Neutral Citation: [2023] UKFTT 00891 (TC)

Case Number: TC08966

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2018/07756

IMPORT VAT – *whether import VAT in respect of goods supplied free of charge and where the supplier remains the owner of those goods can be credited as input tax – whether the goods were used for the purposes of the business carried on by the taxpayer – Article 168 Principle VAT Directive – sections 24-27 Value Added Tax Act 1994 – EU principle of equal treatment – Revenue and Customs Brief 02/19 – whether Appellant entitled to a transitional period – Appeal allowed in part*

Heard on: 25-26 September 2023
Judgment date: 17 October 2023

Before

TRIBUNAL JUDGE ROBIN VOS
DEREK ROBERTSON

Between

PIRAMAL HEALTHCARE UK LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: **Mark Hetherington** of UNW LLP, Accountants

For the Respondents: **James Puzey** of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

FORM OF HEARING

1. Due to industrial action resulting in the Manchester Tribunal Centre being closed, the hearing took place remotely by video using the Tribunal's video hearing service.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

INTRODUCTION

3. The appellant, Piramal Healthcare UK Limited ("Piramal") is a pharmaceutical company based in the UK. As part of its business, it imports pharmaceutical goods into the UK and, historically, has paid the import VAT on the value of those goods. The supplier does not make any charge for the supply of the goods and remains the owner of the goods.

4. Having provided certain services in relation to the goods, they are either sent back to the customer, sent to third parties for further processing or sent to clinics for use in clinical trials. Piramal did not itself make any onward supply of the goods. The only supply it made was the supply to the owner of the goods of the services which it provided.

5. Until 2018, Piramal claimed the import VAT which it paid as an input tax credit on its VAT returns. On 4 October 2018, HMRC issued Piramal with a formal decision that it was not entitled to claim credit for the import VAT as the goods were not used for the purposes of Piramal's business in the sense that the cost of the goods did not form part of any onward supply made by Piramal.

6. Based on that decision, HMRC made an assessment on 28 August 2019 to recover VAT which they considered Piramal had over-claimed for the VAT period 11/18 totalling £118,571. The assessment only related to VAT incurred on imports after the 4 October 2018 decision.

7. A third decision was made by HMRC on 23 May 2019 to withhold a repayment of import VAT claimed by Piramal totalling £77,683.23, being import VAT which it had paid in the VAT period 02/19.

8. Piramal appeals against all three decisions. There are two grounds for the appeal. The first is that import VAT paid in these circumstances is available as an input tax credit. The second is that HMRC's decisions offend the EU principle of equal treatment as other taxpayers were, in accordance with Revenue and Customs Brief 02/19, allowed to claim credit for import VAT until 14 July 2019, a transitional period of just over three months from the date the Brief was issued.

THE EVIDENCE AND THE FACTS.

9. The evidence consisted of a bundle of documents and correspondence including a witness statement given by Karen Allison who, since January 2017, had been the financial accountant at Piramal. Since giving the witness statement in October 2022, she has ceased her employment with Piramal.

10. There is, however, no dispute as to the facts. HMRC were content to accept Ms Allison's evidence and did not require her to attend the hearing in order to be cross-examined.

11. To the extent relevant to the appeal, we summarise the facts in the following paragraphs.

12. Part of Piramal's business is the production of pharmaceutical/medical products for clinical trials.

13. In relation to this part of the business, customers outside the UK supply Piramal with pharmaceutical products which are sometimes known as "active pharmaceutical ingredients" ("API"). The customer makes no charge for the supply of the API and remains the owner of the API.

14. For customs purposes however, Piramal acted as the importer of the API and was therefore liable to pay import VAT on the value of the goods imported.

15. Once received, Piramal would carry out work on the API. Ms Allison's evidence is that sometimes this consisted of processing the API, for example converting it into tablet form. On other occasions, Piramal would simply carry out research or testing to check the formulation or stability of the product.

16. Piramal invoices its customers for the services which it provides. These services are taxable supplies for VAT purposes but, in most cases, the supplies are zero rated as the customers are located outside the UK. Piramal does not make any onward supply of goods representing or containing the API.

17. Piramal's practice was to claim credit for the import VAT as input tax in the VAT return for the period in which the import took place.

18. Ms Allison does not explain in her witness statement what prompted her to do so but, in January 2018, she contacted HMRC by webchat to check that their treatment of the import VAT as input tax was correct. The relevant HMRC officer confirmed that it was.

