177,865 which was the amount of the second assessment to which the Respondents had referred in their letter of 24 September 2015 (or even the £2,558,386 which constituted the aggregate amount of the two assessments or the £2,706,279.09 which constituted the aggregate of the amount of the second assessment and the amount which had been stated to be in issue in the notice of appeal to the First-tier Tribunal in relation to the first assessment) but instead the £2,528,414.09 which was the amount which had been stated to be in issue in the first notice of appeal to the First-tier Tribunal.

13. The Respondents have not sought to take issue with the discrepancies in the amounts which are stated to be in issue in the notices of appeal to the First-tier Tribunal in relation to the two assessments.

14. The grounds on which the Appellant made its appeal against the review decision in relation to the penalty were that the Appellant had not been careless in its behaviour in relation to the VAT errors that are alleged by the Respondents to have been made by the Appellant.

15. All three appeals have been consolidated pursuant to directions of the First-tier Tribunal dated 15 February 2016 and 16 August 2016.

16. Leaving the penalty assessment on one side for the moment, the issues which need to be addressed in relation to the VAT assessments that are the subject of the appeals mentioned above are:

> (a) in relation to each of the supplies in question, does the Appellant hold sufficient evidence of export to satisfy the conditions for zero-rating set out in Section 30(8) VATA, Regulation 134 of the VAT Regulations and VAT Public Notice 725?

(b) to the extent that it does hold such evidence in relation to a supply, did the Appellant acquire such evidence within the time limit set out in VAT Public Notice 725 – ie within three months of making the relevant supply - because, to the extent that it did not, the Appellant will remain liable for interest in respect of the relevant supply unless the supply qualified for zero-rating pursuant to paragraph 2A; and

(c) in relation to certain of the supplies in question, does the relevant supply fall within paragraph 2A?

17. There have unfortunately been a number of miscommunications and misunderstandings between the parties in relation to the assessments over the past three years. For example, it became apparent at the start of the hearing that, whilst the Appellant thought that the question set out in paragraph 16(a) above had already been resolved in its favour by agreement with the Respondents, the Respondents were of the view that their agreement extended only to certain of the supplies in question – namely, the ones made by the Appellant to RR – and that they had not agreed that the supplies of parts to other customers of the Appellant satisfied the conditions for zero-rating as exports. Similarly, it has taken longer than one might have hoped for the Respondents to accept that the Appellant now holds sufficient evidence of export in relation to its supplies to RR to justify zero-rating for those supplies and mean that, so far as those supplies are concerned, the only issues between the parties in relation to the application of the provisions conferring zero-rating for export supplies are the issues described in paragraphs 16(b) and 16(c) above.

18. As a result of the miscommunications which had occurred in the lead-up to the hearing, the parties agreed at the start of the hearing that they would seek to resolve the issues described in paragraphs 16(a) and 16(b) above by agreement following the hearing and would request a further hearing in relation to those issues only if and to the extent that:

(a) they were unable to reach agreement in relation to them; and

(b) after taking into account my decision in relation to the issue described in paragraph 16(c) above, the Appellant still wished to continue with its appeals.

19. Accordingly, the two issues described in paragraphs 16(a) and 16(b) are hereby deferred to a later date and both parties have liberty to make further applications to the First-tier Tribunal in relation to them.

20. In addition, it has been agreed that any decision in relation to the penalty will be deferred until all the issues in relation to the appeals against the two substantive VAT assessments have been resolved. The Respondents have, in any event, agreed to a suspension of the penalty, at least to the extent that it relates to the VAT arising on the supplies made by the Appellant to RR.

21. The above means that the only issue which needs to be determined in this decision is the issue described in paragraph 16(c) above, which is whether certain of the supplies which have given rise to the two VAT assessments that are the subject of

the appeals, as specified in the table set out in paragraph 41 below, fall within the ambit of paragraph 2A.

II THE RELEVANT LEGISLATION

22. Article 148(f) of Directive 2006/112/EC (the "PVD") requires Member States to exempt the supply of equipment incorporated or used by airlines operating for reward chiefly on international routes and Article 371 and paragraph (11) of Part B to Annex X PVD provide that Member States which, as at 1 January 1978, exempted the supply of equipment incorporated or used in aircraft used by State institutions could continue to exempt such supplies in accordance with the conditions applying in the Member State concerned on that date.

23. Article 131 PVD provides that the exemptions for which the PVD provides shall apply "in accordance with conditions which Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse".

24. These provisions are reflected in UK domestic law by Section 30(2) VATA and paragraph 2A, which together provide for the zero-rating of:

"The supply of parts and equipment, of a kind ordinarily installed or incorporated in, and to be installed or incorporated in, -

(a) the propulsion, navigation or communication systems; or

(b) the general structure,

of a qualifying ship or, as the case may be, aircraft".

25. The notes to Group 8 of Schedule 8 to the VATA which are relevant to paragraph 2A are as follows:

" (A1) In this Group—

… (b) a "qualifying aircraft" is any aircraft which —

(i) is used by an airline operating for reward chiefly on international routes, or

(ii) is used by a State institution and meets the condition in Note (B1).

(B1) The condition is that the aircraft—

(a) is of a weight of not less than 8,000 kilograms, and

(b) is neither designed nor adapted for use for recreation or pleasure.

(C1) In Note (A1)(b)—

"airline" means an undertaking which provides services for the carriage by air of passengers or cargo (or both);

"State institution" has the same meaning as in Part B of Annex X to the Council Directive 2006/112/EC on the common system of value added tax (transactions which member States may continue to exempt)…

(2) Items 1, 2, 2A, 2B and 3 include the letting on hire of the goods specified in the items.

(2A) Items 2A and 2B do not include the supply of parts and equipment to a Government department or any part of the Scottish Administration unless—

(a) they are installed or incorporated in the course of a supply which is treated as being made in the course or furtherance of a business carried on by the department; or

(b) the parts and equipment are to be installed or incorporated in ships or aircraft used for the purpose of providing rescue or assistance at sea."

III THE RELEVANT CASE LAW

26. I was referred to very few relevant cases in this context.

27. One case which was cited to me was the decision of the European Court of Justice (the "ECJ") in *Albert Collée v Finanzamt Limburg an der Lahn* (Case C – 146/05) ("*Collée*"). Although that case related to a different exemption from VAT from the one with which this decision is concerned - it related to the exemption accorded to exports of goods from one Member State to another – it does set out certain principles of VAT law so far as that law pertains to exemptions in general. Those principles may be summarised as follows:

(a) the measures which Member States may adopt in order to ensure the correct levying and collection of tax and for the prevention of fraud "must not go further than is necessary to attain such objectives" (see paragraph [26] in *Collée*);

(b) those measures "may not therefore be used in such a way as to have the effect of undermining the neutrality of VAT" (see paragraph [26] in *Collée*);

(c) "a national measure which, in essence, makes the right of exemption in respect of an intra-Community supply subject to compliance with formal obligations, without any account being taken of the substantive requirements and, in particular, without any consideration being given as to whether the requirements have been satisfied, goes further than is necessary to ensure the correct levying and collection of tax" (see paragraph [29] in *Collée*);

(d) transactions should be taxed taking into account their objective characteristics and, if the substantive requirements of the exemption are satisfied, then the exemption should apply even if the taxable person in question has failed to comply with some of the formal requirements. "The only exception is if the non-compliance with such formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied" (see paragraph [31] in *Collée*); and

(e) Member States must comply with the principle of legal certainty when they exercise the powers conferred on them by Community directives (see paragraph [32] in *Collée*).

28. Another decision of the ECJ relating to the exemption accorded to exports of goods from one Member State to another but which sets out certain principles which are of general application to the exemptions is *Mecsek-Gabona Kft v Nemzeti Adó-és Vámhivatal Dél-dunántúli Regionális Adó Föigazgatósága* (Case C- 273/11) ("*Mecsek*"). The principles relevant to this decision which are to be derived from *Mecsek* are that:

(a) in the absence of any specific provision in the PVD as to the evidence required to be provided in order to qualify for an exemption, it is for Member States to lay down in accordance with Article 131 PVD the conditions in which supplies of goods will be exempt with a view to ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse. "However, when they exercise their powers, Member States must observe the general principles of law which form part of the European Union legal order, which include, in particular, the principles of legal certainty and proportionality" (see paragraph [36] in *Mecsek*); and

(b) the principle of legal certainty requires that taxable persons be aware, before concluding a transaction, of their tax obligations. Thus, where it is impossible to produce tangible evidence to substantiate the conclusion that a particular exemption applies – as is the case with the export exemption because the abolition of border controls means that it is impossible to produce conclusive evidence that the goods in question have left the jurisdiction – "to oblige taxable persons to provide conclusive proof of this does not ensure the correct and straightforward application of the exemptions. On the contrary, that obligation places taxable persons in an uncertain situation as regards the possibility of applying the exemption to their intra-Community supplies or as regards the need to include VAT in the sale price" (see paragraph [41] in *Mecsek*).

29. A case which related more specifically to the exemption pursuant to which paragraph 2A has been enacted was the ECJ decision in *A Oy* (Case C – 33/11). The ECJ in *A Oy* held that:

(a) the words "operating for reward on international routes" in what is now Article 148(f) PVD must be interpreted as "encompassing also international charter flights to meet demand from undertakings and private persons" (see paragraph [35] in *A Oy*). In other words, the purpose of the provision is to grant exemption for the supply of aircraft when the aircraft are intended for use for flights crossing the airspace of several states as well as, in some case, international airspace and, in that regard, it is not necessary to draw a distinction between regular flights and charter flights;

(b) the exemption in what is now Article 148(f) PVD applies to the supply of an aircraft to an operator which is not itself an "airline operating

for reward chiefly on international routes" but which acquires the aircraft for the purposes of the exclusive use thereof by such an undertaking. The ECJ noted that, although the exemptions in what is now the PVD must be interpreted strictly, that does not mean that they should be construed in such a way as to deprive the exemptions of their intended effect. In this case, the key feature of the exemption was that the aircraft being supplied must be intended for use by an airline operating for reward chiefly on international routes and it was irrelevant whether the recipient of the supply was that airline or some other person who makes the aircraft available to that airline (for example, by way of a leasing agreement);

(c) it would not be difficult for Member States (or taxpayers) to apply the exemption on this basis - "[m]aking the exemption in such circumstances subject to the intended use being known and duly established as of the time of acquisition of the aircraft and to subsequent verification of the actual use of the aircraft by such an undertaking does not seem, in the light of the type of object at issue here and, inter alia, the registration and authorisation mechanisms in place for its use, to be liable to give rise to constraints for the Member States and the economic agents concerned which would be irreconcilable with the correct and straightforward application of the exemptions prescribed by the Sixth Directive" (see paragraph [56] in *A Oy*); and

(d) whether or not the exemption in what is now Article 148(f) PVD applies depends solely on whether or not the language in the provision is satisfied - whether or not the operator who acquired the aircraft would pass on to another person the cost of any VAT input tax arising in respect of the supply is irrelevant.

IV THE RESPONDENTS' PRACTICE

30. I was referred at the hearing to certain extracts from the Respondents' internal manuals in relation to "VAT Transport" and to VAT Public Notice 744C ("744C"), which pertains to "Ships, aircraft and associated services".

31. The extracts from the manuals stipulate that:

(a) a "State institution" includes, inter alia, Central Government departments and agencies and persons exercising functions on behalf of a Minister of the Crown as defined in Sections 41(6), 41(7) and 41(8) VATA (for example, the Ministry of Defence, the Respondents, the Maritime and Coastguard Agency, the Met Office, the Department of Transport and NHS bodies);

(b) there is no legally prescribed requirement for the supplier or customer to issue or hold any form of evidence that a supply relates to a qualifying ship or aircraft. However, general guidance in relation to the evidence in question can be found in 744C, which sets out the Respondents' suggested approach;

(c) in cases of doubt, such as when a customer is unwilling or unable to give the confirmation necessary to establish that the conditions in

paragraph 2A have been met, VAT should be charged at the standard rate; and

(d) in relation to Note (2A) to paragraph 2A, it is only the actual supply to the Government Department in question which is standard-rated. Supplies by sub-contractors to main contractors or other sub-contractors are zero-rated, even if the final supply will be standard-rated.

32. 744C notes that it is not part of the law and does not override the law. It merely reflects the Respondents' interpretation of the law and the Respondents' current practice. It instructs a taxpayer who is in any doubt as to the VAT liability of its own supplies to contact the Respondents (see paragraph 1.6).

33. At section 3, 744C notes that the word "aircraft" includes aeroplanes (civil or military), helicopters and airships but excludes spacecraft and satellites. It then summarises the definition of "qualifying aircraft" as set out in the Notes to paragraph 2A and makes the point that the ECJ established in *A Oy* that the question in relation to the first limb of the "qualifying aircraft" definition is not whether the particular aircraft itself will be used on international routes but rather whether the aircraft will be used by an airline which operates for reward chiefly on international routes.

34. The notice then states, somewhat erroneously, that aircraft which are used wholly or partly for purposes other than the supply of passenger or freight transport cannot be considered to be "qualifying aircraft". It is possible that this statement derives from the fact that, in order to be an "airline" the relevant undertaking needs to provide "services for the carriage by air of passengers and cargo (or both)". The notice then explains how undertakings can go about establishing that they qualify as "airlines" for the purposes of zero-rating.

35. Paragraph 3.7 of 744C describes the entities which qualify as "State institutions". This is broadly in line with the description of such entities in the manual.

36. The key parts of 744C are paragraph 7 – which deals with the VAT treatment of parts and equipment for qualifying ships and aircraft – and paragraph 13 – which describes the evidence which a supplier should obtain in order to establish that its supplies qualify for zero-rating under paragraph 2A.

37. The main points of relevance arising from paragraph 7 are that:

(a) paragraph 2A involves a two-stage test. First, the part or equipment in question must of a kind that is usually installed or incorporated in the propulsion, navigation or communication systems, or the general structure, of a qualifying aircraft and, secondly, the part or equipment in question must be to be installed or incorporated in the propulsion, navigation or communication systems, or the general structure, of a qualifying aircraft;

(b) parts and equipment can include part-assembled aircraft;

(c) zero-rating applies to the supply of parts in a supply chain, "as long as at the time of supply the part is destined for a qualifying ...aircraft. To avoid

doubt, you should get evidence of your customer's entitlement to zero rating, see section 13"; and

(d) raw or bulk materials, partly processed parts or equipment and non-specialist goods or appliances are excluded from zero-rating under paragraph 2A.

38. Paragraph 7 of 744C then concludes with the following advice:

"7.6 The evidence you need to qualify for the zero rating of a supply of parts or equipment

You should keep commercial documentation as evidence that the goods are eligible for relief. There is no need to get further documentary evidence of use from your customer as long as you're satisfied that the parts and equipment are eligible for relief.

7.7 If you are unsure about how the parts or equipment are to be used

You should get confirmation from your customer if you are unsure about how the parts or equipment are going to be used, for example if:

you're supplying a part capable of use on both qualifying and non-qualifying ships or aircraft

your customer is a government department

To make sure that the parts or equipment qualify for zero rating, and to avoid doubt, you should get evidence of your customer's entitlement to zero rating, see section 13.

7.8 How to treat cases where the customer cannot give an undertaking

In cases where the customer cannot or is unwilling to give an undertaking, you should charge VAT at the standard rate."

39. The relevant parts of paragraph 13 of 744C provide as follows:

"13. Evidence of 'qualifying' ship or aircraft

13.1 Supply of ships and aircraft

This section covers the supply of ships and aircraft, and of services and parts to maintain them.

…It's the responsibility of the supplier to ensure that the conditions for zero rating are met for each supply made.

As the supplier, you should keep some form of documentary evidence. This can either consist of normal commercial documentation such as contracts or work orders or a declaration made by the buyer. There are some suggested formats set out in paragraphs 13.2 and 13.3.

The declaration may form part of the supplier's standard commercial documentation (such as on the order form) or may be a stand alone document.…

13.1.3 Sub-contractors

If you're a sub-contractor (see paragraphs 4.11, 6.7 and 7.2) you should keep some form of evidence that your supplies qualify for zero rating.

13.1.4 How often you should get a declaration from your customers

As explained in paragraphs 13.1.1 and 13.1.2 it is not essential to get a declaration in respect of each supply that you make. In many cases it will be apparent that the ship or aircraft is 'qualifying'.

But it may be the case that the supplier is in doubt as to whether zero rating applies and wishes to get a declaration from the customer (for example doing business with a new customer for the first time)...

For contracts with long-standing customers, you should make sure that they renew any declaration annually, or earlier if you've reasonable cause to believe that …an airline has stopped operating chiefly on international routes…

13.3 Suggested format of the undertaking of use of parts

Referred to in paragraph 7.

We confirm that all the parts and equipment:

- we order, or
- in this purchase order, or
- marked with an * in this purchase order

are of a kind ordinarily installed or incorporated in, and are to be installed or incorporated in, the propulsion, navigation or communications systems or the general structure of:

a qualifying ship as set out in Notice 744C, or*

a qualifying aircraft as set out in Notice 744C,* and

(where the customer is a government department) the parts and equipment are to be installed or incorporated in:

the course of a supply treated as being in the course or furtherance of a business carried on by the department, or*

ships or aircraft used for the purpose of providing rescue or assistance at sea*

We undertake to tell you immediately should these parts be used for any other purpose and to pay you the VAT due.

NOTES

1. *- delete which doesn't apply
2. The customer's name, address and VAT registration number should be quoted on all undertakings."

V THE SUPPLIES TO WHICH THIS DECISION RELATES

40. It is worth noting at the outset of this section that the supplies which are in issue in this decision do not encompass all of the supplies which are in issue in relation to the three assessments that are the subject of the appeals to which this decision relates. That is because, as noted in paragraph 6 above, the parties originally locked horns on the question of whether the supplies which led to the two VAT assessments qualified for zero-rating as exports and the Appellant is not alleging that all of those supplies also qualify for zero-rating under paragraph 2A. As noted in paragraph 19 above, the question of whether or not each of the supplies which led to the two VAT assessments qualified for zero-rating as exports and the question of whether, to the extent that a supply did so qualify, the Appellant held the evidence requisite to establish that that was the case within the time limit prescribed by UK law are matters which have been deferred until a later date.

41. The supplies which form the subject of this decision are as follows. In each case, I have set out the name of the Appellant's customer, the type of engine in which the relevant parts were to be installed or incorporated and the type of aircraft in which the relevant type of engine is customarily installed or incorporated:

Customer	Engine type	Aircraft
Industria de Turbo Propulsores, S.A. ("ITP")	EJ200	Eurofighter
ITP Externals, SL ("ITP Externals")	EJ200	Eurofighter
RR	TP400	Airbus A400M
ITP	TP400	Airbus A400M
MTU Aero Engines AG ("MTU")	TP400	Airbus A400M
TEI-TUSAS Engine Industries, Inc ("TEI")	TP400	Airbus A400M
ITP	Trent 1000	Boeing 787
Magellan Aerospace	Trent 1000	Boeing 787

("Magellan")		
RR	Trent 1000	Boeing 787
Rolls-Royce Singapore	Trent 1000	Boeing 787
SMF Druckweiztechnologie GmbH & Co. KG ("SMF")	Trent 1000	Boeing 787
GKN Aerospace – Chem-tronics Inc. ("GKN")	Trent 700	Airbus A330
FAG Aerospace GmbH & Co KG ("FAG")	Trent 700, Trent 800 and Trent 900	Airbus A330 and A380 and Boeing 777
Turbomecanica S.A. ("Turbomecanica")	Trent 700, Trent 800 and Trent 900	Airbus A330 and A380 and Boeing 777
Goodrich Corporation ("Goodrich")	Trent 900	Airbus A380
ITP	Trent 900	Airbus A380
Magellan	Trent 900	Airbus A380
RR	Trent 900	Airbus A380
Rolls Royce Singapore	Trent 900	Airbus A380
International Aerospace Manufacturing Pvt Ltd ("IAMPL")	Trent XWB	Airbus A350
IHI Aerospace Co., Ltd ("IHI")	Trent XWB	Airbus A350
ITP	Trent XWB	Airbus A350
RR	V2500	Airbus A320
MTU Aero Engines Polska Sp. z o.o. ("MTU Poland")	V2500	Airbus A320

42. For completeness, I should note that BDO's letter of 25 August 2015 (at the documents bundle ("DB") pages 100 to 103), which originally raised the argument in relation to zero-rating under paragraph 2A, related only to the supplies made to RR

and not to the supplies made to other customers as set out in the above table. In addition, not all of the supplies to RR mentioned in that letter are included in the above table. The supplies of parts to be installed or incorporated in Tay engines (which are customarily installed or incorporated in Gulfstream aircraft) and the supplies of parts to be installed or incorporated in BR7 engines (which are customarily installed or incorporated in Gulfstream and Bombardier aircraft) were both mentioned in that letter but do not form part of the subject matter of this decision because the Appellant subsequently withdrew its claim for zero-rating under paragraph 2A in relation to those supplies.

VI THE EVIDENCE

43. The evidence in this case can be divided into three distinct categories, as follows:

(a) evidence from the internet in the form of entries in Wikipedia and other relevant websites;

(b) the documentation which has passed between the Appellant and its customers; and

(c) witness evidence.

The internet evidence

44. Before describing the internet evidence, it is convenient at this stage to note that, from the table set out in paragraph 41 above, it can be seen that the parts whose supply by the Appellant are the subject of this decision have been installed or incorporated in the following engines:

(a) the EJ200 engine;

(b) the TP400 engine;

(c) the Trent 1000 engine;

(d) the Trent 700 engine;

(e) the Trent 800 engine;

(f) the Trent 900 engine;

(g) the Trent XWB engine; and

(h) the V2500 engine.

45. As a further preliminary point, I should mention that it is well-known that information on Wikipedia can, on occasion, be incorrect. This suggests that an element of caution is generally advisable when relying on Wikipedia entries as evidence of any particular fact. However, as both parties were content to rely on Wikipedia entries in support of their respective cases, in reaching my decision, I have proceeded on the basis that the Wikipedia entries referred to below are accurate.