19. However, in April 2018, Piramal was the subject of a VAT inspection during which this treatment was questioned. The VAT officer involved, Joanne Robson, informed Ms Allison on 25 June 2018 that she was seeking further advice internally within HMRC in relation to this issue.

20. Ms Robson wrote to Piramal on 2 August 2018 to say that HMRC's conclusion was that the import VAT was not available to be credited as input tax and that she would be raising assessments for the input tax which had been (in HMRC's view incorrectly) claimed in the past.

21. UNW wrote to HMRC on behalf of Piramal on 14 September 2018 disputing their conclusion. Ms Robson replied by email on 24 September 2018 confirming HMRC's position.

22. UNW responded on 26 September 2018 noting that HMRC had reached a conclusion, requesting an independent review and putting forward further technical arguments as to why it considered HMRC's position to be wrong.

23. On 1 October Ms Robson notified UNW that HMRC could not carry out an independent review as no appealable decision had been made. This was followed up on 4 October 2018 by HMRC's formal decision letter notifying Piramal that it could not claim the import VAT as an input tax credit and offering a review. The review duly took place and HMRC's decision was upheld on 15 November 2018.

24. On 11 April 2019, HMRC issued Revenue and Customs Brief 02/19. This explained that they had become aware of "incorrect treatment by businesses whereby import VAT has been incorrectly deducted as input tax by non-owners of the goods". Pharmaceutical goods being imported for clinical trials was given as a specific example. In the Brief, HMRC expressed the view that the correct approach would be for the customer outside the UK to be the importer and to pay the import VAT and then reclaim it.

25. HMRC noted in the Brief that none of this gave rise to any loss of tax for HMRC and accepted that its previous guidance was not clear as to the correct procedure. Based on this

they stated that they would not pursue tax where the deduction of the import VAT as input tax had taken place before 15 July 2019.

26. In the light of HMRC's position as set out in Revenue and Customs Brief 02/19, Ms Robson agreed in July 2019 that HMRC would not seek to deny the deduction by Piramal of import VAT as input tax prior to the date of their formal decision on 4 October 2018. However, the HMRC position was that Piramal (and other taxpayers in a similar position) were not entitled to relief up to 15 July 2019 (the date set out in Revenue and Customs Brief 02/19) as Piramal had already been made aware of the correct procedures and should have started applying them.

IMPORT VAT AND INPUT TAX – THE LEGAL FRAMEWORK

27. VAT has its origins in EU law. The United Kingdom's domestic legislation is intended to implement the relevant EU Directives. Despite this, Mr Hetherington's submission on behalf of Piramal is that the question as to whether the import VAT is available as an input tax credit should be decided solely by reference to domestic legislation. On the other hand, Mr Puzey, on behalf of HMRC, made extensive reference to EU legislation and case law in support of his arguments. We should therefore clarify at the outset the extent to which EU law remains relevant to this appeal following Brexit.

28. The relevant provisions are contained in the European Union (Withdrawal) Act 2018 ("the Withdrawal Act") which has to some extent been amended by the European Union (Withdrawal Agreement) Act 2020. Further changes will be made by the Retained EU Law (Revocation and Reform) Act 2023 ("the Revocation Act") but those changes will not come into force before 1 January 2024.

29. Section 5(2) of the Withdrawal Act confirms that the principle of the supremacy of EU law continues to apply on or after what is known as "IP completion day" (which was 31 December 2020) so far as this is relevant to the interpretation of domestic legislation made before that date. In effect, this means that if there is a conflict between EU Law and pre-2021 domestic legislation (such as the Value Added Tax Act 1994 ("VATA")), EU Law will prevail.

30. One of the changes to be made by the Revocation Act (s 3) is that the supremacy of EU Law will come to an end. However, as we have said, this amendment will not come into force until after the end of 2023 and so is not relevant to this appeal.

31. As far as EU case law is concerned, the effect of s 6 of the Withdrawal Act is that EU case law decided before 31 December 2020 must be taken into account by this Tribunal in relation to the validity, meaning or effect of the UK's VAT legislation.

32. Although s 6 of the Revocation Act makes some changes to the extent to which courts are bound by EU case law after 31 December 2023, it does not alter the fact that such case law remains binding on this Tribunal. The implications of this have yet to be explored given that EU law will no longer have supremacy over domestic law but that is not something we need to grapple with given that the changes have not yet come into force.

33. Based on this, we cannot accept Mr Hetherington's submission that the Tribunal can make its decision based solely on the provisions of the VATA. Instead, the Tribunal must take into account the provisions of the Directives on which that legislation is based and of the EU case law (decided before 1 January 2021) which informs the interpretation of those Directives and, by extension, the UK's domestic VAT legislation.

34. Looking first at domestic law, s 24(1) VATA defines input tax as follows:

> "**24 Input tax and output tax**

(1) Subject to the following provisions of this section, 'input tax'", in relation to a taxable person, means the following tax, that is to say -

(a) VAT on the supply to him of any goods or services;

(b) . . . and

(c) VAT paid or payable by him on the importation of any goods . . .,

being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him."

35. The question which arises in this case is whether the API which were imported by Piramal are goods which have been used for the purposes of the business carried on by it.

36. The entitlement to a credit for import VAT is contained in s 25 VATA. However, credit for import VAT is only available to the extent that it is allowed under s 26 VATA.

37. To the extent relevant, s 26 VATA provides as follows:

"**26 Input tax allowable under s 25**

(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies. . . and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business -

(a) taxable supplies;…"

38. There is no dispute in this case that the supplies made by Piramal (being the supply of the services which it carried out in respect of the API) were taxable supplies. The question posed by s 26(1) VATA is whether, if the import VAT was in principle available as input tax, it was attributable to those supplies.

39. Mr Hetherington also referred to s 27 VATA. This provides a mechanism for import VAT on goods imported wholly or partly for private purposes to be reclaimed. The details of the circumstances in which such a reclaim is possible are not relevant to this appeal. What is however relevant according to Mr Hetherington are the threshold conditions set out in s 27(1) VATA which are as follows:

"**27 Goods imported for private purposes**

(1) Where goods are imported by a taxable person . . . and -

(a) at the time of importation they belong wholly or partly to another person; and

(b) the purposes for which they are to be used include private purposes either of himself or of the other,

VAT paid or payable by the taxable person on the importation of the goods shall not be regarded as input tax to be deducted or credited under s 25; but he may make a separate claim to the Commissioners for it to be repaid."

40. As can be seen, s 27(1) VATA specifically provides that import VAT on goods which belong wholly or partly to another person is not to be treated as input tax which can be credited under s 25 if the goods are to be used wholly or partly for private purposes. Mr Hetherington's submission is that there is a strong inference from this provision that goods which belong to somebody other than the importer but which are used purely for the purposes of that person's

business (and not for private purposes) would be regarded as input tax available to be credited under s 25 VATA. We discuss this further below.

41. Turning to the EU legislation, Mr Puzey referred us first of all of Article 2 of Directive 67/22/EEC (commonly known as the First Directive). This introduces the concept of a cost component in relation to onward supplies, which, as we shall see, is at the heart of Mr Puzey's submissions. The relevant part of Article 2 reads as follows:

> "On each transaction, VAT is calculated on the price of the goods or services at the rate applicable to such goods or services. VAT is chargeable after deduction of the amount of VAT borne directly by the various cost components."

42. The current provisions relating to the deduction of input tax are contained in Article 168 of the Principal VAT Directive (Directive 2006/112/EC) (the PVD) which provides as follows:

> "Article 168
>
> Insofar as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;
>
> …
>
> (e) the VAT due or paid in respect of the importation of goods into that Member State."

43. Whilst this does not refer to the concept of a "cost component" it does make it clear that, in order for VAT relating to goods to be available as an input tax credit, the goods must be used for the purposes of transactions of the relevant taxpayer which are within the scope of VAT.

44. HMRC's position is that, taking into account the EU legislation, VAT paid either on a supply of goods or services or on the import of goods is only available as an input tax credit if the goods or services are a "cost component" in relation to any supply made by the person who acquires the goods or services.

45. Applying this to s 24(1) VATA, Mr Puzey submits that the reference to goods being used for the purposes of a business carried on by the taxpayer must be taken to mean that the goods are used as a cost component in relation to that business. In Piramal's case, as the goods continue to belong to their customers and do not form a cost component in the supplies made by Piramal, he says that the import VAT is not input tax within s 24(1) VATA.

46. Piramal's position is that ss 24-26 VATA contain a two-stage test. According to Mr Hetherington, the first part of the test is contained in s 24(1) VATA and simply requires a consideration of whether the goods in respect of which the VAT has been paid are used for the purposes of the taxpayer's business. He suggests that the word "used" has no special meaning. On this basis he submits that, as Piramal does use the API, for example converting it into tablets, the requirements of s 24(1) VATA are satisfied so that, in principle, the import VAT qualifies at input tax.