The EJ200 engine

46. The Rolls-Royce website (at the DB page 155) states that the EJ200 engine is an "[i]deal candidate engine for new military aircraft market and for re-engining existing fighters".

47. The Wikipedia entry in relation to the EJ200 engine (at the DB page 156) states that the engine is "used as the powerplant of the Eurofighter Typhoon" and also "used in the Bloodhound SSC supersonic land speed record attempting car" and (at the DB page 157) states that the applications of the engine are twofold - for the Eurofighter Typhoon and the Bloodhound SSC. Finally, although it was not in the DB, I was referred by the Appellant to an article on the internet which states that the EJ200 engine received certification in 2001.

48. The Wikipedia entry in relation to the Eurofighter (at the DB page 160) states that it entered into operational service in 2003 and (at the DB page 175) states that its weight is 11,000 kilograms. The Wikipedia entry in relation to the Eurofighter (at the DB pages 173 and 174) also sets out the operators of the Eurofighter. Those operators are all State institutions for the purposes of paragraph 2A.

49. Although it was not in the DB, I was referred by the Appellant to the Wikipedia entry in relation to the Bloodhound SSC supersonic land speed record attempt, which states that "[a] prototype Eurojet EJ 200 jet engine developed for the Eurofighter and bound for a museum, was donated to the project". It also states that "[t]he Rolls-Royce EJ 200 jet engine was designed with one purpose, to sit in a Eurofighter Typhoon fighter plane, it was not designed to be used in a jet car".

The TP400 engine

50. The Rolls-Royce website (at the DB page 336) states that the TP400 engine was designed for the A400M military aircraft.

51. The Wikipedia entry in relation to the TP400 engine (at the DB page 337) states that the engine was developed and produced for the A400M Atlas military transport aircraft.

52. The Wikipedia entry in relation to the A400M Atlas military transport aircraft (at the DB page 342) states that the TP400 engine received certification from the European Aviation Safety Agency ("EASA") in May 2011 and that serial production of the A400M Atlas military aircraft formally commenced in January 2011. The Wikipedia entry in relation to the A400M military transport aircraft (at the DB page 344) also sets out the operators of the A400M military transport aircraft. Those operators are all State institutions for the purposes of paragraph 2A.

The Trent 1000 engine

53. The Wikipedia entry in relation to the Trent 1000 engine (at the DB page 349) states that the engine is used on the Boeing 787 Dreamliner and (at the DB 350) states that the engine was certified by both the EASA and the Federal Aviation Authority (the "FAA") in August 2007. It also notes that the initial design of the engine failed to meet Boeing's required specific fuel consumption ("SFC") and that, as a result of

delays to the entry into service of the Boeing 787 Dreamliner, two redesign packages were "incorporated into the test programme which are said to improve the SFC by 3-4% to bring it within 1% of specification".

54. The Wikipedia entry in relation to the Boeing 787 Dreamliner (at the DB page 354) states that the aircraft seats between 242 and 335 passengers and (at the DB pages 367 and 368) states that, as at July 2015, a total of 286 Boeing 787 Dreamliners were "in airline service" and names some of the more significant operators of the aircraft. The operators so named operate for reward chiefly on international flights.

55. The Rolls-Royce website (at the DB page 348) states that customers who have bought Trent 1000-powered Boeing 787 Dreamliners include a number of international airlines (which are specified on the page in question, and who operate for reward, chiefly on international flights) but it also states that there has been a "Private Customer".

The Trent 700 engine

56. The Rolls-Royce website (at the DB page 388) states that the Trent 700 engine is the engine of choice on the A330, with 58% of the market share.

57. The Wikipedia entry in relation to the Trent 700 engine (at the DB pages 389 and 390) states that the sole application of the engine is to power the A330 and that the engine was certified in 1994 but that an upgraded version of the engine was introduced in 2009 and that a further upgrade (announced in 2013) was expected in 2015.

58. The Wikipedia entry in relation to the A330 (at the DB page 393) states that it seats up to 335 passengers and (at the DB page 399) states that, as of May 2016, there were 1,253 examples of A330s "in airline service" and names some of the more significant operators of the aircraft. The operators so named operate for reward chiefly on international flights. However, it also (at the DB page 397) states that the A330-200 is "available as an ultra-long-range corporate jet as the A330-200 Prestige". Finally, the Wikipedia entry in relation to the A330 (at the DB page 401) states that the aircraft can be powered by three different types of engine – the General Electric CF6-80E1 engine, the Pratt & Whitney PW4000 engine and the Trent 700 engine.

59. The Wikipedia entry in relation to Airbus Corporate Jets (which was handed to me at the hearing by the Respondents) (the "ACJ DB") states that there are 41 A330-200 aircraft which fall within the category of "Governments, Executive and Private Jets" in operation as at 31 May 2017 and describes the ACJ330-200 Prestige as a wide-bodied corporate jet offering space for 60 passengers and the ACJ330neo Harmony as a corporate jet which is capable of flying 25 passengers. It also states that the ACJ330neo Harmony is powered by Trent 7000 engines (that is to say, not Trent 700 engines).

The Trent 800 engine

60. The Rolls-Royce website (at the DB page 406) states that the Trent 800 engine powers the Boeing 777.

61. The Wikipedia entry in relation to the Trent 800 engine (at the DB page 407) states that the engine was designed to power the Boeing 777 and that the engine was certified in 1995 and (at the DB page 408) states that an upgraded version of the engine is being offered by Rolls-Royce as of 2014.

62. The Wikipedia entry in relation to the Boeing 777 (at the DB page 410) states that it is the world's largest twinjet and that it is a "commercial aircraft" and seats between 314 and 415 passengers and (at the DB page 418) states that, as of July 2015, 1,265 Boeing 777s were "in airline service" and names some of the more significant operators of the aircraft. The operators so named operate for reward chiefly on international flights.

The Trent 900 engine

63. The Rolls-Royce website (at the DB page 427) states that the Trent 900 engine is the engine of choice for the A380, with over half of the operators selecting the engine.

64. The Wikipedia entry in relation to the Trent 900 engine (at the DB page 428) states that the engine is one of the options to power the A380 and that the engine was certified in October 2004 by the EASA and in December 2006 by the FAA and (at the DB page 429) states that the sole application of the engine is to power the A380 and that an upgraded version of the engine was available from 2012.

65. The Wikipedia entry in relation to the A380 (at the DB page 433) states that it is the world's largest passenger airliner and seats between 525 and 853 passengers and (at the DB page 447) states that, as at 30 June 2016, there were 193 A380s in service and names the operators of the aircraft. The operators so named operate for reward chiefly on international flights.

66. The ACJ DB states that one executive variant of the A380 was ordered in 2012 "with two full decks and a third deck in the cargo compartment but the aircraft was sold as a regular aircraft before modifications were made". It then states as follows:

"British tabloids said that the version ordered by Prince Al-Waleed bin Talal was to contain a conference room, a concert hall, a garage, wellness and steam room as well as a lift to enter the plane. The undelivered plane was to be called "Prestige". The Guardian reported that the plane was sold amid disputes between Forbes and Talal around the size of his fortune and his efforts to affect his ranking in Forbes billionaires list. As of May 2018, plans to retrofit one of the first A380s to be retired from service with Singapore Airlines as a business jet were reported to be "at a very advanced stage.""

The Trent XWB engine

67. The Rolls-Royce website (at the DB page 460) states that the Trent XWB engine powers the A350.

68. The Wikipedia entry in relation to the Trent XWB engine (at the DB page 462) states that the engine is used exclusively for the A350 and (at the DB page 463) states that the engine was certified in 2013.

69. The Wikipedia entry in relation to the A350 (at the DB page 466) states that it seats between 280 and 366 passengers and (at the DB page 474) states that, as at 31 May 2016, there were 24 A350s in service with six operators all of which are named. The operators so named operate for reward chiefly on international flights.

70. The ACJ DB states that "the A350 XWB is also offered as the ACJ350 corporate jet by Airbus Corporate Jets". However, it also states that, although one A350 corporate jet has been ordered, there have been no deliveries of any such aircraft and no such aircraft are in operation.

The V2500 engine

71. The International Aero Engines website (at the DB page 480) states that the V2500 engine is designed by International Aero Engines, a global partnership of aerospace leaders with the reputation of producing the engine of choice for the A320 family.

72. The Wikipedia entry in relation to the V2500 engine (at the DB page 482) states that the engine powers the A320 family, which includes (inter alia) the "Airbus Corporate Jet", that its applications also include the McDonnell Douglas MD-90 and the Embraer KC-390 and that it was certified by the FAA in 1988.

73. The Wikipedia entry in relation to the A320 family (at the DB page 486) states that the family includes the ACJ business jet, (at the DB page 493) states that the ACJ319 (a corporate business jet within the A320 family) "is powered by the same engine types as the A320" – a point which is made clear by the table at the DB page 495, which states that both categories of aircraft may be powered by V2500 engines or by the CFM56-5 series of engines - (at the DB page 486) states that the aircraft can accommodate up to 220 passengers but (at the DB page 493) states that the ACJ319 can accommodate up to 39 passengers. In addition, (at the DB page 494) the Wikipedia entry in relation to the A320 family states that, as at 31 May 2016, there were 6,750 members of the A320 family in commercial service with over 250 airline operators and names three of the operators. The operators so named operate for reward chiefly on international flights.

74. The ACJ DB states that there are 22 A320 aircraft falling within the category of "Government, Executive and Private Jets" in operation as at 31 May 2017, describes the ACJ319 as the corporate jet version of the A319 and notes that the ACJ319 competes with, inter alia, the Gulfstream G550 and is the presidential aircraft of a number of countries.

75. Although it was not in the DB, the entry from Wikipedia in relation to the Embraer KC-390 states that it is a military transport aircraft with a weight of 68,500 kilograms.

76. I was informed by both parties that no V2500 engines in which the parts supplied by the Appellant were installed or incorporated had been installed or incorporated in a McDonnell Douglas MD-90 aircraft.

The documentation between the Appellant and its customers

77. The table set out in paragraph 41 above specifies the customers to whom the Appellant has made the supplies which are the subject of this decision, together in each case with the engine types in which the supplied parts were to be installed or incorporated. In the course of the hearing, I was provided with correspondence which passed between the Appellant and certain of its customers in relation to the supplies and, in view of the arguments which were raised at the hearing, it is necessary to outline the terms of those documents in some detail.

Supplies to RR

78. I was referred to a letter dated 23 December 2015 from Mr Martin Brook, the VAT and Duty Controller of Rolls-Royce, to the Appellant (at the DB pages 511 and 512) headed "Supplies of Qualifying Aircraft Parts by McBraida plc to Rolls-Royce Deutschland Ltd & Co KG (UK VRN – 558782193)". The letter reads as follows:

"V2500

Rolls-Royce Deutschland Ltd & Co KG is subcontracted by Rolls-Royce plc to assemble V2500 engines. McBraida supplies parts for these engine types to Rolls-Royce Deutschland Ltd & Co KG.

The V2500 engine is predominantly used to power the Airbus A320 family of aircraft. These are commercial civil aircraft designed for carrying between 120 and 220 passengers. All of these aircraft will meet the definition of a qualifying civil aircraft defined in Public Notice 744C. ie used by an airline operating for reward chiefly on international routes. Most operators are located outside the UK and no UK operators will be flying predominantly within UK airspace. A variant of the V2500 is used to power the Embraer KC-390, a military transport aircraft weighing over 70 tons.

TP400

Rolls-Royce Deutschland Ltd & Co KG assembles TP400 engines. McBraida supplies parts for these engine types to Rolls-Royce Deutschland Ltd & Co KG.

The TP400 engine powers a single aircraft type, the Airbus A400M. This is a military transport aircraft with a maximum take-off weight exceeding 140,000 kg. The only customers for this aircraft are the armed forces of some EU and a small number of non-EU Governments. This meets the criteria for qualifying aircraft laid down in Public Notice 744C. ie is used by a State institution and is of a weight of not less than 8,000 kg and is neither designed nor adapted for use for recreation or pleasure.

We confirm that at the time McBraida Plc supplied parts for the V2500 and TP400 engine programmes to Rolls-Royce Deutschland Ltd & Co KG, McBraida knew that all the parts and equipment ordered by Rolls-Royce Deutschland Ltd & Co KG, were of a kind ordinarily installed or incorporated in, and were to be installed or incorporated in, the propulsion system of a qualifying aircraft as set out in Notice 744C.

We can also confirm that all parts supplied by McBraida have not and will not be used for any other purpose."

79. I was referred to an end use certificate (for presentation to the Export Control Authorities of the UK) (each such certificate's being referred to in this decision as an "End Use Certificate") that had been provided by RR to the Appellant on 30 April 2015 in relation to the parts supplied by the Appellant for the TP400-D6 engine (at the DB page 513). That End Use Certificate states that the parts to be supplied by the Appellant "[a]re intended for the development phase of the TP400-D6 engine…" before going on to explain that "[t]he TP400-D6 engine is for the Airbus A400M a military transport aircraft…" and then setting out the Governments which will be using the aircraft.

80. I was referred to correspondence between Ms Susan Haworth of the Appellant and Mr Brook which took place in the week before the hearing in relation to the reference in the End Use Certificate described in paragraph 79 above to the fact that the parts supplied by the Appellant to RR were to be used for the development phase of the TP400-D6. (The correspondence was at tab 3 of an additional bundle that was provided to me at the hearing by the Appellant (the "ADB")). In that correspondence, Ms Haworth asked Mr Brook why the relevant language in the End Use Certificate had been used "as we all know that the TP400 has been out of the development phase for almost a decade". Ms Haworth said that the wording used had appeared in every annual certificate which the Appellant had received from Rolls-Royce between 2006 to 2015 and postulated that this might simply be "an oversight by the Export Control Department as, for export purposes, it does not make any material difference whether the project is in development or in production". In a further email, Ms Haworth asked "for written confirmation from RR that the parts shipped for TP400 during the Audit Period (April 2011 to Dec 2014) were no longer for the development phase of the A400M, and an explanation as to why that wording was used in the End-User Certificates for Export". Mr Brook responded by saying that the letter set out in paragraph 78 above should be sufficient for the Appellant to obtain zero-rating for the parts in question and that he was not aware that End Use Certificates had any bearing on whether or not zero-rating applied. He went on to say that, to satisfy his own curiosity, he had spoken to his Export Control team in Germany and they had told him that "End User certificates are provided on request and after carrying out appropriate due diligence to ensure that we are in a position to provide an accurate certificate." He went on as follows:

"The certificates are normally requested to support the Export [Licencing] obligations and requirements of the Export Licence holder. In this case McBraida. It is the responsibility of the Licence holder to define the scope of the supply that they require certification for and we can only conclude from the certificate you sent through that McBraida have not requested that the scope of the End User certificate needed to be widened to include production. Note

though that the existence of this certificate cannot be taken as proof that McBraida only provides parts for TP400 development".

81. Finally, I was referred to an end use undertaking from RR (at the DB page 517) confirming that certain specified parts supplied to it will "only be used for production, repair and overhaul of TP400 engine for the A400M military transport aircraft" and "will be incorporated and [assembled] into TP400 modules and engines".

Supplies to Rolls-Royce Singapore

82. I was referred to a letter dated 23 December 2015 from Mr Brook to the Appellant (at the DB page 528) headed "Supplies of Qualifying Aircraft Parts by McBraida plc to Rolls-Royce Singapore Pte Ltd (UK VRN – 125065636)". The letter reads as follows:

"The Trent 900, 1000 and XWB engines power the Airbus A380 Superjumbo, Boeing 747 Dreamliner and Airbus A350 aircraft respectively. These are all extremely large aircraft designed to carry well in excess of 300 passengers. It is not feasible that these aircraft will be purchased for corporate or private use or by any UK operator who will fly predominantly within UK airspace.

Rolls-Royce Singapore Pte Ltd is subcontracted by Rolls-Royce plc to assemble Trent 900 and Trent 1000 engines and also to produce parts to be used in the construction of these engines and other engines including the Trent XWB. McBraida is the supplier of parts to Rolls-Royce Singapore Pte Ltd.

We confirm that at the time McBraida Plc supplied parts to Rolls-Royce Singapore Pte Ltd, McBraida knew that all the parts and equipment ordered by Rolls-Royce Singapore Pte Ltd, were of a kind ordinarily installed or incorporated in, and were to be installed or incorporated in the propulsion system of a qualifying aircraft as set out in Notice 744C.

We can also confirm that all parts supplied by McBraida have not and will not be used for any other purpose."

Supplies to TEI

83. I was referred to:

(a) a confirmation from TEI (at the DB page 519) to the effect that, at the time when the Appellant supplied goods to it, the Appellant knew that certain parts specified in the confirmation "are incorporated into the FBS module of TP400-D6 Gas Turbine Engine which empower A400 Military Transportation Plane. We undertake to advise you if these parts were used for any other purpose";

(b) an End Use Certificate from TEI (at the DB page 520) stating that TEI had purchased parts from the Appellant for the TP400-D6 programme and that the TP400-D6 engine "is to be used in the Airbus A400M military transport aircraft being developed for" the Governments of certain specified NATO countries; and

(c) a letter of intent from TEI (at the DB pages 522 and 523) stating that a particular part supplied to TEI - the oil jet distributor assembly (Part number TP290127) - was to be exported to ITP "[a]fter the completion of machining".

Supplies to GKN

84. I was referred to an exchange of emails between Ms Jenna Peters of the Appellant and Mr Ward Holifield of GKN (at the DB pages 529 to 532) to the following effect. Ms Peters sent an email to Mr Holifield on 1 December 2015 stating that, as a result of a UK government audit, the Appellant needed some information confirming the eligibility of the parts that it had supplied to GKN to be exported as exempt from VAT and that, accordingly, "[w]e are asking our customers to sign the attached document and return to us on their company headed paper. The purpose of this document is for you to confirm the parts we have supplied to you are for Qualifying Aircraft which are exempt from VAT under UK law." She then set out the definition of a qualifying aircraft under UK law and continued:

"In this regard please can you also confirm that parts received from McBraida Plc have been incorporated into RR engines of a type that will be or have been supplied to Qualifying Aircraft."

The certificate attached to the email reads as follows:

"We confirm that at the time McBraida Plc supplied goods to us McBraida Plc knew that all the parts and equipment ordered by us were of a kind ordinarily installed, or incorporated in, the propulsion, navigation or communications systems or the general structure of an aircraft used by an airline operating for reward chiefly on international routes.

We undertake to advise you if these parts were used for any other purpose."

85. Mr Holifield responded to the email from Ms Peters by signing the attachment and returning it on the same day under cover of an email saying "[h]ere you are". Three days later, on 4 December 2015, Ms Peters sent a further email to Mr Holifield, asking Mr Holifield to confirm "which engine type the parts we delivered to you [were] incorporated into" and setting out in a table the part number in question. Mr Holifield again responded immediately, inserting into the table the words "Trent 700" and saying in his email "Please see below. Parts go into Rolls Royce T-700".

86. For the purposes of the rest of this decision, each confirmation which has been received by the Appellant on the terms set out in paragraph 84 above is referred to as "a confirmation on the terms of the Standard Certificate" and, in each case, a draft of the confirmation was sent to the relevant customer by the Appellant as an attachment to an email on the terms set out in paragraph 84 above.

Supplies to FAG

87. I was referred to a confirmation on the terms of the Standard Certificate received by the Appellant from FAG (at the DB page 539A) in relation to all of the parts which have been supplied by the Appellant to FAG.

Supplies to Magellan

88. I was referred to a confirmation on the terms of the Standard Certificate received by the Appellant from Magellan (at the DB page 539) in relation to all of the parts which have been supplied by the Appellant to Magellan.

Supplies to SMF

89. I was referred to a confirmation on the terms of the Standard Certificate received by the Appellant from SMF, and related correspondence (at the DB pages 541 to 544) in relation to all of the parts which have been supplied by the Appellant to SMF.

Supplies to IAMPL

90. I was referred to a letter from IAMPL to the Appellant (at the DB page 540) in which IAMPL confirmed that certain specified parts which had been supplied to it by the Appellant "are used in the manufacturing of Shrouds, and supplied to Rolls Royce Plc for their civil Aircraft Engine programmes".

Supplies to MTU Poland

91. I was referred to a confirmation on the terms of the Standard Certificate received by the Appellant from MTU Poland (at the DB page 524) in relation to all of the parts which have been supplied by the Appellant to MTU Poland.

Supplies to ITP

92. I was referred to an End Use Certificate from ITP (at the DB page 527) confirming that the goods to be supplied by the Appellant to ITP were intended for the production/repair of the TP400-D6 engine which "is for the Airbus A400M, a military transport aircraft" and will be for the end-use of certain specified NATO countries.

Supplies to ITP Externals

93. I was referred to a confirmation on the terms of the Standard Certificate received by the Appellant from ITP Externals (at the DB page 525) in relation to all of the parts which have been supplied by the Appellant to ITP Externals.

94. I was also referred to an End Use Certificate which, although written on the headed notepaper of ITP, was sent by ITP Externals (at the DB page 526) confirming that the goods to be supplied by the Appellant to ITP Externals were intended for the production/repair of the TP400-D6 engine which "is for the Airbus A400M, a military transport aircraft" and will be for the end-use of certain specified NATO countries.

Supplies to Goodrich

95. I was referred to an email from Mr Todd Numelin of Collins Aerospace (the group of which Goodrich is a member) to the Appellant (at the ADB tab 5) to the effect that "Rolls Royce subcontract a Trent 900 nozzle build to Goodrich for which McBraida has and continues to supply components (FK19942 our PN 129309), these are and always have been for the sole purpose of Trent 900 build with end use in the Airbus A380".

Supplies to MTU, IHI and Turbomecanica

96. I was not referred to any correspondence between the Appellant and any of MTU, IHI or Turbomecanica in relation to the Appellant's supplies to those companies.

The witness evidence

97. I was provided with witness evidence from two people – Mr Ian McBraida, the chief executive of the Appellant, and Mr Peter Brown, the former Group Commercial Director of the Appellant.

The evidence of Mr McBraida

98. Mr McBraida explained that, in the airline industry, it was standard practice for a piece of equipment to be tracked through the chain of suppliers from when it is first cast through to its installation or incorporation in an aircraft. Thus, the life story of each individual component was recorded and traced. However, that is not to say that any single supplier in the supply chain was entitled to access all of the relevant information – each supplier had access to the information held by each company with which it directly contracted, whether on the buy side or the sell side, but it had no entitlement to obtain information from higher up or lower down the supply chain. Consequently, in this case, the Appellant did not have access to the information demonstrating the specific aircraft in which its parts had been installed or incorporated.

99. However, because the aerospace industry is quite specialised, there are not many players in the market and therefore the Appellant had close relationships with its customers. This enabled the Appellant to target, for its business, those parts which were required on growing programmes, as those parts had a longer term future. It also meant that there were frequent meetings between the Appellant's technical team and the technical team of the Appellant's customer to find ways of reducing cost and improving quality.

100. Mr McBraida explained that, as a result, the Appellant knew in each case the end engine program for which its parts were destined and, as engines were certified for only certain airframes, that meant that it knew the type of aircraft for which its parts were destined even if it could not identify the specific engine and the specific aircraft in each case. It also meant that the Appellant knew when engine types were still in their development phase.

101. Mr McBraida conceded that, even after certification for a particular type of engine was obtained, the relevant type of engine would continue to be tested so that its performance could be improved and therefore that, in theory, the Appellant's parts might be installed or incorporated in an engine that was being tested, as opposed to an engine that was being fitted to an aircraft. However, in his experience, an engine manufacturer was unlikely to build a new engine just to carry out post-certification improvements. The manufacturer would generally use an engine constructed for the pre-certification development phase to carry out the ongoing tests. He added that, if, unusually, one of the Appellant's parts supplied after the engine had been certified was going to be installed on a test engine, the relationship between the Appellant and its customers was such that he thought the Appellant would be made aware of this.

102. Mr McBraida also conceded that an individual (or a body corporate other than an airline) might acquire a new aircraft on which the Appellant's parts were installed even though the aircraft was of a type that was generally supplied to airlines but he believed that the exchanges of correspondence which the Appellant had had with Rolls-Royce, as summarised above, meant that Rolls-Royce would have told the Appellant if that had in fact been the case in relation to any of the parts the supplies of which are the subject of this decision.

103. Mr McBraida explained that, even in cases where the Appellant's immediate customer was an entity other than a member of the Rolls-Royce group, the relevant parts would, to the extent that they related to a Rolls-Royce engine, always end up with a member of the Rolls-Royce group. Hence, in his view, the confirmations provided by Rolls-Royce on behalf of members of the Rolls-Royce group as described in paragraphs 78 and 82 above applied not only to the parts for the engines specified in the relevant confirmation which had been supplied directly by the Appellant to a member of the Rolls-Royce group but also to the parts for the engines specified in the relevant confirmation which had been supplied by the Appellant to an entity other than a member of the Rolls-Royce group and then on-supplied by that entity to a member of the Rolls-Royce group.

104. To illustrate that point, Mr McBraida explained that, in relation to the supplies of parts made by the Appellant to FAG, FAG made roller bearings for Rolls-Royce engines and the parts which FAG had acquired from the Appellant had gone into those bearings. In his view, as the contract between the Appellant and FAG had originally been between the Appellant and a member of the Rolls-Royce group, and had then been novated by that member of the Rolls-Royce group to FAG, FAG would be highly likely to have supplied the bearings only to a member of the Rolls-Royce group and not to any other engine manufacturer. Otherwise, in Mr McBraida's view, FAG might be in breach of certain intellectual property rights relating to the bearings. It followed, said Mr McBraida, that the confirmation from the member of the Rolls-Royce group to which the bearings would have been on-supplied applied to the supplies made by the Appellant to FAG in the same way as if the supplies had been made by the Appellant directly to the relevant member of the Rolls-Royce group.

105. In relation to the statement in Wikipedia to the effect that an EJ200 engine had been used in the Bloodhound Project, Mr McBraida said that, in that case, the engine

in question was a used engine that the Rolls-Royce group was otherwise going to donate to a museum. He said that the parts that were incorporated in that engine would have been supplied in the late 1980s or early 1990s and therefore well before the period which was relevant in this case.

106. In relation to the confirmation from TEI referred to in paragraph 83 above, Mr McBraida said that the reference to "further machining" – which, if correct, would mean that the parts supplied by the Appellant were not eligible for zero-rating under paragraph 2A because of the exclusion from zero-rating under that provision of supplies of partly-processed parts – was not accurate. He put this down to the fact that English was not the first language of the person providing the confirmation. In Mr McBraida's view, it was almost unheard of for the Appellant to sell partly-processed parts.

107. Similarly, in relation to the End Use Certificate from RR referred to in paragraphs 79 and 80 above, Mr McBraida denied that the parts in question were to be used in the development phase of the TP400-D6 engine because that phase had been completed by the time that the supplies in question were made. He put this down to a "copy and paste" error by RR because the supplies in question were part of a series of supplies which had started at a time when the relevant engine type was still in its development phase and RR had simply failed to amend the terms of the certificate once that phase had ended.

108. As regards the form of the confirmation on the terms of the Standard Certificate and the correspondence surrounding the obtaining of each such confirmation, Mr McBraida said that he did not know why the Appellant had chosen to proceed with its own bespoke confirmation in each case instead of using the standard form of confirmation provided by the Respondents in 744C.

109. In relation to the statement in Wikipedia that the Trent XWB engine can be installed or incorporated in an aircraft that is sold as a corporate jet (the ACJ350), Mr McBraida said that, as far as he was aware, no sale of ACJ350 aircraft powered by Trent XWB engines had been made. He also said that he had received confirmation from IAMPL that the parts supplied to IAMPL by the Appellant had not been used in the development phase of the Trent XWB engine.

110. In relation to the statement in Wikipedia (at the DB page 155) to the effect that the EJ200 engine can be fitted to new military aircraft and not solely to the Eurofighter, Mr McBraida said that any such use was in the future and that no EJ200 engine had, as yet, been fitted on any aircraft other than the Eurofighter.

111. In relation to the statement in Wikipedia (at the DB page 486) to the effect that the V2500 engine could be installed or incorporated in the ACJ319 – a corporate jet in the A320 family – Mr McBraida said that he had spoken to Rolls-Royce about that in the lead up to the hearing and had been told by Rolls-Royce that, in practice, another type of engine - the CFM International CFM 56-5 series of engines – was the engine type installed on the ACJ319.

112. In relation to the statement on the Rolls-Royce website (at the DB page 348) to the effect that one of the customers who had bought a Boeing 787 Dreamliner (to which the Trent 1000 engines were fitted) was a "Private Customer", Mr McBraida said that "Private Customer" in that context might simply be referring to a customer which wished to remain confidential – it did not necessarily mean that the customer was not an airline operating for reward chiefly on international routes.

113. Mr McBraida reiterated that, whilst the claim for zero-rating under paragraph 2A had been made some time after the relevant supplies had been made, thereby indicating that the Appellant was unaware at the time when it made the relevant supplies that the aircraft in which the parts were destined to be installed or incorporated were "qualifying aircraft", as defined in paragraph 2A, for the purposes of zero-rating under the VAT legislation, the Appellant knew at the time when it made the relevant supplies the identity of the aircraft in which the parts were destined to be installed or incorporated. It just didn't know that those aircraft constituted "qualifying aircraft", as defined in paragraph 2A, for the purposes of zero-rating under the VAT legislation.

The evidence of Mr Brown

114. Mr Brown said that, prior to joining the Appellant in 2014, he had worked as Head of Business for Rolls-Royce Military Engines since 1975. In that role, he had had commercial responsibility for the TP400 project between Rolls-Royce and the consortium which was responsible for the co-ordination and building of the TP400 engine during the development and production stages and for delivering those engines to Airbus.

115. Mr Brown said that, as a result, he knew that the first TP400 engine run was in 2005, that the engine received full certification by the EASA in May 2011, that the first production engine had been delivered in April 2012 and that the first A400M aircraft incorporating the engine was delivered in April 2013. It followed that the parts for these engines which the Appellant had delivered to Rolls-Royce from early 2011 were for engines that were to be used in production and not for development. In Mr Brown's view, the reference in the End Use Certificate from RR referred to in paragraphs 79 and 80 above to the parts in question being used in the development phase of the relevant engine was incorrect. Like Mr McBraida, Mr Brown put this down to a "copy and paste" error. RR had simply failed to update the wording once the development phase had finished because, for the purposes of the End Use Certificates which Rolls-Royce was producing, it was irrelevant whether the relevant parts were to be used in development or used in production.

116. Mr Brown added that the parts supplied by the Appellant for incorporation in the EJ200, V2500, Trent 700 or Trent 1000 engines were also certain to have been destined for production as opposed to development because the development phases of each of those engines had ended long before the supplies in question were made.

117. Turning to the corporate jet market, Mr Brown said that, so far as he was aware, a new A380 had never been acquired from the manufacturer by a private individual

and he was therefore somewhat cynical that the statement in Wikipedia to the effect that one had been bought from the manufacturer by Prince Al Waleed bin Talal was correct. He thought it more likely that the aircraft bought by the prince would be the one mentioned in the second paragraph of the relevant Wikipedia entry – ie one that had been retired from service from Singapore Airlines.

118. He added that, notwithstanding the statement in Wikipedia that there were, as at 31 May 2017, 22 Airbus A320s in operation as corporate jets, he was not aware of any such jet's being powered by a V2500 engine and he believed that the reference in the Rolls-Royce confirmation set out in paragraph 78 above to the A320's being a "commercial civil aircraft" tended to support that view.

119. Mr Brown conceded that it was possible that, even in the post-development phase of an engine type, parts sold by the Appellant to an engine manufacturer might be placed on an engine that had been used in the development phase and was then retained for the purpose of carrying out the testing required to effect ongoing improvements to the relevant engine type but, although he could not discount that possibility, he thought that that would be unusual.

120. As regards replacement parts in general, Mr Brown said that, on most occasions, the Appellant would know when the parts that it was supplying to a particular customer were going to be used as replacement parts because of the address to which the delivery of the parts was made. Moreover, he estimated that no more than 1% to 2% of parts would be used as replacement parts.

VII THE ARGUMENTS OF THE PARTIES

121. There was no disagreement between the parties as to the engines in which the parts supplied by the Appellant were to be installed or incorporated. However, they disagreed on a number of issues, both in relation to the applicable law and in relation to the applicable facts.

Questions of law

The procedural question

122. One of the issues which arose at the hearing was whether the Respondents should be precluded from alleging that the confirmations which had been obtained by the Appellant from certain of its customers were deficient or, in the alternative, whether any ambiguity in those confirmations should be resolved against the Respondents because the alleged deficiencies in those confirmations – which are described in paragraphs 175 to 191 below - emerged for the first time only during Mr Watkinson's submissions and cross-examination of the Appellant's witnesses at the hearing and had not been set out specifically by the Respondents in their statement of case or skeleton argument before the hearing.

123. In this regard, Ms Sloane submitted that the statement of case simply stated that the onus was on the Appellant to establish that the parts that it had supplied had been installed or incorporated in a qualifying aircraft and that the Appellant had failed to

discharge that burden, whilst the Respondents' skeleton argument, whilst alluding to the alleged deficiency in the End Use Certificate provided by RR in relation to the parts supplied for the TP400 engine, did not specifically mention the confirmations or allege that the confirmations were deficient in any respect.

124. Ms Sloane referred me to the provisions of Rule 25(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules") – to the effect that a statement of case must "set out the respondent's position in relation to the case" – and said that the decision of Judge Mosedale in *Allpay Limited v The Commissioners for Her Majesty's Customs and Excise* [2018] UKFTT 273 (TC) ("*Allpay*") establishes that, even though the burden of proof in a particular case is on the appellant, the Respondents still need to refer in their statement of case to the points on which they intend to rely at the hearing. In the words of the same judge in her decision at first instance in *BPP* v *The Commissioners for Her Majesty's Revenue and Customs* [2014] UKFTT 644 (TC) ("*BPP*"):

> "There is very clear prejudice to the appellant in not knowing HMRC's case. Litigation is not to be conducted by ambush. The appellant has the right to be put in the position so that it can properly prepare its case: it needs to know HMRC's case not only before it gets to the hearing but before it prepares its witness statements and really before it prepares its list of documents".

125. In her decision in *Allpay*, Judge Mosedale referred to a statement by Lord Woolf MR in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 ("*McPhilemy*") (at 792J to 793A) to the effect that pleadings are required to mark out the parameters of the case that is being advanced by each party. Lord Woolf MR noted in that regard that:

> "In particular [pleadings] are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader":

126. Judge Mosedale in *Allpay* also referred to a decision by the Upper Tribunal in *Fairford Group plc v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKUT 329 (TCC) to the effect that, if there is a real challenge to the other party's evidence, it should be identified in the pleadings. She concluded that "both parties should set out the key parts of their legal and factual case in advance."

127. Mr Watkinson responded that there was no deficiency in the statement of case in this respect. He pointed out that, in paragraphs 9 and 11 of the consolidated statement of case of 17 October 2016, the Respondents did indicate that it regarded the confirmations which had been provided by the Appellant to the Respondents as being deficient. Paragraph 9 stated that the Respondents had seen no evidence to support the assertion that the supplies fell within paragraph 2A and paragraph 11 stated that the Appellant had failed to discharge the burden of showing that the supplies fell within paragraph 2A.

128. Mr Watkinson went on to say that there was no authority for the proposition that a statement of case was required to set out the evidence on which the Respondents intended to rely in putting their case – it was merely necessary for the statement of

case to set out the Respondents' position. In this case, the Respondents' position was clearly set out in the statement of case – namely, that they did not accept that the Appellant had provided the evidence necessary to discharge the burden of showing that its supplies fell within paragraph 2A.

129. As authority for his position, Mr Watkinson referred me to the following words from the decision of Leggat J in the commercial case of *Tchenguiz and others v Grant Thornton LLP and others* [2015] EWHC 405 (*Tchenguiz*"):

"**[1]** Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial.

[2] As commercial transactions have become more complex and more heavily documented (including electronically), adhering to the basic rules of pleading has become both increasingly difficult and all the more important. It is increasingly difficult because it is harder for pleaders to distil what is essential from the material with which they are provided and because they can feel pressure to show their mettle and enthusiasm for their client's case by treating the pleadings as an opening salvo of submissions in the litigation. It is all the more important because prolixity adds substantial unnecessary costs to litigation at a time when it is harder than ever to keep such costs under control".

130. Ms Sloane said that the passage from *Tchenguiz* which had been cited by Mr Watkinson should not be taken out of context. The pleadings in that case were some 94 pages in length and were criticised by the judge as including "background facts, evidence and polemic in a way which makes it hard to identify the material facts and complicates, instead of simplifying, the issues." She alleged that, as such, it was not very enlightening in relation to the present case.

131. Ms Sloane added that the confirmations in question were provided to the Respondents in late 2015 and early 2016 and there was evidence in the bundles that that was the case. For example, the Appellant said in its re-served notice of appeal of 8 September 2016 in relation to the penalty assessment (at the DB page 36) that the confirmations were provided to an officer of the Respondents on 28 January 2016 and there were references to the provision of the confirmations to the Respondents in the statement at the bottom of page 3 of the letter from BDO to the Respondents of 21 March 2016 (at the DB page 115) and in the third paragraph on page 1 and on pages 5 and 6 of the letter from BDO to the Respondents of 12 June 2018 (which was handed to me at the hearing and placed at the DB tab 16);

132. Ms Sloane said that, if, at the stage when the re-served notice of appeal was lodged, the Respondents had notified the Appellant of the reasons for their conclusion that the confirmations were deficient or amended their statement of case, then the Appellant would either have been able to cure the relevant deficiencies before the hearing by obtaining updated confirmations from the relevant customers or been able to provide further witness evidence to counter the specific allegations in question.

133. Mr Watkinson replied that there was no requirement for a party to litigation to provide the other party in advance with notice of the points which the first-mentioned party intended to raise on cross-examination. He pointed out that the Appellant was aware from the statement made by the Respondents at paragraphs 9 and 11 of the consolidated statement of case of 17 October 2016 that the Respondents did not accept that the confirmations were effective as evidence that the supplies in question fell within paragraph 2A. As such, it was open to the Appellant before the hearing to seek further information from the Respondents as to why the Respondents considered that the confirmations were insufficient.

134. Mr Watkinson added that, in any event, if, contrary to his submissions in relation to this procedural question, I were to decide that raising this argument at the hearing amounted to a breach of the requirement in Rule 25(2) of the Tribunal Rules, then the appropriate remedy for the Appellant to seek would be to apply for the hearing to be adjourned or for the relevant argument to be disregarded. In his view, there was no basis for saying that such failure should lead to the resolution in favour of the Appellant of any ambiguities in the exchanges of correspondence between the Appellant and its customers in the lead-up to the receipt by the Appellant of confirmations from its customers or in the confirmations themselves.

135. Finally, Mr Watkinson pointed out that there had been procedural irregularities in the litigation documents which the Appellant had submitted in relation to the appeals. For example, he mentioned that the re-served notice of appeal referred only to parts supplied for two engines – the TP400 and the V2500 engines – and not to the other engines in the table set out in paragraph 41 above. Mr Watkinson noted that the Respondents had not taken any procedural points in that regard.

Must installation or incorporation in a qualifying aircraft have been certain to occur?

136. Turning to the terms of paragraph 2A itself, Mr Watkinson alleged that the language which was used in paragraph 2A meant that, in order for a supply to qualify for zero-rating under paragraph 2A, the Appellant must have been certain at the time of the relevant supply that the parts which were being supplied were going to be installed or incorporated in a qualifying aircraft. He said that it was very clear from the language used in paragraph 2A that, in order for the supply of a part to qualify for zero-rating under that paragraph, the part must both be of a kind ordinarily installed or incorporated in a qualifying aircraft and "to be" installed or incorporated in a qualifying aircraft. Both limbs of the above test must be satisfied. As such, leaving aside for the moment how the issue might be addressed by obtaining a confirmation from the relevant customer, zero-rating under paragraph 2A was available only if, at the time of the supply, in addition to the relevant part's being of a kind which was ordinarily installed or incorporated in a qualifying aircraft, the relevant part was actually to be installed or incorporated in a qualifying aircraft. In that regard, the words "to be" meant that absolute certainty was required. It was insufficient for the supplier merely to expect that the part in question would be installed or incorporated in a qualifying aircraft, even if the supplier's expectation level were to be high. Even a minute possibility that the part in question might be used for a purpose other than installation or incorporation in a qualifying aircraft was sufficient to mean that there

was an uncertainty that that would occur and that, in turn, meant that the supplier needed to act in the manner described in 744C for cases of uncertainty and obtain a confirmation from its customer as to the satisfaction of the two conditions in relation to the supply in question.

137. In response, Ms Sloane said that, without prejudice to the Appellant's contention that the facts showed that such certainty did in fact exist in this case, even if there were to be a minute possibility that the parts in question might not have been certain to be installed or incorporated in a qualifying aircraft, the law should be applied without regard to remote possibilities – ie the principle of *de minimis non curat lex* applied. In support of her position that the law disregarded remote possibilities, she relied on the decision of the House of Lords in *Customs and Excise Commissioners v Viva Gas Appliances Ltd* [1984] 1 All ER 112 ("*Viva*").

138. That case concerned the meaning of the word "alteration" in item 2 of Group 8 of Schedule 4 to the Finance Act 1972. The House of Lords were considering whether the word "alteration" in the context in which it appeared in the relevant item should be construed in such a way as to encompass only alterations to the structure or fabric of the relevant building which were substantial in relation to the building as a whole. The House of Lords rejected that proposition, holding that works of alteration should still qualify for zero-rating even though they were not substantial in relation to the building as a whole but, in the course of so doing, they noted that works of alteration which were so slight or trivial as to fall within the *de minimis* rule did not qualify as "alteration". Ms Sloane submitted that the case supported the proposition that a similar principle should operate in the context of construing paragraph 2A, with the result that I should disregard remote or extremely unlikely possibilities in determining whether a particular part was going to be installed or incorporated in a qualifying aircraft.

139. She added that, if the Respondents were to be correct in their submission that certainty was required in order to fall within the ambit of the paragraph, then the UK legislation would be contrary to the EU principle that legislation conferring zero-rating needed to be proportional and certain in its application. Ms Sloane pointed out that, just as, in *Mecsek*, the ECJ held that, where it is impossible to produce tangible evidence to substantiate the conclusion that a particular exemption applied, requiring taxable persons to provide conclusive proof that that exemption applied "does not ensure the correct and straightforward application of the [relevant exemption]" (see paragraph [41] in *Mecsek*), so too should that conclusion be drawn (by analogy) in a case where the Respondents were requiring proof that the parts in this case were certain to have been installed or incorporated in a qualifying aircraft.

140. Moreover, she said that there was evidence that this was not the standard which the Respondents have invariably adopted in relation to other UK suppliers of aircraft parts. She provided me at the hearing with an exchange of correspondence between another taxpayer and the Respondents (at the ADB tab 4) in which the Respondents had taken a much more relaxed approach to de minimis possibilities than the one which they were taking in this case. In that exchange, the Respondents confirmed to the relevant taxpayer that it could zero-rate supplies of parts for the

Trent XWB engine even though that engine was, at the time of the relevant supply, still in the course of its development phase. That is not, of course, a basis on which I can find for the Appellant on this question. It is relevant only in the context of a potential claim for judicial review in the High Court. But Ms Sloane suggested that the fact that the Respondents were adopting a position in this case which was inconsistent with their usual one was indicative of the fact that their position in this case was wrong in law.

141. Mr Watkinson said that *Viva* had no relevance in the present context because that case did not relate to language which was at all similar to the language at issue in the present proceedings. In these proceedings, what was in issue was, inter alia, whether the relevant parts were "to be" installed or incorporated in a qualifying aircraft, leaving no room for the application of the *de minimis* principle. This is because either the relevant parts were certain to be installed or incorporated in a qualifying aircraft or there was some element of doubt as to whether or not they were to be so installed and incorporated. In the first case, the statutory language would be satisfied whereas, in the second case, it would not.