47. Mr Hetherington submits that the second stage of the test for availability of the input tax as a credit is contained in s 26 VATA which looks only at whether the input tax is attributable to taxable supplies or to exempt supplies. On the basis that all of Piramal's supplies are taxable,

he concludes that the import VAT is available as an input tax credit and that there is no need to establish that the goods are a cost component of any of the supplies made by Piramal as this is only relevant where the taxpayer is making both taxable and exempt supplies and it is necessary to determine which of those supplies the input tax is attributable to.

48. As persuasive as Mr Hetherington's submissions were, considering the EU case law which is binding on us, we cannot accept them, even taking into account the other points (which we will come onto) put forward by Mr Hetherington in support of Piramal's position. Instead, we agree with Mr Puzey that, as the law currently stands, import VAT is only available as an input tax credit if the goods in respect of which the import VAT has been paid are a cost component in a supply which is made by the taxpayer.

49. To explain the reasons for our decision, we now need to look at the case law, both EU and domestic, which the parties have drawn to our attention.

50. It is convenient to start with the decision of the European Court of Justice (ECJ) in *Midland Bank Plc v Customs & Excise Commissioners* (Case 98/98; [2000] 1 WLR 2080). The Court was concerned with the predecessor to Article 168 of the PVD which was contained in Article 17(2) of the Sixth VAT Directive (Directive 77/38/EEC). However, there is no material difference between the two provisions. The particular issue which the Court had to deal with was whether VAT on supplies made to Midland Bank related to taxable or exempt supplies.

51. The Court noted at [19] that:

> "The deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities, provided that such activities are themselves, in principle, subject to VAT".

52. However, the Court went on to observe at [20] that:

> "To give the right to deduct under paragraph (2), the goods or services acquired must have a direct and immediate link with the output transactions giving rise to the right to deduct".

53. This interpretation was, the Court considered, confirmed by Article 2 of the First Directive "which states that only the amount of VAT borne directly by the various cost components of a taxable transaction may be deducted" (a point which the Court emphasised again at [29] which refers to this point as "the fundamental principle which underlies the VAT system").

54. The Court in *Midland* concluded by explaining at [30] that:

> "The right to deduct the VAT charged on such goods or services presupposes that the expenditure incurred in obtaining them was part of the cost components of the taxable transactions. Such expenditure must therefore be part of the costs of the output transactions which utilise the goods and services acquired."

55. The principles established in *Midland* were confirmed by the judgment of the ECJ in *Abbey National plc v Customs & Excise Commissioners* (case C-408/98; [2001] STC 297) at [26/28]. Again, *Abbey National* was a case dealing with the extent to which VAT incurred on a provision of services was allowable as an input tax credit in circumstances where the taxpayer made both taxable and exempt supplies.

56. These principles were applied by the Court of Appeal in *Customs & Excise Commissions v Sutton Primary Housing Association Limited* [2003] EWCA Civ 1662. In that case, the taxpayer incurred VAT on a purchase of land. It then sold the land to a housing association

but also entered into a development contract with the housing association to build housing on the land. The VAT paid on the purchase of the land could not be credited against any VAT charged on the sale of the land as that transaction was exempt from VAT. The question therefore was whether the VAT on the purchase of the land could be credited against the VAT charged in respect of the development contract which was a taxable supply of services.

57. Whilst the Court of Appeal accepted that the land purchase was commercially necessary to make the performance of the development contract possible, it concluded that it was not a cost component of the development contract. Similarly, whilst there was a link between the purchase of the land and the development contract, it was not a "direct and immediate" link. It accepted that the development contract would not have been made but for the associated land purchase and sale but observed at [32] that "'but for' is not the test and does not equate to the 'direct and immediate link' and 'cost component' test".

58. Taking these cases together, it is clear that, in order for VAT incurred in relation to goods and services to be allowed as an input tax credit, the goods or services must form a cost component of a taxable supply made by the taxable person.

59. Mr Hetherington quite rightly points out that these principles all derive from cases where the question was whether VAT paid in relation to goods or services was attributable to taxable supplies or exempt supplies. They do not focus on the question as to whether VAT paid on the import of goods which are used for the purposes of a business which makes only taxable supplies is available as an input tax credit.

60. In this context, we note that Advocate General Saggio noted in his opinion in the *Midland* case at [24] that:

> "…where a taxable person carries on a business with the purpose of carrying out only taxable transactions, it is not necessary, for the purposes of deducting the whole of the VAT, that he should prove the existence of a direct and immediate link between each and every input transaction and a particular taxable output transaction. The Community legislature only requires that the goods and services be used or be likely to be used 'for the purposes of … taxable transactions …:' Article 17(2) and (3) of the Sixth Directive."

61. This could be interpretated as an indication that, in these circumstances, the goods or services do not have to be shown to be a cost component of the supplies made by the taxable person, particularly given the Advocate General's conclusion at [31] that a direct and immediate link exists in particular:

> "…if the amount of the tax paid in respect of the supply of a good or provision of a service was borne directly by the various cost components of the taxable transaction."

62. However, this is not a point that was made in the judgment of the Court itself and it is clear from subsequent cases that the ECJ considers the principle that the goods or services must be a cost component of a supply made by the taxpayer is one of general application including in circumstances where the VAT in question is import VAT in relation to goods which are not owned by the taxpayer.

63. For example in *Skatteministeriet v DSV Road A/S* (Case C-187/14), a case involving a claim by a company transporting goods belonging to a third party to deduct import VAT in relation to those goods as input tax, the Court stated at [49] that:

> "In accordance with the settled case law of the Court, concerning the right to deduct VAT on the acquisition of goods or services, that condition is satisfied

> only where the cost of the input services is incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his economic activities."

64. As the value of the goods transported did not form part of the costs invoiced by the taxpayer for the transport of the goods, no deduction was available in accordance with Article 168 of the PVD.

65. This was followed by a reasoned order of the ECJ in *Financne Riaditeľstvo Slovenskej Republiky v Weindel Logistik Service SR spol. s.r.o.* (Case c.621/19) in which the Court made an order stating that Article 168(e) of the PVD:

> "Must be interpreted as precluding the grant of a right to deduct value added tax ("VAT") to an importer where he does not dispose of the goods as an owner and where the upstream import costs are non-existent or are not incorporated in the price of particular output transactions or in the price of the goods and services supplied by the taxable person in the course of his economic activities".

66. In that case, the taxpayer incurred import VAT on the import of goods belonging to third parties into the Slovak Republic. The goods were repackaged and were then exported. The customer was invoiced by the taxpayer for the repackaging services.

67. The fact that the ECJ dealt with the case by way of reasoned order indicates that it considered the law in this area to be settled.

68. Mr Hetherington sought to distinguish the decision in *DSV Road* on the basis that DSV was neither the owner nor the importer of the goods being transported but had only become liable to the import VAT as a result of the relevant customs formalities not having been carried out correctly. In addition, Mr Hetherington notes that DSV did not, in any sense, use the goods which were being transported for the purposes of its business (unlike Piramal which carried out various processes in relation to the API which it imported).

69. As far as *Weindel* is concerned, Mr Hetherington accepts that Weindel did carry out some services in relation to the goods imported but suggests that these services were rather more modest than those carried out by Piramal in respect of the API. In addition, he submits that the decision in that case cannot be given much weight given that the Order of the ECJ consisted of a single paragraph which refers to no EU case law and which, he infers, may have been influenced by the decision in *DSV Road*.

70. We cannot however accept these criticisms. It is in our view clear, based on the authorities to which we have referred, that the ECJ considers the law in this area to be settled. VAT in respect of goods or services, including import VAT, is not available as an input tax credit unless those goods or services form a cost component of a supply which is made by the taxpayer.

71. In addition, as noted Mr Puzey, if the test is purely whether the goods have, to some extent, been used for the purposes of the taxpayer's business (whether or not they form a cost component of any supply made by the taxpayer) it could be very difficult to determine in any given case whether the use of the goods was sufficient to satisfy the requirements of s 24(1) VATA.

72. For example, Mr Hetherington suggested that, although the goods in *Weindel* were used by the taxpayer for the purposes of its business (which consisted of repackaging the goods), the goods were not being used to a sufficient extent to enable the import VAT to qualify as input tax. In the case of Piramal, we can see that it is arguable that turning the API into tablets

could be said to involve a greater use of the goods which are being imported than was the case in *Weindel*. However, in circumstances where Piramal only carried out tests in relation to the API, arguably the use of the goods is less than was the case in *Weindel*.

73. Taking into account these difficulties, this reinforces our conclusion that the decisions in *Weindel* and *DSV Road* cannot be explained simply on the basis of the limited (or lack of) use of the relevant goods by the taxpayers in question but instead are based on the wider principle which we have just mentioned.

74. Given the supremacy of EU law and the binding nature of EU case law in interpreting pre-2021 domestic case law, our conclusion is that s 24(1) VATA must be interpreted so that the reference to goods being "used" for the purposes of the taxpayer's business means used in such a way that the goods or services are a cost component of a taxable supply made by that business.