142. Mr Watkinson added that, although the test as so expressed was a strict one, the argument on proportionality and certainty had no relevance in circumstances where the legislation required certainty but the clearly-stated practice of the Respondents was to allow a supplier to rely on a confirmation from its customer in a case of doubt. In support of this, he pointed to the statement made by the ECJ at paragraph [56] in *A Oy* set out in paragraph 29 above, to the effect that making zero-rating contingent on the intended use of a part "being known and firmly established" and to the actual use of the aircraft by an appropriate undertaking subsequently being verified as not being liable to give rise to constraints for the Member States and the parties involved in the supply. Mr Watkinson went on to point out the terms of 744C to the effect that certain parts and equipment (including partly-processed parts and equipment) were considered not to fall within the ambit of paragraph 2A and the various paragraphs of 744C which reiterated that, if a supplier was unsure of the use to which a part was going to be put, it should seek a confirmation from its customer and setting out a standard form of confirmation which might be sought from its customer to the relevant effect.

143. Mr Watkinson observed that the present circumstances were therefore not analogous to those in *Mecsek*. In *Mecsek*, the ECJ was considering a situation where it was impossible for the taxpayer to provide the conclusive proof demanded by the tax authority because tangible evidence to support the relevant conclusion did not exist. In contrast, in this case, it was open to the taxpayer to obtain such tangible evidence in the form of a confirmation from its customer in the appropriate terms.

144. In short, Mr Watkinson submitted that, even if the possibility that a supplied part might be used for a purpose other than installation or incorporation in a qualifying aircraft were to be low or remote, there would in such a case be an element of doubt as to the potential application to the relevant supply of paragraph 2A and therefore, in accordance with the injunction in 744C, it would be incumbent on the supplier in such a case to obtain a confirmation from its customer that the supply of

the relevant part satisfied both conditions in paragraph 2A and, in particular, that the relevant part was actually going to be installed or incorporated in a qualifying aircraft.

145. In contrast, Ms Sloane said that the reference in 744C to cases of doubt meant cases where it was reasonable to doubt that the conditions in paragraph 2A might not be satisfied. If the possibility that the relevant part might not be installed or incorporated in a qualifying aircraft were to be so negligible or remote that, to all intents and purposes, it would not be reasonable to contemplate that the relevant part would fail to be so installed or incorporated, then the injunction in 744C to seek a declaration from the customer was not in point. She pointed out that 744C did not say that a declaration from the customer was required in all cases where the supplier did not have conclusive proof that the relevant part was going to be installed or incorporated in a qualifying aircraft. Instead, it said that such a confirmation was required only in cases of doubt. So there was no need for a customer confirmation in cases where the possibility that the supplied part would not be so installed or incorporated was low or negligible.

What did the Appellant need to know at the time of the relevant supply?

146. On a related subject, Mr Watkinson went on to say that, because the legislation required that, absent a confirmation from the customer, it must be certain at the time of supply that the parts in question were going to be installed or incorporated in a qualifying aircraft, the fact that the Appellant was unaware at the time of each relevant supply that the aircraft in which the part was to be installed or incorporated was a "qualifying aircraft", as defined in paragraph 2A, for the purposes of zero-rating under the VAT legislation was necessarily fatal to the position that the required level of certainty existed. He said that, since the Appellant became aware of the possibility that its supplies of parts might fall within paragraph 2A only some time after the supplies in question were actually made - because that possibility was raised for the first time by BDO in its letter of 25 August 2015 (at the DB pages 100 to 103), after the first assessment had been issued - the Appellant could not possibly have had the degree of knowledge required by the terms of the legislation at the time of each supply. Since the Appellant was unaware of the relevant provision at the time of the relevant supplies, it would not have cared about, or considered, whether the parts that it was supplying were going to be installed or incorporated in a qualifying aircraft.

147. In response, Ms Sloane said that there was no need for the Appellant to have been aware, at the time of each relevant supply, that the aircraft in which the parts in question were going to be installed or incorporated was a "qualifying aircraft", as defined in paragraph 2A, for the purposes of zero-rating under the VAT legislation. It was merely necessary that, at the time of each relevant supply, the Appellant knew that the parts in question were going to be installed or incorporated in a particular type of aircraft, which type of aircraft was then subsequently identified as being a "qualifying aircraft", as defined in paragraph 2A, for the purposes of zero-rating under the VAT legislation. In other words, the Appellant need merely have been aware of the use to which the parts would be put without necessarily knowing that that use would qualify for zero-rating as a matter of VAT law.

Does the evidence show that, on the balance of probabilities, each supply satisfied both conditions in paragraph 2A?

148. Mr Watkinson maintained that, after taking into account his submissions in relation to the correct construction of paragraph 2A, the Appellant had failed to provide the requisite evidence to establish that any of the relevant supplies satisfied both conditions in paragraph 2A. More particularly:

(a) before taking into account any confirmation which the Appellant had received from the relevant customer, the evidence showed that, in relation to each supply, there was some possibility that the relevant parts might not have been installed or incorporated in a qualifying aircraft and therefore the evidence was insufficient to establish, on the balance of probabilities, that the relevant parts were certain to have been so installed or incorporated; and

(b) as for the confirmations, the deficiencies in those confirmations as outlined in paragraphs 175 to 191 below meant that they could not be accepted as evidence that the parts to which the confirmations referred were certain to have been so installed or incorporated.

149. Ms Sloane maintained that:

(a) before taking into account any confirmation which the Appellant had received from the relevant customer, the evidence which had been provided by the Appellant was sufficient to establish, on the balance of probabilities, that the parts in question were certain to have been installed or incorporated in a qualifying aircraft;

(b) even if I was not convinced that that was the case, the possibility that the parts in question might not have been installed or incorporated in a qualifying aircraft was so remote that it could (and should) be disregarded, pursuant to the *de minimis* principle, in applying paragraph 2A; and

(c) as regards those supplies in relation to which confirmations had been provided by the relevant customer, the terms of those confirmations satisfied the requirements for confirmations from customers which were set out in 744C and therefore, in accordance with the Respondents' practice, amounted to conclusive evidence that the parts to which the confirmations referred were certain to have been so installed or incorporated.

Summary of the questions of law

150. From the arguments set out above, I have identified the following four points of law on which the parties do not agree:

(a) first, is Mr Watkinson at this stage entitled to raise the arguments which he did at the hearing in relation to the alleged deficiencies in the confirmations which were obtained by the Appellant from certain of its

customers, given the terms of the Respondents' statement of case and skeleton argument or is he precluded from doing so and, if the latter is the case, what is the appropriate way procedurally to deal with the Respondents' breach of Rule 25(2) of the Tribunal Rules?

(b) secondly, in order for zero-rating to apply to a supply made in circumstances where no valid confirmation covering both of the conditions in paragraph 2A has been obtained from the relevant customer, is it necessary, at the time of the relevant supply, for it to have been certain that the parts in question were going to be installed or incorporated in a qualifying aircraft or is it merely necessary for that to have been highly likely to be the case, with only a negligible or remote possibility that that would not be the case?

(c) thirdly, in order for zero-rating to apply to a supply made in circumstances where no valid confirmation covering both of the conditions in paragraph 2A has been obtained from the customer, is it necessary for the supplier to have been aware at the time of the relevant supply that the parts in question were to be installed or incorporated in a "qualifying aircraft", as defined in paragraph 2A, for the purposes of zero-rating under the VAT legislation – that is to say, that the supplier knew that the type of aircraft in which the parts were going to be installed or incorporated was a "qualifying aircraft", as defined in paragraph 2A, for the purposes of zero-rating under the VAT legislation – or is it merely necessary for the supplier to have been aware at the time of the supply that the parts in question were to be installed or incorporated in a type of aircraft known to the supplier, which type of aircraft has subsequently been identified as being a "qualifying aircraft", as defined in paragraph 2A, for the purposes of zero-rating under the VAT legislation, without also knowing at that time that that type of aircraft was a "qualifying aircraft", as defined in paragraph 2A for the purposes of zero-rating under the VAT legislation? and

(d) finally, on the basis of my conclusions in relation to each of the above questions, is the evidence which has been provided by the Appellant in relation to its supplies sufficient to establish that, on the balance of probabilities, each supply fell within the ambit of paragraph 2A?

Questions of fact

Were the relevant parts to be installed or incorporated in a qualifying aircraft?

151. Mr Watkinson's starting point was to say that the Appellant had never produced any evidence of a single qualifying aircraft in which the parts that the Appellant had supplied had been installed or incorporated or identified an actual airline or State institution that was to use any aircraft in which the parts that the Appellant had supplied had been installed or incorporated.

152. Ms Sloane responded by saying that the fact that the Appellant had not been able to identify a specific airline or State institution that was to use the aircraft in which the relevant parts were to be installed or incorporated was neither here nor there as neither the legislation nor 744C nor the Respondents' manual required it. The Appellant's primary case was that the evidence showed that the parts which it had supplied would necessarily have been installed or incorporated in a qualifying aircraft because the parts were manufactured to particular designs for particular engines which could be used only in a qualifying aircraft.

153. Mr Watkinson submitted that, on the contrary, in relation to each of the engines for which the parts had been supplied, the evidence showed that there was no certainty that the relevant engines were going to be installed or incorporated in a qualifying aircraft.

154. The parties' respective arguments in relation to each engine type are set out in paragraphs 155 to 174 below.

The EJ200 engine

155. Mr Watkinson said that the Rolls-Royce website (at the DB page 155) and the entries from Wikipedia in relation to the EJ200 engine (at the DB page 156) showed that EJ200 engines have been used for a purpose other than installation or incorporation in the Eurofighter. The former stated that the EJ200 engine was used in the Bloodhound Project, whilst the latter stated that EJ200 engines can be used to power new military aircraft (which aircraft might weigh less than 8,000 kilograms and therefore not be qualifying aircraft).

156. In response, Ms Sloane pointed to the evidence of Mr McBraida, to the effect that:

> (a) the engine which was used in the Bloodhound Project was a used engine that the Rolls-Royce group were otherwise going to donate to a museum and the parts that were incorporated in that engine would have been supplied in the late 1980s or early 1990s and therefore well before the period which is relevant in this case, a view which was supported by the entry in Wikipedia in relation to the Bloodhound Project, as noted in paragraph 49 above; and
>
> (b) the use of EJ200 engines on new military aircraft was a plan for the future and that no EJ200 had, as yet, been fitted on any aircraft other than the Eurofighter.

157. She added that the most natural construction of the language used in the Rolls-Royce website (at the DB page 155) – that is to say "[i]deal candidate engine for new military aircraft market" - was that Rolls-Royce were advertising the fact that the engine would be ideal for military aircraft other than the Eurofighter in due course, as opposed to being currently in use on such aircraft. This tended to support Mr McBraida's evidence, as set out in paragraph 156(b) above.

The TP400 engine

158. As regards the supply of parts to RR to be installed or incorporated in the TP400 engine, Mr Watkinson referred me to the End Use Certificate from RR of 30 April 2015 (at the DB page 513). He pointed out that, notwithstanding:

> (a) the oral evidence of both Mr McBraida and Mr Brown to the effect that the reference in that End Use Certificate to the development phase was a copy and paste error because the development phase for the TP400 engine ended a long time before the parts in question were supplied; and
>
> (b) the statement by Ms Haworth in her email of 20 November 2018 at 12:39 in the correspondence between her and Mr Brook (at the ADB tab 3), to the effect that, by the time of the supplies in question, the development phase in relation to the TP400 engine type had been over for almost a decade,

the certificate clearly stated that the relevant parts were "intended for the development phase" of the TP400 engine and the response of Mr Brook to Ms Howarth in the correspondence referred to in paragraph 158(b) above did not suggest that those words in the End Use Certificate had been used in error.

159. On the contrary, said Mr Watkinson, that correspondence suggested precisely the opposite. The third paragraph of Mr Brook's email of 27 November 2018 at 19:02 stated that RR always carried out due diligence before issuing an End Use Certificate "to ensure that we are in a position to provide an accurate certificate". The proper construction of that paragraph in Mr Brook's email was that:

> (a) the parts in question were certainly intended for use, either wholly or partly, in the development phase; and
>
> (b) they might, in addition, have been intended for use in the production phase but, if the Appellant had wanted the End Use Certificate to refer to both the development phase and the production phase, the Appellant should have said so at the time.

160. In Mr Watkinson's view, if the Appellant wished to show that the reference in the End Use Certificate to the relevant parts' being used in the development phase was an error, then the Appellant should have obtained oral or written evidence from RR to that effect.

161. In response, Ms Sloane said that, in her view, the email exchange between Mr Brook and Ms Haworth did not support the conclusion that the parts in question were intended for the development phase of the TP400 engine. She submitted that the thrust of Mr Brook's email of 27 November 2018 was to seek to lay the blame for any error in the End Use Certificate at the Appellant's door as opposed to RR's door and to stress that, unlike the declaration which Rolls-Royce had provided on behalf of RR in the letter of 23 December 2015 (at the DB pages 511 and 512), the End Use Certificate was, in any event, not relevant for the purposes of determining whether the supplies in question fell within paragraph 2A.

The Trent 1000 engine

162. Mr Watkinson referred me to the Rolls-Royce website in relation to the Trent 1000 engine (at the DB page 348), which stated that one of the customers who has bought a Boeing 787 Dreamliner was a "Private Customer".

163. In response, Ms Sloane provided me with an extract from the Business Insider UK website (at the ADB tab 6), which showed that there was only one private 787 Dreamliner and that that aircraft was available for hire at an hourly rate. Ms Sloane submitted that, since note (C1) in paragraph 2A defined an "airline" as "an undertaking which provides services for the carriage by air of passengers or cargo (or both)", the owner of that privately-owned 787 Dreamliner was an airline operating for reward chiefly on international routes and therefore the aircraft in question was a qualifying aircraft.

The Trent 700 engine

164. Mr Watkinson referred me to the entry from Wikipedia in relation to the A330, in which the Trent 700 engine is installed or incorporated (at the DB page 397) to the effect that the A330 "is also available as an ultra-long-range corporate jet as the A330-200 Prestige" and to the ACJ DB which stated that there were 41 A330-200 aircraft which fell within the category of "Governments, Executive and Private Jets" in operation as at 31 May 2017 and that the ACJ330-200 was a wide-bodied corporate jet offering space for 60 passengers.

165. Ms Sloane made two points in response. First, she pointed out that simply because an aircraft is described as a "corporate jet", that does not necessarily mean that the aircraft in question is in private use and is not being used by an airline operating for reward chiefly on international routes. It is quite possible that the aircraft in question might be owned by a company which makes the aircraft available to corporate customers by charter in return for a consideration and is therefore in use by an airline operating for reward chiefly on international routes. Secondly, she pointed out that there were only two categories of A330-200 which fell within the category of "corporate jets" – the ACJ330-200 Prestige and the ACJ330neo Harmony. Aircraft within the former category had three engine options, of which the Trent 700 was only one, whilst aircraft within the latter category did not use Trent 700 engines at all (as such aircraft were powered by Trent 7000 engines). As regards the former category, Ms Sloane submitted that, as far as the Appellant was aware, no ACJ330-200 Prestige had ever been sold for private use (as opposed to use for chartering, which would be a qualifying use) and that the Respondents had produced no evidence to show that it had.

The Trent 900 engine

166. Mr Watkinson observed that, although the A380, in which the Trent 900 engine was installed or incorporated, was generally used by international airlines, the ACJ DB stated that a new A380 had been ordered by Prince Al-Waleed bin Talal (as noted in paragraph 66 above).

167. In response, Ms Sloane directed me to the evidence of Mr Brown to the effect that, so far as he was aware, a new A380 had never been acquired from the manufacturer by a private individual and that the aircraft mentioned in the ACJ DB was more likely to be one that had been retired from service by an airline than one that was bought new from the manufacturer.

The Trent XWB engine

168. Mr Watkinson referred me to the ACJ DB which stated that A350 aircraft powered by Trent XWB engines were available for sale as corporate jets.

169. In response, Ms Sloane directed me to the evidence of Mr McBraida to the effect that, so far as he was aware, no A350 corporate jet had yet been sold and to the table in the ACJ DB which revealed that, as at 31 May 2017, no A350 corporate jet had ever been delivered or was in operation.

170. Mr Watkinson also referred me to the entry from Wikipedia in relation to the Trent XWB engine (at the DB page 463), which stated that the engine had received EASA certification only in 2013. He said that this meant that, in relation to supplies made in relation to this engine for a material part of the period which was relevant to this decision, the parts supplied by the Appellant might well have been installed or incorporated in an engine which was used in the development phase of the Trent XWB engine type.

The V2500 engine

171. Mr Watkinson referred me to the entry from Wikipedia in relation to the V2500 engine (at the DB page 482) which stated that the engine powered the A320 family that included the Airbus Corporate Jet and the entry from Wikipedia in relation to the A320 family which (at the DB page 486) stated that the family included the ACJ business jet and (at the DB page 493) stated that the ACJ319 "[was] powered by the same engine types as the A320" – a point which was made clear by the table at the DB page 495. He also referred me to the ACJ DB, which stated that there were 22 A320 aircraft falling within the category of "Governments, Executive and Private Jets" in operation as at 31 May 2017 and stated that the ACJ319 is the corporate jet version of the A319 and competes with, inter alia, the Gulfstream G550 and is the presidential aircraft of a number of countries.

172. Ms Sloane pointed out that the table in the entry from Wikipedia in relation to the A320 family (at the DB page 495) made it clear that engines other than the V2500 – such as the CFM56-5 series and the PW6000 series - could also be used to power aircraft from that family and that both Mr McBraida and Mr Brown, with their long experience in the industry, had said that they were not aware of any Airbus corporate jet that was powered by V2500 engines. This suggested that the A320 aircraft that were listed under the heading of "Governments, Executive and Private Jets" in the ACJ DB were therefore likely to be powered by engines other than the V2500 engine (a point which Mr McBraida had also said he had confirmed with Rolls-Royce).

All engines

173. Finally, in relation to each engine type, Mr Watkinson pointed out that, at the time of each supply, the Appellant could not have been certain that the parts which it was supplying were not going to be installed or incorporated in an engine that was going to be used in the development phase in relation to that engine type or, if the relevant supply was taking place after the end of the development phase in relation to that engine type, incorporated in an engine that was being going to be used in the process of carrying out the testing required to effect ongoing improvements to the relevant engine type.

174. Ms Sloane said that the prospects of this being the case were remote. As regards incorporation in an engine which was going to be used in the development phase of the relevant engine type, she pointed out that, based on the various Wikipedia entries and the evidence of Mr McBraida and Mr Brown, it was plain that the supplies in each case were being made after, and, in many cases, long after, the relevant engine type had been certified by the authorities, so that the development phase in relation to that engine type had finished. As regards incorporation in an engine which was going to be used in the process of carrying out the testing required to effect ongoing improvement to the relevant engine type, she reminded me of the evidence of Mr McBraida – to the effect that:

> (a) the Appellant's customers were unlikely to build new engines to carry out the testing required to effect ongoing improvements to a particular engine type and were more likely for that purpose to use the old engines which had been built for the development phase in relation to that engine type; and
>
> (b) the Appellant's relationship with its customers was so close that he thought that the Appellant would be made aware by its customer if the customer intended to install or incorporate the Appellant's parts in an engine which was being used to carry out the testing required to effect ongoing improvements to the particular engine type as opposed to being installed or incorporated in an aircraft,

and the evidence of Mr Brown – to the effect that spare parts formed only a small proportion of the Appellant's overall sales (he estimated no more than 1% to 2%) and that the Appellant would generally know (because of the delivery address) when its parts were going to be used as spare parts.

The documents from customers

175. Turning to the documents which the Appellant had presented to the Respondents as evidence that its supplies fell within paragraph 2A, Mr Watkinson began by reiterating that the terms of 744C made it clear that, in any case where a supplier was in doubt as to whether or not the terms of that paragraph were satisfied in relation to a supply, the supplier needed to obtain a confirmation from its customer to the effect that the conditions of paragraph 2A had been met. Mr Watkinson pointed out that the further away in the supply chain that a supplier was from the person installing or incorporating the relevant engine in an aircraft, the more likely it was that there would be an element of doubt that the parts that the supplier was supplying

would satisfy the conditions and therefore the more necessary such a confirmation would become.

176. Mr Watkinson then observed that the Appellant had failed to obtain any confirmations whatsoever in relation to the satisfaction of the conditions set out in paragraph 2A from any of IHI, ITP, MTU or Turbomecanica and that the confirmations which the Appellant had obtained from its other customers were all deficient in one way or another.

177. As regards the absence of any confirmation from ITP, Ms Sloane said that the confirmation at the DB page 525 was such a confirmation even though it appeared to have been given by ITP Externals and not ITP. Ms Sloane said that that was evident from the fact that the confirmation referred to the installation or incorporation of the relevant parts in an aircraft used by an airline operating for reward chiefly on international flights (ie a civil commercial aircraft). In fact, the parts supplied by the Appellant to ITP Externals had all been for the EJ200 engine, which was to be installed or incorporated in the Eurofighter and it was the parts supplied to ITP which had been for engines to be installed or incorporated in civil commercial aircraft - namely, the Trent 900, the Trent 1000 and the Trent XWB engines. She added that the End Use Certificate of 27 March 2015 (at the DB page 526) demonstrated that the ITP group tended to use the relevant company names interchangeably because, in that case, the End Use Certificate was purportedly given by ITP Externals and yet it was set out on the notepaper of ITP and referred to the relevant parts' being supplied for the TP400 engine (and it was clear from the other evidence which had been provided for the hearing that the supplies made by the Appellant to the ITP group of parts for the TP400 engine had been made to ITP and not to ITP Externals).

178. Turning then to the position in relation to those customers who had provided a confirmation to the Appellant in relation to the parts supplied to them, Mr Watkinson reiterated that paragraph 13.3 of 744C set out a standard form of confirmation which it said would satisfy the Respondents that the supply in question fell within paragraph 2A. He accepted Ms Sloane's point that the use of the standard form of confirmation was not obligatory - it was open to a supplier, if it wished to do so, to obtain a confirmation in a different form as long as the relevant confirmation ticked the same boxes as the standard form. In this case, in those instances where the Appellant had sought and obtained a confirmation from its customer, the Appellant had chosen to obtain that confirmation in a form that was not the standard form. For reasons on which he then proceeded to elaborate, there were defects in each of the confirmations so obtained.