75. Whilst we accept that there is some force in Mr Hetherington's submission that the UK domestic legislation splits the requirements of Article 168 of the PVD into a two stage test, taking into account the EU law principles, the result would in our view be the same even if he is right that the cost component question only arises in relation to the second stage.

76. The reason for this is that s 26 VATA only allows an input tax credit if the input tax is "attributable" to taxable supplies. The effect of the EU case law in relation to this question can only mean that the goods or services must be a cost component of those supplies. If Mr Hetherington were right that s 26 is dealing solely with the question as to whether the input VAT is attributable to taxable supplies or exempt supplies, the result would be that the clear principles of EU law set out in the cases to which we have referred would not feature anywhere in the UK legislation dealing with input tax credits.

77. Clearly this cannot be the right result given the EU law origins of our domestic legislation. In order to avoid this result, the expression "attributable to" would need to be interpreted as requiring the goods or services in question to form a cost component of the relevant supply.

78. In this context, it is perhaps worth mentioning that general overheads, although not linked to particular output transactions, can nonetheless form a cost component of the taxpayer's supplies and are therefore still capable of giving rise to an input tax credit to the extent they relate to taxable supplies (see *Eon Aset Menidjmunt OOD v Direktor na Direktsia* (Case C-11811; [2012] EU-C-2012-97) at [47]).

79. It is not therefore the case, as submitted by Mr Hetherington, that the cost component test does not need to be considered if all of a person's supplies are taxable. It is simply that the test will be satisfied in respect of general overheads if all of the supplies are taxable as those overheads are a cost component of all of the supplies.

80. Mr Hetherington also referred us to the decisions of the ECJ in *Sveda UAB v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos* (Case C-12614; [2015] EU-2015-254) and *Sofia v Iberdrola Inmobiliaria Real estate Investments* (Case C-13216: [2017] EU-C-2017-283) as authority for the proposition that the requirement for goods/services to be a cost component of onward supplies in order for any VAT to be available as an input tax credit has been relaxed.

81. However, as is clear from the decisions of the Court (see paragraphs [27] and [28] of *Sveda* and paragraphs [29], [36] and [40] of *Iberdrola*), the cost component requirement remains. The issue was more to do with how that requirement was satisfied where the supplies in question had more than one purpose.

82. We note that our conclusion is similar to that reached by this Tribunal in *Associated British Ports v HMRC* [2016] UKFTT 0491 (TC). Although decisions at the First-tier Tribunal are not binding on us, we should follow them unless we consider that they are wrong. For the reasons we have explained, we agree with the conclusions reached in *Associated British Ports*.

83. In particular, the Tribunal in *Associated British Ports* rejected the existence of a distinction between VAT paid on a supply of goods and VAT incurred in relation to an import of goods belonging to another person. As the Tribunal noted at [39]:

> "It is not the distinction between 'supply VAT' and import VAT that matters; it is the common factor of the VAT being related to goods and the requirement in every case that the goods are used for the purposes of taxed transactions of the taxable person".

84. In reaching its conclusion in *Associated British Ports*, the Tribunal, in effect, followed the decision of the ECJ in *DSV Road* (which it referred to at [45]).

85. It is true that, in *Associated British Ports* the taxpayer made no use of the goods in question. It was a warehouse keeper which simply stored the goods but which, in the particular circumstances, became liable for the import VAT. However, the Tribunal's conclusion was based clearly on the wider principle set out in *DSV Road* relating to the use of the goods as a cost component and not on the narrower basis that the goods had simply not been used at all by the taxpayer. In the same way as we have done, it appears (see the comments made at [45], [51] and [53]) that the Tribunal in *Associated British Ports* interpreted the word "used" in s 24(1) as requiring the goods to be used as a cost component in relation to a taxable supply made by the taxpayer.

86. As we have mentioned, Mr Hetherington put forward a number of other points in support of his primary submission and we should explain briefly why we do not consider that these points change the conclusion which we have reached based on the EU and domestic case law.

87. Looking first at s 27(1) VATA, we have already mentioned Mr Hetherington's submission that the wording of that sub-section implies that VAT paid on the importation of goods belonging to another person but which are used purely for business purposes would fall within the definition of input tax in s 24(1) VATA. If this were not the case, Mr Hetherington argues that it would be unnecessary for s 27(1) VATA to specifically provide that import VAT in relation to goods which belong to another person but which are used for private purposes is "not to be regarded as input tax to be deducted or credited under s 25".

88. Linked to this, Mr Hetherington makes a point that, had Parliament intended that import VAT could only be credited as input tax in circumstances where the taxpayer becomes the owner of the goods, it could have made this clear by drafting s 24(1)(c) VATA so that it reads "VAT paid or payable by him on the importation of any goods **owned by him**."