179. Starting with the confirmations which had been obtained from each of MTU Poland, SMF, FAG, GKN, Magellan and IAMPL - which were all in the same form (ie on the terms of the Standard Certificate) and had been obtained by the Appellant's sending a draft of the relevant confirmation to the customer as an attachment to an email in the same form (as to which, see paragraphs 84 to 86 above) - Mr Watkinson observed that, in each case, the relevant confirmation singularly failed to cover the second condition in paragraph 2A - that is to say, failed to contain a statement that the parts in question were to be installed or incorporated in a qualifying aircraft. Instead,

the relevant confirmation merely said that the relevant parts "were of a kind ordinarily installed, or incorporated in" a qualifying aircraft, without going on to say that they had been so installed or incorporated.

180. Ms Sloane pointed out that the final sentence in each confirmation covered the second condition by necessary implication because that sentence said that the relevant customer would advise the Appellant "if these parts were used for any other purpose". Ms Sloane said that the reference in that sentence to use for any other purpose necessarily meant that the customer was saying that, in the absence of its notifying the Appellant to the contrary, the relevant parts had actually been installed or incorporated in a qualifying aircraft. The words "used for any other purpose" could be referring only to the second condition because only the second condition dealt with actual use. The first condition dealt with the description of the goods and not with actual use. So the reference in that sentence to purpose could not be referring back to the words relating to the first condition in the preceding paragraph.

181. Mr Watkinson said that, on the contrary, the final sentence of the confirmation was simply stating that the customer would notify the Appellant if it transpired that the parts in question were not of a kind ordinarily installed or incorporated in a qualifying aircraft. Mr Watkinson said that his interpretation of the final sentence in the confirmation was consistent with the terms of the email sent by the Appellant to the customer attaching the draft of the relevant confirmation which the Appellant was requesting the customer to execute.

182. In that covering email, the Appellant began by explaining that the purpose of asking the relevant customer to sign the confirmation was for the relevant customer "to confirm the parts we have supplied to you are for Qualifying Aircraft which are exempt from VAT under UK law". It then set out the definition of "qualifying aircraft" and said the following:

> "In this regard please can you also confirm that parts received from McBraida Plc have been incorporated into RR engines of a type that will be or have been supplied to Qualifying Aircraft."

183. Mr Watkinson seized on the sentence set out above as evidence that the confirmation which the Appellant had attached to its email was simply covering the first condition in paragraph 2A and that, by virtue of this additional request, the Appellant was asking the relevant customer to provide a separate and self-standing confirmation, in addition to executing the relevant attached form of confirmation, which would deal with the second condition in paragraph 2A. He went on to say that, as the relevant customer in each case had not provided a separate self-standing confirmation in response to the email but had simply executed the attached form of confirmation, the relevant customer had not provided any confirmation whatsoever to the effect that the parts supplied by the Appellant had in fact been installed or incorporated in a qualifying aircraft.

184. In response, Ms Sloane pointed out that the exchanges between the Appellant and its customer in each case had not been effected by lawyers and therefore it was

inappropriate to apply strict rules of construction to the terms of the exchange. In each case, it was necessary to consider each party's understanding of the exchange as opposed to construing the exchange in the same way as a statute or contract. Once one adopted that approach, the first part of the email made it clear that the Appellant was asking the relevant customer to complete the attached form of confirmation and thereby confirm that the parts in question were both of a kind ordinarily installed or incorporated in a qualifying aircraft and to be installed or incorporated in a qualifying aircraft. That having been done, the sentence which appeared in the covering email after the definition of "qualifying aircraft" was not asking the relevant customer to provide a separate self-standing confirmation in addition to completing the attached form of confirmation but simply explaining why the attached form of confirmation was needed, having set out the definition of "qualifying aircraft" which was the term used in the attached form of confirmation. Thus, the word "also" which appeared in the sentence was otiose and was not intended by the Appellant to convey to the relevant customer that a separate self-standing confirmation in addition to executing the attached form of confirmation was required. This was clearly understood by the relevant customer in each case because each of them simply returned an executed copy of the attached form of confirmation without either providing a separate self-standing confirmation or refusing to do so or even asking for that part of the email to be explained further to them. In fact, the only additional exchange between the parties in each case had involved a request from the Appellant to the customer to fill in a table showing the engine type for which the Appellant's parts were destined, a request with which each customer complied immediately.

185. Mr Watkinson then turned to the various documents which had been provided to the Appellant by Rolls-Royce.

186. He referred once again to the concern raised by the reference to the use of the parts in the development phase of the TP400 engine, as set out in paragraphs 158 to 161 above.

187. As for the other documents, Mr Watkinson first pointed out that the letter from Mr Brook of Rolls-Royce to the Appellant of 23 December 2015 (at the DB page 528) related only to parts for the Trent 900, Trent 1000 and Trent XWB engines which had been supplied directly by the Appellant to Rolls-Royce Singapore. By its very terms, therefore, it did not apply to parts for those engines which had been supplied by the Appellant to a customer other than Rolls-Royce Singapore and then on-supplied by that customer to Rolls-Royce Singapore, to parts for those engines which had been supplied by the Appellant to RR or to parts for any engines other than the engines specified in the letter. The letter also referred to the "747 Dreamliner" instead of the "787 Dreamliner". Finally, he submitted that the statement at the end of the first paragraph, to the effect that it was "not feasible" that any of the A380, the Boeing 787 Dreamliner or the A350 "will be purchased for corporate or private use" was plainly incorrect, given his view of the evidence from Wikipedia and Rolls-Royce's own website, as summarised in paragraphs 162, 166 and 168 above.

188. Similar observations could be made in relation to the letter from Mr Brook of Rolls-Royce to the Appellant of 23 December 2015 (at the DB pages 511 and 512).

Again, that letter applied only to parts for the V2500 and TP400 engines which had been supplied directly by the Appellant to RR. By its very terms therefore, it did not apply to parts for those engines which had been supplied to a customer other than RR and then on-supplied by that customer to RR or to parts for any engines other than the engines specified in the letter. As such, the letter did not apply to supplies to RR of parts for the Trent 900 or Trent 1000 engines. In addition, the statement in the first paragraph of the letter to the effect that all of the Airbus A320 family of aircraft "will meet the definition of a qualifying civil aircraft defined in Public Notice 744C" was plainly incorrect, given his view of the evidence from Wikipedia and Rolls-Royce's own website, as summarised in paragraph 171 above.

189. Ms Sloane noted that, notwithstanding the above points, each of the above letters contained a confirmation at the end of the letter which covered both of the conditions necessary for paragraph 2A to apply. Mr Watkinson conceded that this was the case but noted that each confirmation was limited in its application to the supplies to which the relevant letter was referring (and therefore subject to the limitations noted above) and that little weight could be attached to each confirmation given the clear errors which appeared earlier in the relevant letter.

190. Turning to the documents provided by TEI, Mr Watkinson observed that, just as the Appellant was alleging that the reference in the End Use Certificate from RR (at the DB page 513) to the relevant parts' being required for the development phase of the TP400 engine was a copy and paste error by RR, so too was the Appellant alleging that the reference in the letter of intent from TEI of 22 March 2012 (at the DB pages 522 and 523) to a particular part which had been sold to TEI – the oil jet distributor assembly (Part number TP290127) - requiring "further machining" was an error attributable to the fact that English was not the first language of the writer and that, in reality, none of the parts sold to TEI had been sold partly-processed. In Mr Watkinson's view, this was another case where a document which had been produced to the Respondents by the Appellant suggested on its terms that the relevant supply did not fall within paragraph 2A and the Appellant was alleging that the document was simply incorrect.

191. Ms Sloane submitted that the terms of the confirmation from TEI (set out at the DB page 519) and the End Use Certificate from TEI (set out at the DB page 520) clearly showed that all of the parts which had been supplied by the Appellant to TEI were to be incorporated directly into the TP400 engine, without the need for further machining. The confirmation stated that the parts "[were] incorporated into the FBS module of TP400-D6 Gas Turbine which empower A400M Military Transportation Plane" and the End Use Certificate stated that "TEI…shall complete modular design and manufacture some of the modules which belong to TP400-D6 engine" and certified that "the parts purchased from McBraida plc, UK are used solely in manufacturing of the end product which eventually will be sent to [a named entity]". Ms Sloane submitted that these statements showed that the reference in the letter of intent to the fact that the relevant part would be subjected to "further machining" was clearly an error on the part of TEI.

VIII FINDINGS OF FACT

192. After considering:

(a) the evidence which is set out in the section headed VI THE EVIDENCE above;

(b) the arguments of the parties so far as they pertain to questions of fact which are set out in the sub-section headed "Questions of fact" in the section headed VII THE ARGUMENTS OF THE PARTIES above,

my conclusions in relation to the questions of fact which are relevant to this decision are set out in paragraphs 193 to 226 below.

193. Before examining in detail the specific facts in relation to each of the supplies which are the subject of this decision, I should make one general observation and set out one general conclusion in relation to the evidence with which I have been presented.

194. The general observation is that I was impressed by both of the witnesses who gave evidence on behalf of the Appellant. The impression I formed was that both Mr McBraida and Mr Brown were reliable and credible witnesses. However, in relation to certain points, the evidence of one or both witnesses was expressed in less than fulsome terms – for example, the relevant witness said that he was "not aware that", or "thought it unlikely that", a particular engine type had ever been installed or incorporated in a particular aircraft type or that a particular aircraft type had ever been acquired for use other than by an airline operating for reward chiefly on international routes.

195. In such cases, where the relevant statement was directly contrary to some clear written evidence which was provided to me - whether in the form of statements made on the internet or in the form of documents provided to the Appellant by its customers - and was not itself supported by some other written evidence, I have tended to favour the written evidence over the witness evidence. This is because, despite the credibility of the witnesses in giving their oral evidence, it is difficult for an assertion which is less than absolute to trump clear written evidence to the contrary, particularly as both parties have, in general, placed considerable reliance on the written evidence in making their submissions.

196. The general conclusion to which I refer above relates to the question of whether each confirmation on the terms of the Standard Certificate which was obtained by the Appellant from certain of its customers, together with the email exchanges which took place between the Appellant and the relevant customer in each case in relation to the Appellant's obtaining the relevant confirmation, should be construed in the manner proposed by Mr Watkinson - ie as covering solely the first condition in paragraph 2A and leaving at large the question of whether or not, in addition to being of a kind ordinarily installed or incorporated in a qualifying aircraft, the relevant parts were actually to be so installed or incorporated - or in the manner proposed by Ms Sloane - ie as covering both conditions in paragraph 2A.

197. Before expressing my view on this question and explaining the reasons for reaching my view, I should say that I am puzzled by the fact that:

(a) when the Appellant could have used the standard form of confirmation set out in paragraph 13.3 of 744C, it chose instead to use its own bespoke form of confirmation which is expressed in terms that have led the parties to differ on the construction of the confirmation; and

(b) the fact that the Appellant then compounded that error by sending the draft confirmation to each customer under cover of an email which might generously be described as elliptical, if not downright confusing.

198. Had the Appellant not acted in this manner, I suspect that it would have saved itself a great deal of trouble.

199. Having said that, I have concluded that, notwithstanding the drafting infelicities noted by Mr Watkinson in paragraphs 179 to 184 above, Ms Sloane's interpretation of the confirmation on the terms of the Standard Certificate and the email exchanges which took place between the Appellant and the relevant customer in each case in relation to the Appellant's obtaining that confirmation is to be preferred. The main reason for my reaching this conclusion is that, despite the fact that Mr Watkinson sought to persuade me otherwise, in my opinion, the final sentence in each confirmation is clearly saying that the relevant parts will have actually been installed or incorporated in a qualifying aircraft unless the customer informed the Appellant to the contrary. In my view, the reference to "any other purpose" in that sentence means that the sentence cannot logically be construed in any other way and, in particular, cannot be construed as referring to the first condition.

200. Given that that is the case, I think that the unfortunate sentence in the covering email which could be read as suggesting that the Appellant was asking the relevant customer to provide a further self-standing confirmation, in addition to the formal confirmation which was attached in draft to the initial email from the Appellant, should simply be read as reiterating that, by completing the formal attached confirmation, the relevant customer would effectively be confirming the satisfaction of both conditions in paragraph 2A – that is to say, as confirming the satisfaction of the second condition in paragraph 2A, in addition to the first. I think that the fact that the parties to the exchange were not lawyers and that none of the customers appears to have understood the request in any other way tends to support my conclusion. If the covering email had been intended to say what Mr Watkinson alleges that it says, then one would have expected at least one of the customers to have replied either by providing the requested self-standing confirmation or by refusing to do so or by asking for a further explanation in relation to it and none of them has done any of those things.

201. Following that general observation and that general conclusion, my findings of fact in relation to each of the relevant supplies are as follows.

Supplies of parts for the EJ200 engine to ITP

202. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from ITP in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to ITP for installation or incorporation in the EJ200 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion because the evidence shows that there are only three possible reasons why any EJ200 engine in which the parts in question were to be installed or incorporated would not have then been installed or incorporated in a Eurofighter aircraft weighing more than 8000 kilograms and used by a State institution.

The first reason is that the EJ200 engine in question might have been used in the Bloodhound Project, the second reason is that the EJ200 engine in question might have been installed or incorporated in a "new military aircraft" other than the Eurofighter (as mentioned on the Rolls-Royce website (at the DB page 155)) and that that "new military aircraft" might not have been heavy enough to be a qualifying aircraft and the third reason is that the EJ200 engine in question might have been used in carrying out the testing required to effect ongoing improvements to EJ200 engines in general.

Of those three reasons, I discount the first two on the basis of the Wikipedia entries referred to in paragraphs 46 to 49 above and the evidence of the two witnesses as set out in paragraphs 97 to 120 above. That is to say that I accept that the EJ200 engine which was used in the Bloodhound Project was an old engine constructed out of parts supplied long before the period to which this decision relates that would otherwise have been donated to a museum and I accept that, in the period to which this decision relates, there were no aircraft in which the EJ200 engines were installed or incorporated other than the Eurofighter and that the installation or incorporation of the EJ200 engines in military aircraft other than the Eurofighter was simply a potential future use.

In relation to the former, the entry from Wikipedia in relation to the Bloodhound Project makes it clear that the EJ200 engine which was used in the course of that project was a used engine that was destined for a museum. It therefore supports the evidence given by Mr McBraida.

In relation to the latter, although the Rolls-Royce website referred to the fact that the EJ200 engine was an "[i]deal candidate engine" for new military aircraft, I do not regard that as contradicting the evidence of the witnesses to the effect that such use had not yet occurred at the time of the supplies in question. This is because there is no specific reference in the website to the new military aircraft in question and the phraseology set out above seems to me to be more aptly referring to a future use than a current one.

But I cannot discount the possibility, however remote it may be, that the parts in question might have been installed or incorporated in an EJ200 engine which was then used for carrying out the testing required to effect ongoing improvements to EJ200 engines in general. Whilst the evidence of Mr McBraida was that it was highly unlikely that new EJ200 engines would be built for the purpose of carrying out the testing required to effect ongoing improvements to EJ200 engines in general, he could not discount that possibility. And, whilst the evidence of Mr Brown was that only 1% or 2% of the parts supplied by the Appellant to its customers were acquired as replacement parts, he could not discount the possibility that some of those replacement parts might in due course be installed or incorporated in EJ200 engines which were to be used in carrying out the testing required to effect such ongoing improvements.

Consequently, before taking into account the terms of any confirmation from ITP in relation to the supplies in question, I do not think that it is possible to conclude with 100% certainty that the parts which were supplied for the EJ200 engine by the Appellant to ITP were to be installed or incorporated in a qualifying aircraft but, based on the evidence of the two witnesses and the evidence from the internet, I believe that the possibility that this was not the case was remote; and

(b) the Appellant did not receive a confirmation from ITP to the effect that the supplies of parts for the EJ200 engine by the Appellant to ITP satisfied the two conditions in paragraph 2A.

I have reached this conclusion because, although the Appellant received a confirmation on the terms of the Standard Certificate from ITP Externals (at the DB page 525), that confirmation came from ITP Externals and not ITP and referred to the installation or incorporation of the relevant parts on civil commercial aircraft and not qualifying aircraft used by a State institution. In order to be an effective confirmation, the relevant document needed to have been executed by ITP itself and to have related to qualifying aircraft used by a State institution.

Supplies of parts for the EJ200 engine to ITP Externals

203. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from ITP Externals in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to ITP Externals for installation or incorporation in the EJ200 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 202(a) above; and

(b) the Appellant did not receive a confirmation from ITP Externals to the effect that the supplies of parts for the EJ200 engine by the Appellant to ITP Externals satisfied the two conditions in paragraph 2A.

I have reached this conclusion because, although the Appellant received a confirmation on the terms of the Standard Certificate from ITP Externals (at the DB page 525), that confirmation referred to the installation or incorporation of the relevant parts on civil commercial aircraft and not on qualifying aircraft used by a State institution. The statement is therefore demonstrably incorrect and cannot constitute a valid confirmation for the purposes of paragraphs 7.7 and 13 of 744C.

Supplies of parts for the TP400 engine to RR

204. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from RR in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to RR for installation or incorporation in the TP400 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion because the evidence shows that there are only two possible reasons why any TP400 engine in which the parts in question were to be installed or incorporated would not itself have been installed or incorporated in an A400 military aircraft weighing more than 8000 kilograms and used by a State institution.

The first reason is that the TP400 engine in question might have been used in the development phase of the engine, as that is what the End Use Certificate of 30 April 2015 provided by RR (at the DB page 513) said and the second reason is that the TP400 engine in question might have been used in carrying out the testing required to effect ongoing improvements to TP400 engines in general.

As regards the first of these reasons, I have considered all of the evidence provided to me on this subject and have concluded that, on the balance of probabilities, the parts which were supplied for the TP400 engine by the Appellant to RR during the period with which this decision is concerned were not used in the development phase of the TP400 engine.

The sole evidence to the contrary on which the Respondents rely is the statement in the End Use Certificate of 30 April 2015 from RR to the effect that the parts supplied by the Appellant were "intended for the development phase of the TP400-D6 engine" and the exchange of correspondence between Ms Haworth of the Appellant and Mr Brook of Rolls-Royce shortly before the hearing in relation to that statement which Mr Watkinson submits supports the veracity of that statement.

On the other hand, the supplies to which this decision relates took place in and after January 2011. Although it is not clear exactly from the DB when in the period the relevant parts were supplied, Ms Haworth's email of 21 November 2018 to Mr Brook suggests that the supplies did not commence until April 2011.

It is clear from the Wikipedia entry in relation to the TP400 engine (at the DB page 336) that the first run of the engine was in 2005 and it is also clear from the Wikipedia entry in relation to the A400M military aircraft (at the DB page 342) that serial production of the aircraft commenced in January 2011 and that the engine was certified in May 2011. In addition, in giving their evidence, both Mr McBraida and Mr Brown said that the development phase for the TP400 engine had been over for some time by the time that the supplies by the Appellant were made and that all of the Appellant's parts had been installed or incorporated in production engines (see paragraphs 107 and 115 above).

Given the dates in the Wikipedia entries and the witness evidence, I am inclined, on balance, to place very little evidential weight on the email from Mr Brook of 27 November 2018. It is clear from that email that Mr Brook's main intention in writing it was to reiterate that the Appellant ought to be able to rely on the letters from Rolls-Royce of 23 December 2015 to support its claims for zero-rating and to express surprise that the Respondents were taking into account the terms of an End Use Certificate in determining whether or not zero-rating applied.

I also believe that the terms of the third paragraph of that letter appear to be focused more on which party was responsible for any erroneous statement in the End Use Certificate than on whether the End Use Certificate was in fact erroneous. Indeed, the final sentence suggests that the Appellant ought not to treat the relevant statement in the End Use Certificate as proof that the parts supplied by the Appellant were only used in development.

So, after weighing up all of the evidence in relation to this point, I have reached the view that the Appellant's position on this is to be preferred.

As regards the second of these reasons, the points made in paragraph 202(a) above apply to the parts supplied for the TP400 engine by the Appellant to RR in the same way as they apply to the parts supplied for the EJ200 engine to ITP and I therefore consider that there was a remote possibility that the parts supplied for the TP400 engine by the Appellant to RR were to be used for carrying out the testing required to effect ongoing improvements to TP400 engines in general; and

(b) the Appellant did receive a confirmation from RR to the effect that the supplies of parts for the TP400 engine by the Appellant to RR satisfied the two conditions in paragraph 2A.

I have reached this conclusion because the confirmation from Rolls-Royce (in relation to parts supplied to RR) in the letter from Mr Brook of 23 December 2015 (at the DB pages 511 and 512) applies in relation to the parts which were supplied for the TP400 engine by the Appellant to RR and that confirmation clearly covers both of the conditions which need to be satisfied in order for paragraph 2A to apply to the supplies of those parts.

Mr Watkinson submitted that the fact that the statement made by Mr Brook in the first paragraph of the letter - to the effect that all members of the A320 aircraft family "will meet the definition of a qualifying civil aircraft defined in Public Notice 744C" – was demonstrably incorrect should invalidate the confirmation set out at the end of the letter.

I can see some merit in Mr Watkinson's point so far as the supplies of parts for the V2500 engine by the Appellant to RR are concerned – because of my conclusion set out in paragraph 224(a) below to the effect that not all members of the A320 aircraft family may be being used by airlines operating for reward on international routes - and I consider that issue further in paragraph 224(b) below in setting out my finding of fact as to whether or not a confirmation has been given in relation to those supplies. But I can see no basis for concluding that the relevant confirmation should be disregarded to the extent that it relates to supplies of parts for the TP400 engine by the Appellant to RR.

This is because the equivalent statement by Mr Brook in relation to the TP400 engine and the A400M aircraft further on in the letter is not incorrect and I can see no reason why an incorrect statement in relation to one type of engine and type of aircraft should be treated as invalidating a confirmation to the extent that the confirmation relates to a quite separate type of engine and type of aircraft.