89. We accept that there is some force in Mr Hetherington's submission. Although not conceded by Mr Puzey, in our view, the practical effect of HMRC's interpretation at s 24(1) VATA is that the goods which are imported and in respect of which import VAT is payable must be acquired by the importer in order for the import VAT to be available as an input tax credit. This is because it is difficult to see how the goods can be used as a cost component in any onwards supply if the goods belong to a third party. This point is evident from Revenue and Customs Brief 02/19 which, as we have mentioned, is aimed specifically at import VAT paid by a person who is not the owner of the goods.

90. On this basis, it is not strictly necessary for s 27(1) VATA to state in terms that the import VAT is not available as an input tax credit as it would not (if our conclusion is right) fall within the definition of input tax in s 24(1) VATA in the first place.

91. However, whilst we accept Mr Hetherington's submission that legislation must be interpretated in the light of its context and purpose (see *Kostal UK Ltd v Dunkley* [2021] UKSC 47, at [109] and *R (oao O) v SSHD* [2022] UKSC 3 at [29]), we do not agree that the wording of s 27(1) VATA is sufficient to tip the balance in favour of Piramal's interpretation of s 24(1) VATA.

92. In relation to VAT, the context and purpose must of course be understood in the light of the EU directives from which the UK domestic legislation derives as well as from the other provisions contained in the domestic legislation itself. As we have seen, the EU context is that VAT which is incurred in relation to goods (whether or not a supply of goods or on an import) is only available as an input tax credit if the goods are a cost component of an onward supply.

93. Whilst we agree that the wording of s 27(1) VATA could be taken to infer that import VAT, even where the importer does not become the owner of the goods (and so the goods cannot become a cost component of an onward supply) is available as an input tax credit if the goods are used for business purposes, they could equally well simply have been included to remove any doubt that, in such circumstances, the import VAT cannot qualify as input tax which is available as a credit under s 25 VATA. These words do not therefore in our view have the significance which Mr Hetherington attributes to them looking at the wider context and purpose of the legislation

94. In a similar vein, Mr Hetherington referred to regulation 29 of the Value Added Tax Regulations 1995. This sets out what evidence is needed in order to make a claim for input tax. In relation to the importation of goods, one of the requirements is a document showing the claimant as "importer, consignee or owner".

95. Again, Mr Hetherington suggests that this supports his submission that the importer does not have to be the owner of the goods in order for the import VAT to be available as an input tax credit. However, we do not consider that this provision, which relates only to the documents required to support a claim for input tax, can shed much light on the question as to whether import VAT is available as input tax in the first place. Mr Hetherington did not for example disagree with our suggestion that someone named on the relevant customs declaration as the importer or consignee might also be or become the owner of the relevant goods.

96. In further support of his submissions, Mr Hetherington mentioned two situations where a taxpayer has not incurred any costs in acquiring goods but nonetheless is entitled to an input tax credit. He submits that this illustrates that the cost component rule is not an absolute test.

97. The first situation relates to business gifts. In this situation, there is a deemed supply of goods by the donor who is required to account for output tax. Where the recipient is also a taxable person who uses the goods for business purposes, the donor may provide a tax certificate to the recipient to enable that person to reclaim the VAT as input tax (see VAT notice 700/7 – paragraph 2.4).

98. The second situation mentioned by Mr Hetherington is where there is a taxable supply of goods but the consideration for the supply is paid by a third party. Mr Hetherington notes that, in these circumstances, HMRC still allow the recipient of the supply to reclaim the VAT as input tax even though it has not itself incurred any costs in relation to those goods.

99. We do not however consider that these examples take the debate any further. Whilst the taxpayer may not have incurred any costs (in the sense of having to pay for the goods), it seems to us that there is no objection to the recovery of the VAT paid in relation to these sorts of supplies in circumstances where the goods which have been supplied would be a cost component in relation to taxable supplies which are in turn made by the recipient of the goods had the recipient in fact paid for them.

100. In Piramal's case, the difference is that Piramal did not acquire the goods and so they could not be a cost component of any onward supply. This has nothing to do with the fact that Piramal did not pay for the goods. It is because it did not own the goods.

101. Even if Mr Hetherington were right that these situations were exceptions to a requirement that the taxpayer must themselves have incurred some cost in acquiring the goods in order for an input tax credit to be available, it does not follow that this displaces the general principle evidenced by the authorities which we have referred to that, in order for VAT to be available as an input tax credit, the goods or services in question must form a cost component in relation to an onward supply. The EU cases in particular make it clear that there is no general exception from this principle in relation to import VAT incurred in relation to goods belonging to another party.