Supplies of parts for the TP400 engine to ITP

205. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from ITP in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to ITP for installation or incorporation in the TP400 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion because the evidence shows that the only reason why any TP400 engine in which the parts in question were to be installed or incorporated would not itself have been installed or incorporated in an A400 military aircraft weighing more than 8000 kilograms and used by a State institution is that the TP400 engine in question might have been used in carrying out the testing required to effect ongoing improvements to TP400 engines in general and, in that regard, the points made in paragraph 202(a) above apply to the parts supplied for the TP400 engine by the Appellant to ITP in the same way as they apply to the parts supplied for the EJ200 engine by the Appellant to ITP.

For the sake of completeness, I should record that, even if the reference in the End Use Certificate of 30 April 2015 provided by RR (at the DB page 513) could be seen as evidence that parts supplied for the TP400 engine to a customer other than RR during the period with which this decision is concerned were also for use in the development phase of the TP400

engine, I have already set out, in paragraph 204(a) above, my reasons for concluding that, on the balance of probabilities, notwithstanding that statement, the parts supplied for the TP400 engine to RR during the period with which this decision is concerned were not for such use and the same reasoning obviously applies to supplies of parts for the TP400 engine to customers other than RR during the period in question; and

(b) the Appellant did not receive a confirmation from ITP to the effect that the supplies of parts for the TP400 engine by the Appellant to ITP satisfied the two conditions in paragraph 2A.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 202(b) above.

For the sake of completeness, I should add that I do not accept the Appellant's contention that the confirmation from Rolls-Royce (in relation to parts supplied for the TP400 engine by the Appellant to RR) in the letter from Mr Brook of 23 December 2015 (at the DB pages 511 and 512) applies also to parts which were supplied for the TP400 engine by the Appellant to ITP because those parts were to be on-supplied to RR in due course. The letter from Mr Brook is quite clearly stated to apply only to those parts which were supplied by the Appellant to RR directly. It therefore cannot apply to a part which was supplied to ITP, even if the relevant part was later on-supplied to RR.

I also do not accept that the End Use Certificate at the DB page 526 amounts to a confirmation from ITP to the effect that the supplies of parts for the TP400 engine by the Appellant to ITP satisfied the two conditions in paragraph 2A. This is because, in the first place, the End Use Certificate, although on the headed notepaper of ITP, was purportedly given by ITP Externals and not ITP, in the second place, the End Use Certificate does not deal in any way with the first condition in paragraph 2A – namely, the need for the relevant part to be of a kind ordinarily installed or incorporated in a qualifying aircraft – and, in the third place, as regards the second condition in paragraph 2A, the End Use Certificate merely states the general position that the TP400-D6 engine is "for the A400M, a military transport aircraft" and I read that as saying no more than that, as a general matter, the TP400-D6 engine is the engine type which powers the A400M military transport aircraft and not as saying that the specific parts in question were actually installed or incorporated in an A400M military transport aircraft (as opposed to being, say, used in carrying out the testing required to effect ongoing improvements in the TP400 engine type).

Supplies of parts for the TP400 engine to MTU

206. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from MTU in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to MTU for

installation or incorporation in the TP400 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 205(a) above; and

(b) the Appellant did not receive a confirmation from MTU to the effect that the supplies of parts for the TP400 engine by the Appellant to MTU satisfied the two conditions in paragraph 2A.

I have reached this conclusion for two reasons.

First, the Appellant has provided no confirmation of any kind from MTU.

Secondly, for the reason set out in paragraph 205(b) above, I consider that the confirmation from Rolls-Royce (in relation to parts supplied for the TP400 engine by the Appellant to RR) in the letter from Mr Brook of 23 December 2015 (at the DB pages 511 and 512) does not apply to the parts supplied for the TP400 engine by the Appellant to MTU.

Supplies of parts for the TP400 engine to TEI

207. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from TEI in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to TEI for installation or incorporation in the TP400 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 205(a) above;

(b) the oil jet distributor assembly (Part number TP290127) which was supplied for the TP400 engine by the Appellant to TEI was partly-processed.

I have reached this conclusion because the letter of intent from TEI of 22 March 2012 (at the DB pages 522 and 523) states clearly that the relevant part required "further machining" before being onward supplied by TEI.

I have taken into account the submission by Ms Sloane to the effect that the confirmation from TEI (at the DB page 519) and the End Use Certificate from TEI (at the DB page 520) show that the relevant part was to be incorporated directly into the TP400 engine without the need for further machining. However, I do not see how either of those documents establishes that the relevant part was not to be subject to further machining before being incorporated in the TP400 engine. A confirmation to the effect that a part is to be incorporated into an engine is not necessarily to be construed as saying that the relevant part will be so incorporated without the need for further machining beforehand. And the reference in the End Use Certificate to the fact that the relevant part would "be used solely in manufacturing of the end product which eventually will be

sent to [another entity] for assembly" is, if anything, in my view, more supportive of the conclusion that further machining will be carried out before the relevant part is installed or incorporated in the engine than the contrary.

I have also taken into account the evidence of Mr McBraida to the effect that the relevant part was not partly-processed and that the statement to the contrary in the letter of intent was attributable to the fact that English was not the first language of the writer. However, in the absence of any written evidence to support Mr McBraida's testimony on this point and in the light of the terms of the documents to which I have referred above, I am unable to accept that that was the case; and

(c) the Appellant did not receive a confirmation from TEI to the effect that the supplies of parts for the TP400 engine by the Appellant to TEI satisfied the two conditions in paragraph 2A.

I have reached this conclusion for two reasons.

First, the confirmation from TEI (at the DB page 519) does not deal with the first condition in paragraph 2A – namely, the need for the relevant part to be of a kind ordinarily installed or incorporated in a qualifying aircraft. Whilst I strongly suspect that that is the case, I have been presented with no evidence to that effect and the confirmation does not say as much and therefore does not amount to a confirmation of that fact for the purposes of paragraphs 7.7 and 13 of 744C.

Secondly, as regards the second condition in paragraph 2A, the relevant confirmation from TEI does not say that the parts in question were actually installed or incorporated in a qualifying aircraft. Instead, it simply says that the parts in question were installed or incorporated in a TP400-D6 engine "which empower[s]" the A400M aircraft. In other words, as I read the confirmation, it is simply saying, first, that the parts in question were installed or incorporated in a TP400-D6 engine and, secondly, that the TP400-D6 engine is the engine type which powers the A400M military aircraft. It is not saying that the specific parts in question were actually installed or incorporated in an A400M military aircraft.

Thirdly, the End Use Certificate from TEI (at the DB page 520) suffers from the same deficiencies as those noted in relation to the confirmation from TEI (at the DB page 519) in that it does not cover the first condition in paragraph 2A and does not say that the specific parts in question were actually installed or incorporated in an A400M military transport aircraft.

Finally, for the reason set out in paragraph 205(b) above, I consider that the confirmation from Rolls-Royce (in relation to parts supplied for the TP400 engine by the Appellant to RR) in the letter from Mr Brook of 23 December 2015 (at the DB pages 511 and 512) does not apply to the parts supplied for the TP400 engine by the Appellant to TEI.

Supplies of parts for the Trent 1000 engine to ITP

208. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from ITP in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to ITP for installation or incorporation in the Trent 1000 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion because the evidence shows that there are only two possible reasons why any Trent 1000 engine in which the parts in question were to be installed or incorporated would not then have been installed or incorporated in an aircraft used by an airline operating for reward chiefly on international routes.

The first reason is that the Trent 1000 engine in question might have been installed or incorporated in a Boeing 787 Dreamliner which was to be used by a person other than such an airline and the second reason is that the Trent 1000 engine in question might have been used in carrying out the testing required to effect ongoing improvements to Trent 1000 engines in general.

As regards the first of these reasons, the Wikipedia entry in relation to the Boeing 787 Dreamliner (at the DB pages 354, 367 and 368) states that the aircraft seats between 242 and 335 passengers and that, as at July 2015, a total of 286 of the aircraft were in "airline service".

Mr Watkinson pointed out that the Rolls-Royce website (at the DB page 348) states that customers who have bought Trent 1000-powered Boeing 787 Dreamliners include a "Private Customer" and the Business Insider UK website at the ADB tab 6 includes a detailed description of a privately-owned Boeing 787 Dreamliner. On the other hand, the Business Insider UK website makes it clear that the Boeing 787 Dreamliner referred to therein is "the world's only private Boeing 787 Dreamliner" and that the aircraft in question is available for hire at an hourly rate. Since note (C1) in paragraph 2A defines an "airline" as "an undertaking which provides services for the carriage by air of passengers or cargo (or both)", I have concluded that, on the balance of probabilities, the only privately-owned Boeing 787 Dreamliner is also in use by an airline operating for reward chiefly on international routes.

However, as regards the second of these reasons, the points made in paragraph 202(a) above apply to the parts supplied for the Trent 1000 engine by the Appellant to ITP in the same way as they apply to the parts supplied for the EJ200 engine to ITP and I therefore consider that there was a remote possibility that the parts supplied for the Trent 1000 engine by the Appellant to ITP were to be used for carrying out the testing required to effect ongoing improvements to Trent 1000 engines in general; and

(b) the Appellant did not receive a confirmation from ITP to the effect that the supplies of parts for the Trent 1000 engine by the Appellant to ITP satisfied the two conditions in paragraph 2A.

I have reached this conclusion because, although the Appellant received a confirmation on the terms of the Standard Certificate from ITP Externals (at the DB page 525), that confirmation came from ITP Externals and not from ITP.

I have taken into account Ms Sloane's argument to the effect that the wrong company name was inserted both on the headed notepaper on which the letter was written and in the terms of the relevant letter and that the confirmation has effectively come from ITP and not ITP Externals. However, I am unable to accept this. The letter is clearly stated to come from ITP Externals and, notwithstanding the fact that it refers to supplies of parts to be installed or incorporated in an engine on a civil commercial aircraft, I do not believe that I can overlook that basic point. It was up to the Appellant to satisfy itself that the confirmations which it received in each case came from the right company and referred to the right supplies. For that reason, I do not accept that the confirmation set out at the DB page 525 can be said to have come from ITP.

In addition, for the sake of completeness, I should add that I do not agree with Ms Sloane's contention that the confirmation from Rolls-Royce (in relation to parts supplied for the Trent 900, Trent 1000 and Trent XWB engines by the Appellant to Rolls-Royce Singapore) in the letter from Mr Brook of 23 December 2015 (at the DB page 528) applies to parts which were supplied for the Trent 1000 engine by the Appellant to ITP because those parts were to be on-supplied to Rolls-Royce Singapore in due course. The letter from Mr Brook is quite clearly stated to apply only to those parts which were supplied by the Appellant to Rolls-Royce Singapore directly. It therefore cannot apply to a part which was supplied to ITP, even if the relevant part was later on-supplied to Rolls-Royce Singapore.

Supplies of parts for the Trent 1000 engine to Magellan

209. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from Magellan in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to Magellan for installation or incorporation in the Trent 1000 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 208(a) above; and

(b) the Appellant did receive a confirmation from Magellan to the effect that the supplies of parts for the Trent 1000 engine by the Appellant to Magellan satisfied the two conditions in paragraph 2A.

I have reached this conclusion because the confirmation on the terms of the Standard Certificate from Magellan to the Appellant (at the DB page 539) contained a confirmation in relation to all of the parts which were supplied by the Appellant to Magellan and, in accordance with the general conclusion which I have expressed at paragraphs 196 to 200 above, I believe that that confirmation is to be construed as covering both of the conditions which need to be satisfied in order for paragraph 2A to apply to the supplies of those parts.

Supplies of parts for the Trent 1000 engine to RR

210. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from RR in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to RR for installation or incorporation in the Trent 1000 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 208(a) above; and

(b) the Appellant did not receive a confirmation from RR to the effect that the supplies of parts for the Trent 1000 engine by the Appellant to RR satisfied the two conditions in paragraph 2A.

I have reached this conclusion because, although the Appellant received a confirmation from Rolls-Royce (in relation to parts supplied for the V2500 and TP400 engines by the Appellant to RR) in the letter from Mr Brook of 23 December 2015 (at the DB pages 511 and 512) and that confirmation covered the two conditions which need to be satisfied in order for paragraph 2A to apply, that letter and confirmation related solely to supplies of parts for the V2500 and TP400 engines and not to supplies of parts for Trent 1000 engines. The only confirmation from Rolls-Royce in relation to parts supplied for the Trent 1000 engine related to supplies of such parts to Rolls-Royce Singapore and that confirmation does not therefore apply to supplies of such parts to RR.

Supplies of parts for the Trent 1000 engine to Rolls-Royce Singapore

211. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from Rolls-Royce Singapore in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to Rolls-Royce Singapore for installation or incorporation in the Trent 1000 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 208(a) above; and

(b) the Appellant did receive a confirmation from Rolls-Royce Singapore to the effect that the supplies of parts for the Trent 1000 engine by the Appellant to Rolls-Royce Singapore satisfied the two conditions in paragraph 2A.

I have reached this conclusion because the letter of 23 December 2015 from Mr Brook of Rolls-Royce to the Appellant (at the DB page 528) contained a confirmation in relation to the parts which were supplied for the Trent 1000 engine by the Appellant to Rolls-Royce Singapore and that confirmation clearly covers both of the conditions which need to be satisfied in order for paragraph 2A to apply to the supplies of those parts.

Mr Watkinson submitted that the fact that the statement made by Mr Brook in the first paragraph of the letter - to the effect that "it is not feasible that [any of the A380, Boeing 787 or A350] will be purchased for corporate or private use" – was demonstrably incorrect should invalidate the confirmation set out at the end of the letter.

I can see some merit in Mr Watkinson's point so far as the supplies of parts for the Trent 900 engine by the Appellant to Rolls-Royce Singapore are concerned – because of my conclusion set out in paragraph 214(c) below to the effect that there is at least one A380 aircraft in which Trent 900 engines are installed or incorporated which is not in use by an airline operating for reward chiefly on international routes - and I consider that issue further in paragraph 220(b) below in setting out my finding of fact as to whether or not a confirmation has been given in relation to those supplies. But I can see no basis for concluding that the relevant confirmation should be disregarded to the extent that it relates to supplies of parts for the Trent 1000 engine by the Appellant to Rolls-Royce Singapore.

This is because, on the basis of my finding of fact in paragraph 208(a) above, the statement by Mr Brook is not incorrect to the extent that it pertains to the Boeing 787 Dreamliner and I can see no reason why an incorrect statement in relation to one type of aircraft should be treated as invalidating a confirmation to the extent that the confirmation relates to a quite separate type of aircraft in which a quite separate type of engine is installed or incorporated.

(For completeness, I should add at this juncture that, as there are no supplies of parts for the Trent XWB engine by the Appellant to Rolls-Royce Singapore which are relevant to this decision, it is unnecessary for me to consider whether the relevant confirmation should be disregarded to the extent that it relates to supplies of parts for the Trent XWB engine to Rolls-Royce Singapore.)

Supplies of parts for the Trent 1000 engine to SMF

212. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from SMF in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to SMF for installation or incorporation in the Trent 1000 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 208(a) above; and

(b) the Appellant did receive a confirmation from SMF to the effect that the supplies of parts for the Trent 1000 engine by the Appellant to SMF satisfied the two conditions in paragraph 2A.

I have reached this conclusion because the confirmation on the terms of the Standard Certificate from SMF to the Appellant (at the DB pages 541 to 544) contained a confirmation in relation to all of the parts which were supplied by the Appellant to SMF and, in accordance with the general conclusion which I have expressed at paragraphs 196 to 200 above, I believe that that confirmation is to be construed as covering both of the conditions which need to be satisfied in order for paragraph 2A to apply to the supplies of those parts.

Supplies of parts for the Trent 700 engine to GKN

213. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from GKN in relation to the supplies in question, there was a possibility (which was meaningful and not remote) that the parts which were supplied to GKN for installation or incorporation in the Trent 700 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion because, in addition to the remote possibility that the Trent 700 engine in which the parts supplied by the Appellant to GKN were installed or incorporated might have been used in carrying out the testing required to effect ongoing improvements to Trent 700 engines in general, the evidence in the form of the Wikipedia entry in relation to the A330 (at the DB page 397) and the ACJ DB suggests that a number of A330 aircraft, in which Trent 700 engines are potentially installed or incorporated, are not in use by airlines operating for reward chiefly on international routes.

The Wikipedia entry in relation to the A330 states that the A330 "is also available as an ultra-long-range corporate jet as the A330-200 Prestige" and the ACJ DB states that, as at 31 May 2017, there were 41 A330-200 aircraft falling within the category of "Governments, Executive and Private Jets" and describes the ACJ330neo Harmony as a corporate jet within the A330 family.

Ms Sloane made the point that simply because an aircraft is described as a "corporate jet", that does not necessarily mean that the aircraft in question is not being used by an airline operating for reward chiefly on

international routes. It is quite possible that the aircraft in question might be owned by a company which makes the aircraft available to corporate customers by charter in return for a consideration. However, whilst that is undoubtedly true, the Appellant has produced no evidence to show that that was the case in relation to all, or indeed any, of the 41 aircraft which are shown as falling within the category of "Governments, Executive and Private Jets", as set out in the ACJ DB.

I accept that the ACJ330neo Harmony is not powered by Trent 700 engines, because the ACJ DB states that those aircraft are powered by Trent 7000 engines. However, the Trent 700 is an engine option for the ACJ330-200 Prestige and I am not persuaded that, just because the Appellant's witnesses are not aware of any Trent 700-powered ACJ330-200 which is not in use by an airline operating for reward chiefly on international route, that necessarily means that no such aircraft exists. It is not for the Respondents to establish that one or more of the aircraft which are listed in Wikipedia as corporate jets is or are not in use by an airline operating for reward chiefly on international routes. Instead, it is for the Appellant to establish that each such aircraft is so used and, in my view, the Appellant has not established that, on the balance of probabilities, that is the case; and

(b) the Appellant did receive a confirmation from GKN to the effect that the supplies of parts for the Trent 700 engine by the Appellant to GKN satisfied the two conditions in paragraph 2A.

I have reached this conclusion because the confirmation on the terms of the Standard Certificate from GKN to the Appellant (at DB pages 529 to 532) contained a confirmation in relation to all of the parts which were supplied by the Appellant to GKN and, in accordance with the general conclusion which I have expressed at paragraphs 196 to 200 above, I believe that that confirmation is to be construed as covering both of the conditions which need to be satisfied in order for paragraph 2A to apply to the supplies of those parts.

Supplies of parts for the Trent 700, Trent 800 and Trent 900 engines to FAG

214. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from FAG in relation to the supplies in question, there was a possibility (which was meaningful and not remote) that the parts which were supplied to FAG for installation or incorporation in the Trent 700 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 213(a) above;

(b) before taking into account the terms of any confirmation from FAG in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to FAG for

installation or incorporation in the Trent 800 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion because I have been referred to no evidence which suggests that any Boeing 777 aircraft (to which the Trent 800 engine relates) is in use as a private or corporate jet. As such, the only reason why any Trent 800 engine in which the parts in question were to be installed or incorporated would not itself have been installed or incorporated in a Boeing 777 aircraft used by an airline operating for reward chiefly on international routes is that the Trent 800 engine in question might have been used in carrying out the testing required to effect ongoing improvements to the Trent 800 engine and, in that regard, the points made in paragraph 202(a) above apply to the parts supplied for the Trent 800 engine by the Appellant to FAG in the same way as they apply to the parts supplied for the EJ200 engine by the Appellant to ITP;

(c) before taking into account the terms of any confirmation from FAG in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to FAG for installation or incorporation in the Trent 900 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion because the evidence shows that there are only two possible reasons why any Trent 900 engine in which the parts in question were to be installed or incorporated would not itself have been installed or incorporated in an A380 used by an airline operating for reward chiefly on international routes.

The first reason is that the Trent 900 engine in question might have been installed or incorporated in an A380 aircraft which was to be used by a person other than such an airline and the second reason is that the Trent 900 engine in question might have been used in carrying out the testing required to effect ongoing improvements to Trent 900 engines in general.

As regards the first of these reasons, notwithstanding the evidence of Mr Brown, the ACJ DB states that an A380 was ordered in 2012 by Prince Al-Waleed bin Talal and, in accordance with my general observation in paragraphs 194 and 195 above, I feel bound to accept that the relevant aircraft was bought as a new aircraft from the manufacturer and not second-hand from an airline and therefore that there is at least one A380 which is not in use by an airline operating for reward chiefly on international routes.

Nevertheless, given the size of the A380, it seems most unlikely that there will be many other A380s which are not in use by such airlines and, as at 30 June 2016, there were 193 A380s in service. I therefore consider that the likelihood of a Trent 900 engine in which parts supplied by the Appellant have been installed or incorporated itself being installed or incorporated in an A380 that is not in use by an airline operating for reward chiefly on international routes is remote.

As regards the second of these reasons, the points made in paragraph 202(a) above apply to the parts supplied for the Trent 900 engine by the Appellant to FAG in the same way as they apply to the parts supplied for the EJ200 engine to ITP and I therefore consider that there was a remote possibility that the parts supplied for the Trent 900 engine by the Appellant to FAG were to be used for carrying out the testing required to effect ongoing improvements to Trent 900 engines in general;

(d) it necessarily follows from the findings of fact set out in paragraphs 214(a) to 214(c) above that, before taking into account the terms of any confirmation from FAG in relation to the supplies in question, to the extent that a part which was supplied by the Appellant to FAG cannot be identified as being limited in its use to being installed or incorporated in a Trent 800 engine and/or a Trent 900 engine, and could conceivably have been installed or incorporated in a Trent 700 engine, then the possibility that such part might not have been installed or incorporated in a qualifying aircraft is meaningful and not remote; and

(e) the Appellant did receive a confirmation from FAG to the effect that the supplies of parts for the Trent 700, Trent 800 and Trent 900 engines by the Appellant to FAG satisfied the two conditions in paragraph 2A.

I have reached this conclusion because the confirmation on the terms of the Standard Certificate from FAG to the Appellant (at the DB page 539A) contained a confirmation in relation to all of the parts which were supplied by the Appellant to FAG and, in accordance with the general conclusion which I have expressed at paragraphs 196 to 200 above, I believe that that confirmation is to be construed as covering both of the conditions which need to be satisfied in order for paragraph 2A to apply to the supplies of those parts.

Supplies of parts for the Trent 700, Trent 800 and Trent 900 engines to Turbomecanica

215. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from Turbomecanica in relation to the supplies in question, there was a possibility (which was meaningful and not remote) that the parts which were supplied to Turbomecanica for installation or incorporation in the Trent 700 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 213(a) above;

(b) before taking into account the terms of any confirmation from Turbomecanica in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to Turbomecanica for installation or incorporation in the Trent 800 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 214(b) above;

(c) before taking into account the terms of any confirmation from Turbomecanica in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to Turbomecanica for installation or incorporation in the Trent 900 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 214(c) above;

(d) it necessarily follows from the findings of fact set out in paragraphs 215(a) to 215(c) above that, before taking into account the terms of any confirmation from Turbomecanica in relation to the supplies in question, to the extent that a part which was supplied by the Appellant to Turbomecanica cannot be identified as being limited in its use to being installed or incorporated in a Trent 800 engine and/or a Trent 900 engine, and could conceivably have been installed or incorporated in a Trent 700 engine, then the possibility that such part might not have been installed or incorporated in a qualifying aircraft is meaningful and not remote; and

(e) the Appellant did not receive a confirmation from Turbomecanica to the effect that the supplies of parts for the Trent 700, Trent 800 and Trent 900 engines by the Appellant to Turbomecanica satisfied the two conditions in paragraph 2A.

I have reached this conclusion for two reasons.

First, the Appellant has provided no confirmation of any kind from Turbomecanica.

Secondly, for the reason set out in paragraph 208(b) above, I consider that the confirmation from Rolls-Royce (in relation to parts supplied for the Trent 900, Trent 1000 and Trent XWB engines by the Appellant to Rolls-Royce Singapore) in the letter from Mr Brook of 23 December 2015 (at the DB page 528) does not apply to the parts supplied for the Trent 900 engine by the Appellant to Turbomecanica.

Supplies of parts for the Trent 900 engine to Goodrich

216. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from Goodrich in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to Goodrich for installation or incorporation in the Trent 900 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 214(c) above; and

(b) the Appellant did not receive a confirmation from Goodrich to the effect that the supplies of parts for the Trent 900 engine by the Appellant to Goodrich satisfied the two conditions in paragraph 2A.

I have reached this conclusion for three reasons.

First, the confirmation from Mr Numelin of Collins Aerospace (at the ADB tab 5) does not say that the relevant parts are to be installed or incorporated in a qualifying aircraft. Instead, it simply says that the relevant parts are to be installed or incorporated in an A380 aircraft. Whilst, for the reasons that I have outlined in paragraph 214(c) above, that is highly likely to amount to the same thing, it falls short of the absolute statement which is required by the practice outlined in paragraphs 7.7 and 13 of 744C.

Secondly, the relevant confirmation does not deal at all with the first condition in paragraph 2A – namely, the need for the relevant part to be of a kind ordinarily installed or incorporated in a qualifying aircraft. Whilst I strongly suspect that that is the case, I have been presented with no evidence to that effect and the confirmation does not say as much and therefore does not satisfy the requirements for a confirmation for the purposes of paragraphs 7.7 and and 13 of 744C.

Finally, for the reason set out in paragraph 208(b) above, I consider that the confirmation from Rolls-Royce (in relation to parts supplied for the Trent 900, Trent 1000 and Trent XWB engines by the Appellant to Rolls-Royce Singapore) in the letter from Mr Brook of 23 December 2015 (at the DB page 528) does not apply to the parts supplied for the Trent 900 engine by the Appellant to Goodrich.

Supplies of parts for the Trent 900 engine to ITP

217. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from ITP in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to ITP for installation or incorporation in the Trent 900 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 214(c) above; and

(b) the Appellant did not receive a confirmation from ITP to the effect that the supplies of parts for the Trent 900 engine by the Appellant to ITP satisfied the two conditions in paragraph 2A.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 208(b) above.

Supplies of parts for the Trent 900 engine to Magellan

218. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from Magellan in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to Magellan for installation or incorporation in the Trent 900 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 214(c) above; and

(b) the Appellant did receive a confirmation from Magellan to the effect that the supplies of parts for the Trent 900 engine by the Appellant to Magellan satisfied the two conditions in paragraph 2A.

I have reached this conclusion for precisely the same reason as the one leading to the conclusion set out in paragraph 209(b) above.

Supplies of parts for the Trent 900 engine to RR

219. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from RR in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to RR for installation or incorporation in the Trent 900 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 214(c) above; and

(b) the Appellant did not receive a confirmation from RR to the effect that the supplies of parts for the Trent 900 engine by the Appellant to RR satisfied the two conditions in paragraph 2A.

I have reached this conclusion for precisely the same reason as the one leading to the conclusion set out in paragraph 210(b) above.

Supplies of parts for the Trent 900 engine to Rolls-Royce Singapore

220. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from Rolls-Royce Singapore in relation to the supplies in question, there was a possibility (albeit only a remote possibility) that the parts which were supplied to Rolls-Royce Singapore for installation or incorporation in the Trent 900 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 214(c) above; and

(b) the Appellant did receive a confirmation from Rolls-Royce Singapore to the effect that the supplies of parts for the Trent 900 engine by the Appellant to Rolls-Royce Singapore satisfied the two conditions in paragraph 2A.

I have reached this conclusion because the letter of 23 December 2015 from Mr Brook of Rolls-Royce to the Appellant (at the DB page 528) contained a confirmation in relation to the parts which were supplied for the Trent 900 engine by the Appellant to Rolls-Royce Singapore and that confirmation clearly covers both of the conditions which need to be satisfied in order for paragraph 2A to apply to the supplies of those parts.

In reaching this conclusion, I have given considerable thought to Mr Watkinson's submission that the confirmation in question is effectively invalidated by the erroneous statement made by Mr Brook in the first paragraph of the letter to the effect that "it is not feasible that [any of the A380, Boeing 787 or A350] will be purchased for corporate or private use".

There is some substance in Mr Watkinson's point so far as it pertains to the supplies of parts for the Trent 900 engine by the Appellant to Rolls-Royce Singapore because of my conclusion to the effect that there is at least one A380 aircraft – in which Trent 900 engines are installed or incorporated – that is not in use by an airline operating for reward chiefly on international routes – see paragraph 214(c) above.

However, although that submission has given me pause for thought, I have concluded that the relevant confirmation, to the extent that it relates to supplies of parts for the Trent 900 engine, should not be regarded as being invalidated. My reason for saying this is that there is nothing in the confirmation itself which is self-evidently incorrect. In this respect, it is distinguishable from the confirmation given by ITP Externals in relation to the supplies of parts to be incorporated or installed in the EJ200 engine and discussed in paragraph 203(b) above. Thus, despite the fact that the statement by Mr Brook earlier in the letter is too absolute in nature and therefore incorrect, I do not think that that error should necessarily be regarded as casting doubt on the terms of the confirmation which is provided later in the letter.

Supplies of parts for the Trent XWB engine to IAMPL

221. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from IAMPL in relation to the supplies in question, there was a possibility (which was meaningful and not remote) that the parts which were supplied to IAMPL for installation or incorporation in the Trent XWB engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion because the evidence shows that there are only three possible reasons why any Trent XWB engine in which the parts in question were to be installed or incorporated would not itself have been installed or incorporated in an A350 aircraft used by an airline operating for reward chiefly on international routes.

The first reason is that the Trent XWB engine in question might have been installed or incorporated in an A350 aircraft which was not to be used by

such an airline, the second reason is that the Trent XWB engine in question might have been used in the development phase of the engine, as the entry from Wikipedia in relation to the engine (at the DB page 463) states that the engine was certified only in 2013, which is well after the start of the period to which this decision relates and the third reason is that, even in relation to parts supplied after the development phase for the Trent XWB engine was over, the Trent XWB engine in question might have been used in carrying out the testing required to effect ongoing improvements to Trent XWB engines in general.

As regards the first of these reasons, the ACJ DB states that the ACJ350 XWB is available for sale as a corporate jet. However, Mr McBraida in his evidence said that, as far as he was aware, no sale of an ACJ350 aircraft powered by XWB engines had been made and Mr McBraida's evidence is supported by the "Governments, Executive and Private Jets" table in the ACJ DB which shows that, as at 31 May 2017, no A350 aircraft had been delivered to users in that category.

I am therefore prepared to accept the Appellant's contention that there was no possibility that any A350 aircraft in which the parts supplied for the Trent XWB engine by the Appellant to IAMPL were to be installed or incorporated would not be in use by an airline operating for reward chiefly on international routes.

However, as regards the second of these reasons, I have been provided with no evidence which establishes that the development phase for the Trent XWB engine ended before the date of the EASA certification in 2013. It follows that, in relation to parts supplied by the Appellant to IAMPL in the period prior to the EASA certification, there was a meaningful risk that those parts might have been installed or incorporated in an engine which was then used in the development phase of the Trent XWB engine type.

Moreover, as regards the third of these reasons, even in relation to parts supplied by the Appellant to IAMPL after the development phase for the Trent XWB engine was over, the points made in paragraph 202(a) above apply to the parts supplied for the Trent XWB engine by the Appellant to IAMPL in the same way as they apply to the parts supplied for the EJ200 engine to ITP and I therefore consider that there was a remote possibility that the parts supplied for the Trent XWB engine by the Appellant to IAMPL after the development phase for the Trent XWB engine was over were to be used for carrying out the testing required to effect ongoing improvements to Trent XWB engines in general; and

(b) the Appellant did not receive a confirmation from IAMPL to the effect that the supplies of parts for the Trent XWB engine by the Appellant to IAMPL satisfied the two conditions in paragraph 2A.

I have reached this conclusion for two reasons.

First, the only correspondence from IAMPL to the Appellant which was presented in evidence was a letter from IAMPL to the Appellant of 15 December 2015 (at the DB page 540). This letter merely confirmed that the parts supplied by the Appellant to IAMPL "are used in the manufacturing of Shrouds, and supplied to Rolls Royce plc for their civil Aircraft Engine programmes". It does not contain a confirmation in relation to either of the conditions in paragraph 2A.

Secondly, for the reason set out in paragraph 208(b) above, I consider that the confirmation from Rolls-Royce (in relation to parts supplied for the Trent 900, Trent 1000 and Trent XWB engines by the Appellant to Rolls-Royce Singapore) in the letter from Mr Brook of 23 December 2015 (at the DB page 528) does not apply to the parts supplied for the Trent XWB engine by the Appellant to IAMPL.

Supplies of parts for the Trent XWB engine to IHI

222. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from IHI in relation to the supplies in question, there was a possibility (which was meaningful and not remote) that the parts which were supplied to IHI for installation or incorporation in the Trent XWB engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 221(a) above; and

(b) the Appellant did not receive a confirmation from IHI to the effect that the supplies of parts for the Trent XWB engine by the Appellant to IHI satisfied the two conditions in paragraph 2A.

I have reached this conclusion for two reasons.

First, the Appellant has provided no confirmation of any kind.

Secondly, for the reason set out in paragraph 208(b) above, I consider that the confirmation from Rolls-Royce (in relation to parts supplied for the Trent 900, Trent 1000 and Trent XWB engines by the Appellant to Rolls-Royce Singapore) in the letter from Mr Brook of 23 December 2015 (at DB page 528) does not apply to the parts supplied for the Trent XWB engine by the Appellant to IHI.

Supplies of parts for the Trent XWB engine to ITP

223. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from ITP in relation to the supplies in question, there was a possibility (which was meaningful and not remote) that the parts which were supplied to ITP for installation or incorporation in the Trent XWB engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 221(a) above; and

(b) the Appellant did not receive a confirmation from ITP to the effect that the supplies of parts for the Trent XWB engine by the Appellant to ITP satisfied the two conditions in paragraph 2A.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 208(b) above.

Supplies of parts for the V2500 engine to RR

224. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from RR in relation to the supplies in question, there was a possibility (which was meaningful and not remote) that the parts which were supplied to RR for installation or incorporation in the V2500 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion because, in addition to the remote possibility that the V2500 engine in which the parts supplied by the Appellant to RR were installed or incorporated might have been used in carrying out the testing required to effect ongoing improvements to V2500 engines in general, it is clear from the Wikipedia entry in relation to the V2500 engine (at the DB page 482), the Wikipedia entry in relation to the A320 aircraft family (at the DB pages 486, 493 and 494) and the ACJ DB that the A320 aircraft family includes corporate business jets.

Although the Wikipedia entry in relation to the A320 aircraft family (at the DB page 495) also makes it clear that those jets could be powered by V2500 engines or by the CFM56-5 or PW6000 engines, both witnesses said that they were unaware of any member of the A320 aircraft family which was powered by V2500 engines, and Mr McBraida said that he had had that view confirmed by Rolls-Royce, the Appellant has produced no written evidence to support the conclusion that no member of the A320 aircraft family has been powered by V2500 engines. Accordingly, I do not think that the Appellant has established that every V2500-powered A320 aircraft is in use by an airline operating for reward chiefly on international routes; and

(b) the Appellant did receive a confirmation from RR to the effect that the supplies of parts for the V2500 engine by the Appellant to RR satisfied the two conditions in paragraph 2A.

I have reached this conclusion because the letter of 23 December 2015 from Mr Brook of Rolls-Royce to the Appellant (at the DB pages 511 and 512) contained a confirmation in relation to the parts which were supplied for the V2500 engine by the Appellant to RR and that confirmation clearly covers both of the conditions which need to be satisfied in order for paragraph 2A to apply to the supplies of those parts.

In reaching this conclusion, I have given considerable thought to Mr Watkinson's submission that the confirmation in question is effectively invalidated by the erroneous statement made by Mr Brook in the first paragraph of the letter to the effect that "[all members of the A320 aircraft family] will meet the definition of a qualifying civil aircraft defined in Public Notice 744C. ie used by an airline operating for reward chiefly on international routes". I note that, even if I am wrong in rejecting the evidence of Appellant to the effect that the only members of the A320 aircraft family which are not in use by an airline operating for reward chiefly on international routes are powered by engines other than V2500 engines – as to which, see paragraph 224(a) above - that statement by Mr Brook is not correct because it embraces the whole of the A320 aircraft family and not merely those members of the A320 aircraft family which are powered by V2500 engines.

However, although Mr Watkinson's submission has given me pause for thought, I have concluded that the relevant confirmation, to the extent that it relates to supplies of parts for the V2500 engine, should not be regarded as being invalidated by the statement.

This is because there is nothing in the confirmation itself which is self-evidently incorrect. In this respect, it is distinguishable from the confirmation given by ITP Externals in relation to the supplies of parts to be incorporated or installed in the EJ200 engine and discussed in paragraph 203(b) above. Thus, despite the fact that the statement by Mr Brook earlier in the letter is too absolute in nature and therefore incorrect, I do not think that that error should necessarily be regarded as casting doubt on the terms of the confirmation which is provided later in the letter.

Supplies of parts for the V2500 engine to MTU Poland

225. In relation to these supplies, I find as facts that:

(a) before taking into account the terms of any confirmation from MTU Poland in relation to the supplies in question, there was a possibility (which was meaningful and not remote) that the parts which were supplied to MTU Poland for installation or incorporation in the V2500 engine would not be installed or incorporated in a qualifying aircraft.

I have reached this conclusion for precisely the same reasons as those leading to the conclusion set out in paragraph 224(a) above; and

(b) the Appellant did receive a confirmation from MTU Poland to the effect that the supplies of parts for the V2500 engine by the Appellant to MTU Poland satisfied the two conditions in paragraph 2A.

I have reached this conclusion because the confirmation on the terms of the Standard Certificate from MTU Poland to the Appellant (at the DB page 524) contained a confirmation in relation to all of the parts which were supplied by the Appellant to MTU Poland and, in accordance with

the general conclusion which I have expressed at paragraphs 196 to 200 above, I believe that that confirmation is to be construed as covering both of the conditions which need to be satisfied in order for paragraph 2A to apply to the supplies of those parts.

Summary

226. In summary, I have found as facts that:

(a) in relation to each supply of parts which is the subject of this decision, there was a possibility that the relevant parts might not be installed or incorporated in a qualifying aircraft;

(b) however, except in relation to the supply of parts for the Trent 700 engine by the Appellant to each of GKN, FAG and Turbomecanica, the supply of parts for the Trent XWB engine by the Appellant to each of IAMPL, IHI and ITP and the supply of parts for the V2500 engine to each of RR and MTU Poland (in each of which cases, the possibility was meaningful), that possibility was remote;

(c) the oil jet distributor assembly (Part number TP290127) which was supplied by the Appellant to TEI was partly-processed when it was supplied;

(d) the Appellant has received confirmations which cover both of the conditions in paragraph 2A from each of RR (in relation to supplies of parts for the TP400 engine and the V2500 engine), Magellan (in relation to supplies of parts for the Trent 1000 engine and the Trent 900 engine), Rolls-Royce Singapore (in relation to supplies of parts for the Trent 1000 engine and the Trent 900 engine), SMF (in relation to supplies of parts for the Trent 1000 engine), GKN (in relation to supplies of parts for the Trent 700 engine), FAG (in relation to supplies of parts for the Trent 700 engine, the Trent 800 engine and the Trent 900 engine) and MTU Poland (in relation to supplies of parts for the V2500 engine); and

(e) the Appellant has not received confirmations which cover both of the conditions in paragraph 2A in relation to any of the other supplies which are the subject of this decision.

IX DISCUSSION

227. After considering:

(a) my conclusions in relation to the questions of fact that are relevant to this decision which are set out in the section headed VIII MY FINDINGS OF FACT above; and

(b) the arguments of the parties so far as they pertain to questions of law which are set out in the sub-section headed "Questions of law" in the section headed VII THE ARGUMENTS OF THE PARTIES above,

my analysis in relation to the disputed matters of law which are the subject of this decision are set out in paragraphs 228 to 255 below.

The procedural question

228. Although it is of little practical relevance given the findings of fact set out in paragraphs 193 to 226 above, I believe that Mr Watkinson's arguments in relation to the procedural question are to be preferred to Ms Sloane's. In other words, I consider that the Respondents were not acting in breach of Rule 25(2) of the Tribunal Rules when they raised for the first time only at the hearing the precise manner in which they considered the form of the confirmations from the Appellant's customers to be deficient.

229. The Respondents said in paragraphs 9 and 11 of the consolidated statement of case of 17 October 2016 that they had seen no evidence to support the assertion that the supplies in question fell within paragraph 2A. That was the Respondents' position in relation to the issue and, so far as Rule 25(2) of the Tribunal Rules is concerned, was an ample indication of the fact that the Respondents did not accept that the confirmations which they had seen were adequate evidence to support the assertion that the supplies in question fell within the ambit of paragraph 2A.

230. By the time that the consolidated statement of case was submitted by the Respondents, on 17 October 2017, the Respondents had already been sent copies of the confirmations in question, as the Appellant freely admits (see paragraph 131 above). In addition, it is clear from 744C that the Respondents will accept, as evidence that a particular supply falls within the ambit of paragraph 2A, a confirmation from the customer to the effect that the supply in question satisfies both of the conditions in paragraph 2A. Together, these features mean that a necessary inference from the statement by the Respondents in the consolidated statement of case to the effect that the Respondents had seen no evidence to support the assertion that the supplies in question fell within paragraph 2A was that the Respondents were not satisfied with the terms of the confirmations which they had seen.

231. At that point, the Appellant could have asked the Respondents to set out in detail precisely why the Respondents were not satisfied that the confirmations in question constituted acceptable evidence to support the Appellant's case. Instead, the Appellant chose to proceed to the hearing, presumably in the confident expectation that the Respondents were wrong in considering the relevant confirmations to be unfit for purpose. The Respondents were accordingly entitled to wait until the hearing before elaborating on the precise ways in which they considered that the confirmations that had been presented to them fell short of the evidence that they required.

232. Putting this another way, the Appellant knew the Respondents' case before the hearing. That case was that the evidence submitted by the Appellant to the Respondents was deficient in supporting the Appellant's allegation that the supplies in question fell within the ambit of paragraph 2A. Thus, the consolidated statement of case did set out "the general nature of the case of the pleader" (as described by Lord Woolf in *McPhilemy*) and therefore the elaboration by the Respondents at the hearing on the precise manner in which they considered the confirmations to be deficient in supporting the Appellant's allegation cannot properly be described as the conduct of

litigation by ambush (as outlined in *BPP*). That being the case, I do not think that it is unfair on the Appellant to allow the Respondents to rely on their detailed submissions at the hearing as to the manner in which the confirmations in question were deficient.

233. Having said that, as I have mentioned in paragraph 228 above, this conclusion is of little practical relevance given the findings of fact set out in paragraphs 193 to 226 above.

Must installation or incorporation in a qualifying aircraft have been certain to occur?

234. I should start this part of my decision by making some observations in relation to the submissions which were made by the parties at the hearing. These are as follows:

> (a) first, I agree with Mr Watkinson that the words "to be" in the phrase "to be installed or incorporated in…the propulsion, navigation or communication systems...or…the general structure…of a qualifying…aircraft" are most naturally construed as requiring absolute certainty that the parts in question are to be so installed or incorporated and not simply a certain degree of probability that that will be the case. If the latter had been intended, then the relevant language would have said "likely to be" or something similar.
>
> Moreover, as the ECJ made clear at paragraph [49] of its decision in *A Oy*, as long as doing so does not deprive the exempting provisions of their intended effect, those provisions "are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for a consideration by a taxable person". In this case, I can discern no basis for concluding that a strict interpretation of the exemption in Article 148(f) PVD or the saving provision in paragraph (11) of Part B to Annex X PVD would deprive those provisions of their intended effect;
>
> (b) secondly, I do not see any scope for the application of the *de minimis* principle in this context, notwithstanding the argument to that effect made by Ms Sloane. In particular, I do not think that the decision of the House of Lords in *Viva* supports the proposition that the use of the parts in question for a purpose other than installation or incorporation in a qualifying aircraft can simply be disregarded on the basis that the possibility of such use is remote.
>
> The issue in *Viva* was whether the noun "alteration", when used in the particular context in which it appeared in the VAT legislation, was apt to include slight or trivial works of alteration. It was held that it was not. However, that is some way from leading inexorably to the conclusion that the language with which we are concerned in the present case – which is focused on the use to which the relevant parts were actually put – can be construed as allowing a use the possibility of which was remote to be disregarded. Ms Sloane provided me with no authority for the proposition that the *de minimis* principle can apply in a case where a statute refers to future use in such absolute terms.

In addition, I do not agree with Ms Sloane's contention that the statement by the ECJ at paragraph [29] in *A Oy* to the effect that the "purpose of [the provision which is now Article 148(f) PVD] is to grant an exemption for the supply of aircraft when they are intended chiefly for use on international routes" means that the provision which is now Article 148(f) PVD should be regarded as catering for de minimis exceptions. The language used in Article 148 - and its predecessor, Article 15(6) of the Sixth Directive (77/388/EEC) - refers simply to "aircraft used by airlines operating for reward chiefly on international routes" (see Article 148(e) PVD) and "equipment to be incorporated or used" in such aircraft (see Article 148(f) PVD). It therefore offers no scope for de minimis exceptions as regards the "incorporated or used" part of the drafting. Instead, the word "chiefly", where it appears in that article qualifies only the operations of the airline which is using the relevant aircraft.

It is true that the ECJ, in summarising the exemption in paragraph [29] of its decision, elided those two quite distinct concepts in doing so. However, whilst that is unfortunate, I do not see that as authority for giving the language in the relevant directive a gloss which the words simply cannot bear. And, as the ECJ was doing no more than summarising the provision in the context of dealing with the particular question which it was considering in that part of its decision – that is to say, whether a distinction should be made in this context between regular flights and charter flights - I do not regard that statement as forming any part of the ratio of its decision. Indeed, although the ECJ repeated its error in paragraph [42] of its decision (when it cross-referred to paragraph [29]), it is clear from the way in which the ECJ described the exemption in other parts of its decision – for example, in paragraphs [40], [50], [51], [55] and [57] – that it recognised the two-stage nature of the relevant test; and

(c) thirdly, I do not agree with Ms Sloane's argument to the effect that construing the relevant language in the manner which has been proposed by Mr Watkinson would mean that paragraph 2A contravenes the fundamental principle of EU law that legislation conferring zero-rating needs to be proportional and certain in its application. This is because, although 744C does not have any statutory force in and of itself, it does set out the Respondents' practice in relation to the evidence which the Respondents will accept as satisfying the statutory language and it is clear from the terms of 744C that, in any case where a supplier is unsure about how the parts in question are to be used, it can satisfy the Respondents that the statutory test has been met by obtaining a confirmation from its customer to the effect that the relevant supply meets both of the conditions in paragraph 2A. That being the case, the decision in *A Oy* indicates that the UK legislation complies with the principle described above in that there is a method of establishing that the conditions for zero-rating have been met which is both certain and proportional for the supplier to obtain.

235. The observations in paragraph 234 above suggest that the correct answer to this question of law is that, in order for the statutory language in paragraph 2A to be satisfied, installation or incorporation of the parts in question in a qualifying aircraft must have been certain to occur at the time when the relevant supply was made.

236. However, there are certain aspects of that conclusion which I find troubling.

237. First, it is clear from the evidence with which I was provided at the hearing that there will be very few occasions, if any, in which, in the absence of a confirmation to the relevant effect from its customer, a supplier of parts for aircraft will be capable of knowing with absolute certainty that its parts are to be installed or incorporated in a qualifying aircraft. I would think that, in the case of most, if not virtually all, supplies, there will be some degree of doubt as to whether or not that will be the case even if the doubt arises out of some remote possibilities. As such, on the construction of the language in paragraph 2A which is being proposed by the Respondents in this case, a confirmation from the supplier's customer would be required in the case of most, if not virtually all, supplies of engine parts. If that is right, then the language used in paragraph 7.7 of 744C is somewhat misleading because one might infer from its terms that there will be a number of circumstances where a supplier does not need to obtain a confirmation from its customer. This in turn might be taken to suggest that the reference to doubt is intended to cover only those cases where there is meaningful doubt as to usage and that it does not include those cases, such as most of the supplies to which the present decision relates, where there is only a remote possibility that the parts in question will not be installed or incorporated in a qualifying aircraft. On the basis of the construction which is being advanced by the Respondents in this case, one might have expected paragraph 7.7 in 744C to have been phrased slightly differently – for example, by changing the heading to the paragraph to say: "Unless you are certain that the parts or equipment are to be installed or incorporated in a qualifying ship or aircraft".

238. Secondly, and leading on from the above concern, I have some doubts as to whether, in practice, the Respondents do in fact apply the legislation in question to all relevant taxpayers on exactly the same basis. During the course of the hearing, I was presented with some email correspondence between the Respondents and another taxpayer (at the ADB tab 4) which demonstrated that the Respondents have accepted in at least that case that supplies of parts for the Trent XWB engine could be zero-rated even though the Trent XWB engine was still in its development phase. This suggests that there is at least one case where the Respondents have not objected to the zero-rating of parts which are to be installed or incorporated in an engine which is still in its development phase, a position which is directly contrary to the Respondents' position in this case.

239. Thirdly, I have considered how the Respondents would have sought to apply the law to the present facts if, instead of zero-rating's being dependent on the installation or incorporation of the relevant parts in a qualifying aircraft, zero-rating were to be dependent on the possible uses of the relevant parts including something other than installation or incorporation of the relevant parts in a qualifying aircraft. In that case, would the Respondents simply have accepted without question that the Appellant was entitled to zero-rate the relevant supplies because of a remote possibility that the parts

might have been installed or incorporated in an aircraft that was not a qualifying aircraft or might have been used to carry out the testing required to effect ongoing improvements to the relevant engine type or would they have argued, as I am inclined to suspect, that the possibility that the parts might not have been installed or incorporated in a qualifying aircraft was so remote that that possibility should be discounted and therefore zero-rating should not apply?

240. These reservations have led me to consider whether there could be reasons other than those which were advanced on behalf of the Appellant at the hearing which might lead to the conclusion that the absolute certainty for which Mr Watkinson contends is too strict a requirement.

241. One of those is whether, given that the requisite standard of proof on this question is the normal civil standard (ie on the balance of probabilities), the Appellant should be treated as having satisfied the statutory language as long as it can establish that the parts which it has supplied were, on the balance of probabilities, to be installed or incorporated in a qualifying aircraft. If that were to be the right approach, then the Appellant would be able to rely on the fact that, since the parts were, in each case, likely to be so installed or incorporated, the language in question should be treated as being satisfied. However, I have concluded that that approach would be flawed in that it would involve blending two entirely separate concepts – first, the test imposed by the statutory language and, secondly, the burden of proof in establishing that the test imposed by the statutory language has been met. The correct approach in my view is to ask whether the Appellant has satisfied me, on the balance of probabilities, that the parts in question were certain to be installed or incorporated in a qualifying aircraft rather than to ask whether the parts in question were, on the balance of probabilities, to be installed or incorporated in a qualifying aircraft. So I believe that the Appellant was right not to have raised this point.

242. Another argument, which I consider to have potentially greater force, is that, in applying the language in question to the present facts, I should ignore remote possibilities, based on the line of anti-avoidance cases starting with *WT Ramsay v Inland Revenue Commissioners* [1982] AC 300 and most recently exemplified by the decision of the Supreme Court in *RFC 2012 Plc (in liquidation) (formerly The Rangers Football Club Plc) (Appellant) v Advocate General for Scotland (Respondent) (Scotland)* [2017] STC 1556 ("*RFC*"). This is in some ways similar to the argument based on the *de minimis* principle which was made by Ms Sloane at the hearing but is ultimately different from that argument in that it does not involve the application of the *de minimis* principle as such but is instead based on a fundamental principle of statutory construction, as developed in that line of cases.

243. That principle of construction was described by Lord Hodge - in delivering the unanimous judgment of the Supreme Court in *RFC* – as follows:

"12. Another, more recent, judicial development in the interpretation of taxing statutes is the definitive move from a generally literalist interpretation to a more purposive approach. This can be traced to the speech which Lord Nicholls of Birkenhead delivered in the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684, in which he explained the true principle established in *W T Ramsay Ltd v Inland Revenue Comrs* [1982]

AC 300 and the cases which followed it. As he explained (para 28), the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. In the past, the courts had interpreted taxing statutes in a literalist and formalistic way when applying the legislation to a composite scheme by treating every transaction which had an individual legal identity as having its own tax consequences. Lord Nicholls described this approach as "blinkered" (para 29). Instead, he removed the interpretation of taxing statutes from its literalist enclave and incorporated it into the modern approach to statutory interpretation which the court otherwise adopts. He stated (para 32):

"The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. … [T]he question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311, 320, para 8: 'The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case'."

13. Lord Nicholls (para 34) recognised two features which were characteristic of tax law. First, tax is generally imposed by reference to economic activities or transactions which exist, as Lord Wilberforce said (in *W T Ramsay*, 326) "in the real world". In the Court of Appeal in *Barclays Mercantile* [2003] STC 66 para 66, Carnwath LJ made the same point: taxing statutes generally "draw their life-blood from real world transactions with real world economic effects". Secondly, the prodigious intellectual effort in support of tax avoidance results in transactions being structured "in a form which will have the same or nearly the same economic effect as a taxable transaction but which it is hoped will fall outside the terms of the taxing statute". He continued:

"It is characteristic of these composite transactions that they will include elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge."

The correct response of the courts was not to disregard elements of transactions which had no commercial value. That, he said, was going too far. Instead the court had, first, to decide, on a purposive construction, exactly what transaction would answer to the statutory description and secondly, to decide whether the transaction in question did so (para 36).

14. Lord Reed in *UBS AG v Revenue and Customs Comrs* [2016] 1 WLR 1005, para 62, has helpfully summarised the significance of the new approach, which *W T Ramsay*, as explained in *Barclays Mercantile*, has brought about, in these terms:

"First, it extended to tax cases the purposive approach to statutory construction which was orthodox in other areas of the law. Secondly, and equally significantly, it established that the analysis of the facts depended on that purposive construction of the statute."

15. In summary,…the courts must now adopt a purposive approach to the interpretation of the taxing provisions and identify and analyse the relevant facts accordingly.

16. …. In answering the question whether the relevant statutory provisions were intended to apply to the transaction, the proper approach is, first, to interpret the relevant

statutory provisions purposively and, secondly, to analyse the facts in the light of those statutory provisions so construed..."

244. Although the line of cases to which I have referred above all related to tax avoidance, it is clear from those decisions that the approach described by Lord Hodge in *RFC* is not confined to such cases. Instead, the approach is to be adopted in all cases where the application of the tax legislation to a particular set of circumstances is being considered.

245. Moreover, it is also clear that, in adopting that approach, it is permissible in certain circumstances to disregard remote possibilities when applying the language of the statute to the facts in question. For example, in *RFC* itself, a payment was made by an employer to a trust (the Principal Trust), which used the money in question to settle a sub-trust and the sub-trust then made a loan to the relevant employee. At the time of the initial payment by the employer to the Principal Trust, it was not certain that the funds in question would be settled in the sub-trust or that the tub-trust would then make a loan to the relevant employee. Nevertheless, in deciding that the payment made by the employer to the Principal Trust constituted an emolument of the relevant employee, the Supreme Court held that the possibility that the monies might never reach the relevant employee could be disregarded. Lord Hodge said the following:

"64. The relevant provisions for the taxation of emoluments or earnings were and are drafted in deliberately wide terms to bring within the tax charge money paid as a reward for an employee's work. The scheme was designed to give each footballer access without delay to the money paid into the Principal Trust, if he so wished, and to provide that the money, if then extant, would ultimately pass to the member or members of his family whom he nominated. Having regard to the purpose of the relevant provisions, I consider the sums paid to the trustee of the Principal Trust for a footballer constituted the footballer's emoluments or earnings.

65. There was a chance that the trust company as trustee of the Principal Trust might not agree to set up a sub-trust and there was a chance that as trustee of a sub-trust it might not give a loan of the funds of the sub-trust to the footballer. But that chance does not alter the nature of the payments to the trustee of the Principal Trust. In applying a purposive interpretation of a taxing provision in the context of a tax avoidance scheme it is legitimate to look to the composite effect of the scheme as it was intended to operate. In *Inland Revenue Comrs v Scottish Provident Institution* [2004] 1 WLR 3172 Lord Nicholls stated (para 23):

"The composite effect of such a scheme should be considered as it was intended to operate and without regard to the possibility that, contrary to the intention and expectations of the parties, it might not work as planned."

The footballers, when accepting the offer of higher net remuneration through the trust scheme which the side letters envisaged, were prepared to take the risk that the scheme might not operate as planned. The fact that the risk existed does not alter the nature of the payment to the trustee of the Principal Trust."

246. Similarly, in *Inland Revenue Commissioners v Scottish Provident Institution* [2004] 1 WLR 3172 ("*SPI*"), the question in issue was whether a call option over gilts

which had been granted by Scottish Provident Institution ("SPI") to a bank was a "qualifying contract" for the purposes of Section 147 Finance Act 1994 – that is to say, whether it conferred on the bank "an entitlement...to become a party to a loan relationship" - given that, at the same time as granting the call option, SPI acquired a matching call option from the bank, the likely result of which was that the bank would never acquire the gilts because the two call options would be exercised at the same time. The parties had deliberately priced the two call options in such a way that, although there was a practical likelihood that one of the two call options might be exercised without the other's being exercised, the likelihood that that might happen was so low that it was a risk that the parties were prepared to take. The House of Lords held that that was a commercially irrelevant contingency which could be disregarded in determining whether the call option granted by SPI was a "qualifying contract". The House of Lords said:

"23. We think that it would destroy the value of the *Ramsay* principle of construing provisions such as section 150A(1) of the 1994 Act as referring to the effect of composite transactions if their composite effect had to be disregarded simply because the parties had deliberately included a commercially irrelevant contingency, creating an acceptable risk that the scheme might not work as planned. We would be back in the world of artificial tax schemes, now equipped with anti-Ramsay devices. The composite effect of such a scheme should be considered as it was intended to operate and without regard to the possibility that, contrary to the intention and expectations of the parties, it might not work as planned.

24. It follows that in our opinion the special commissioners erred in law in concluding that their finding that there was a realistic possibility of the options not being exercised simultaneously meant, without more, that the scheme could not be regarded as a single composite transaction. We think that it was and that, so viewed, it created no entitlement to gilts and that there was therefore no qualifying contract."

247. It can be seen that, in both *RFC* and *SPI*, the UK's most senior appellate court concluded that the legislation which it was considering could be applied to the facts which it was considering on the basis that remote possibilities could simply be disregarded. That has led me to consider whether the correct approach in this case should be to apply the "to be installed or incorporated" language in paragraph 2A on the basis that a remote possibility that a particular part might not be installed or incorporated in a qualifying aircraft can simply be disregarded.

248. I confess that I have found this a difficult question to answer but, on balance, I have concluded that that would not be the correct approach. My reasons for saying this are that:

(a) the approach to the construction and application of statutes described by Lord Hodge in *RFC* means that each situation needs to be considered on its own merits. In other words, there is no fixed rule that remote possibilities can in all cases be disregarded. Instead, it is necessary to consider the purpose of the specific statutory provision which

is in issue and then apply that provision to the specific facts which are in issue;

(b) when one does that in this case, it can be seen that the purpose of paragraph 2A is to confer zero-rating on supplies of parts which are both of a kind ordinarily installed or incorporated in a qualifying aircraft and to be installed or incorporated in a qualifying aircraft. It is hard to see how allowing a supply of parts which might not be installed or incorporated in a qualifying aircraft to fall within the ambit of the provision would satisfy that purpose, even if the possibility that the parts might not be so installed or incorporated is remote; and

(c) the fact that the Respondents are prepared to accept, as conclusive evidence that paragraph 2A applies to a supply, a confirmation from the relevant customer to the effect that the two conditions in paragraph 2A have been satisfied tends to support this approach to construing the statute because it means that there is an easy way for the relevant supplier to satisfy the terms of the provision in cases where there would otherwise be a remote possibility that the parts in question might not be installed or incorporated in a qualifying aircraft.

249. I have therefore reached the conclusion that Mr Watkinson is correct in saying that the correct way to construe paragraph 2A is that, in order for a supply to fall within the ambit of the provision, the supplier must produce evidence - which can be in the form of a confirmation in the appropriate terms from its customer - to the effect that, on the balance of probabilities, the parts in question were of a kind ordinarily installed or incorporated in a qualifying aircraft and were actually so installed or incorporated and that, if the evidence shows that, on the balance of probabilities, there is a possibility that the parts in question might not have been installed or incorporated in a qualifying aircraft, then, no matter how remote that possibility may be, the supply of the parts in question does not fall within paragraph 2A.

What did the Appellant need to know at the time of the relevant supply?

250. The conclusion set out in paragraph 249 above means that, strictly speaking, it is unnecessary for me to express any view on the third question of law which has arisen in connection with this decision. However, for completeness, I would say that I prefer the submissions of Ms Sloane to the submissions of Mr Watkinson on this point. In other words, I can see no reason why, in relation to each supply, it was necessary for the Appellant to know, at the time of the relevant supply, that the aircraft in which the relevant parts were going to be installed or incorporated was a "qualifying aircraft", as defined in paragraph 2A, for the purposes of zero-rating under the VAT legislation. Instead, it was merely necessary that, at the time of the relevant supply, the Appellant knew that the parts in question were going to be installed or incorporated in a particular type of aircraft, which type of aircraft has subsequently been identified as being a "qualifying aircraft", as defined in paragraph 2A, for the purposes of zero-rating under the VAT legislation.

251. Thus, the key issue is the one that I have addressed in paragraphs 234 to 249 above. As long as the evidence produced by the Appellant shows that, on the balance

of probabilities, it was absolutely certain at the time of the supply that the parts in question were going to be installed or incorporated in an aircraft which has subsequently been identified as being a "qualifying aircraft", as defined in paragraph 2A, for the purposes of zero-rating under the VAT legislation, the fact that the Appellant was unaware, at the time of the supply, that the aircraft was a "qualifying aircraft", as defined in paragraph 2A, for the purposes of zero-rating under the VAT legislation, is ultimately irrelevant.

Does the evidence show that, on the balance of probabilities, each supply satisfied both conditions in paragraph 2A?

252. Given the findings of fact set out in paragraphs 193 to 226 above and the conclusions of law set out in paragraphs 228 to 251 above, I consider that:

(a) in those cases where I have concluded that the Appellant did not receive a confirmation from the relevant customer to the effect that the supply satisfied both of the conditions in paragraph 2A, the Appellant has failed to satisfy me that, on the balance of probabilities, the parts in question were certain to be installed or incorporated in a qualifying aircraft. This is because the evidence shows that there was in each case a possibility (albeit, in some cases, only a remote possibility) that the parts in question might not have been installed or incorporated in a qualifying aircraft because they might have been used in carrying out the testing required to effect ongoing improvements to the relevant engine type and, in some cases, because the engine type in question was still in its development phase and/or because the engine in which the parts were installed or incorporated might have been installed or incorporated in an aircraft which was not a qualifying aircraft; but

(b) in those cases where I have concluded that the Appellant did receive a confirmation from the relevant customer to the effect that the supply in question satisfied both of the conditions in paragraph 2A, the Appellant has satisfied me that, on the balance of probabilities, the parts in question were certain to be installed or incorporated in a qualifying aircraft. This is because, although the confirmations in question are not in the same form as the model form of confirmation which is set out in paragraph 13.3 of 744C, it contains statements which are to the same effect.

X CONCLUSION

253. In view of the findings of fact which I have made in the section headed VIII MY FINDINGS OF FACT above and the conclusions of law which I have reached in the section headed IX DISCUSSION above, I have concluded that the only supplies to which this decision relates that are entitled to the benefit of zero-rating under paragraph 2A are the following supplies:

Customer	Engine type	Aircraft

RR	TP400	Airbus A400M
Magellan	Trent 1000	Boeing 787
Rolls-Royce Singapore	Trent 1000	Boeing 787
SMF	Trent 1000	Boeing 787
GKN	Trent 700	Airbus A330
FAG	Trent 700, Trent 800 and Trent 900	Airbus A330 and A380 and Boeing 777
Magellan	Trent 900	Airbus A380
Rolls-Royce Singapore	Trent 900	Airbus A380
RR	V2500	Airbus A320
MTU Poland	V2500	Airbus A320

254. This is because I have concluded that the above supplies are the only ones in relation to which the Appellant has produced sufficient evidence to demonstrate that, on the balance of probabilities, the relevant parts were both of a kind ordinarily installed or incorporated in a qualifying aircraft and actually installed or incorporated in a qualifying aircraft. It has done so by providing a confirmation which it received from its customer to the effect that both of the conditions in paragraph 2A were satisfied in relation to the supply.

255. In relation to each of the other supplies, no such confirmation has been provided by the Appellant and the other evidence which has been provided by the Appellant is in my view insufficient to establish that, on the balance of probabilities, the relevant parts were certain to be installed or incorporated in a qualifying aircraft. Therefore, on the basis of my conclusion in paragraphs 234 to 249 above that any possibility that the relevant parts might not be installed or incorporated in a qualifying aircraft means that the second condition in paragraph 2A is not met, the Appellant has failed to provide sufficient evidence to establish that the relevant supply falls within the ambit of paragraph 2A.

256. In addition, in relation to the supply of the oil jet distributor assembly (Part number TP290127) by the Appellant to TEI, the fact that such part was partly-processed when it was supplied means that the relevant supply could not have fallen within the ambit of paragraph 2A even if the Appellant had produced the requisite evidence to show that it was certain to be installed or incorporated in a qualifying aircraft.

XI RIGHT TO APPEAL

257. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules. 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.

TONY BEARE
TRIBUNAL JUDGE

REALEASE DATE: 22 JANUARY 2019