102. The final point relied on by Piramal is the apparent understanding of the government and Customs and Excise (as it then was) in 1985 in relation to the availability of an input tax credit for import VAT incurred in relation to goods belonging to a third party.

103. The debate at the time related to VAT relief where goods were temporarily imported into the UK for process or repair. The details of the relief are not material. The important point is that, as Mr Hetherington notes, it is quite clear from the statements made by Ministers to Parliament and from the internal guidance of Customs and Excise contained in a document known as TA 1/85 (which Mr Hetherington must be congratulated for tracking down) that the understanding of both the Government and Customs and Excise at the time was that import VAT paid by a taxpayer in relation to goods belonging to a third party could be claimed as an input tax credit.

104. For example, TA 1/85 observes that traders who repair or perform certain other work on temporarily imported goods which belong to a third party customer "are required to finance the import VAT charge on the full value of the goods until this can be reclaimed as input tax in a subsequent VAT return." As Mr Hetherington notes, the VAT legislation in force at the time in relation to input tax was substantially similar to the current provisions.

105. We accept therefore that, in 1985, both the Government and Customs and Excise considered that import VAT incurred in relation to goods belonging to a third party could be claimed as an input tax credit despite the fact that those goods would not form part of a cost component in relation to an onward supply by the taxpayer in question.

106. In our view however, this cannot affect the correct interpretation of s 24(1) VATA in light of the relevant EU legislation and case law. The views of ministers or HMRC are not binding. With the benefit of hindsight, the Government and Customs and Excise were simply mistaken in their belief. The most that can be said is that, at some point, HMRC have changed their view on this point.

107. Before leaving this aspect, we should mention that both parties referred to deliberations of the EU VAT Committee. This is an advisory body which issues guidelines in relation to VAT although those guidelines are not binding on any Member State. Neither party therefore placed any great weight on the statements made by the Committee.

108. In 2011 the Committee "almost unanimously" confirmed that import VAT was not available as an input tax credit if the taxpayer does not become the owner of the goods and the cost of the goods has no direct and immediate link with the taxpayer's economic activity. In effect, the Committee was confirming that input tax credit is only available where the goods form a cost component in relation to an onward supply (thus providing the necessary direct and immediate link).

109. The Committee reconsidered this issue in March 2023 in the light of the decision of the ECJ in *Weindel*. This time, eight out of twelve members of the Committee agreed that the import VAT was not available as an input tax credit if the cost of the goods is not part of the taxpayer's output transactions. Four of the members of the Committee expressed doubts in relation to this. The conclusion however was that, as the majority continued to agree, the previous guidelines would not be modified.

110. Given that the guidelines published by the Committee are not binding, we do not place any weight on its conclusions in the same way as we have not placed any weight on the views expressed by the UK Government and Customs and Excise in 1985. Instead, we have relied on our own interpretation of the relevant provisions of the VATA in the light of the EU legislation and case law which are binding on us.

111. As we have already made clear, our conclusion in relation to this part of the appeal is that the import VAT incurred by Piramal is not available as an input tax credit as the goods imported by Piramal, whilst being used in relation to its business, have not been used as a cost component in any onward supply made by Piramal.

112. We therefore turn to consider Piramal's second ground of appeal.

EQUAL TREATMENT

113. As explained by the ECJ in *Marks & Spencer Plc v Revenue & Customs Commissioners* (Case C-309/06; [2008] STC 1408) at [51] "the general principle of equal treatment requires that similar situations are not treated differently unless differentiation is objectively justified".

114. Both parties are agreed that an argument based on the EU principle of equal treatment is within the jurisdiction of the First-tier Tribunal. We therefore proceed on the basis that we do have jurisdiction. This might be said to have been implicitly confirmed by the Upper Tribunal in *RT Rate v HMRC* [2022] UKUT 118 although, as the Upper Tribunal did not consider that there had been any breach of the principle of equal treatment and the jurisdiction point was not specifically addressed, we cannot say that the point is beyond doubt.

115. The questions we need to address are whether Piramal is being treated differently from other taxpayers in similar situations and, if so, whether this is objectively justified. As is clear from the observations of the Upper Tribunal in *R T Rate* at [59-60], the comparison is not with a single taxpayer but with a class of taxpayers.

116. Piramal relies on Revenue and Customs Brief 02/2019 which was published on 11 April 2019. This was directed at two particular classes of taxpayers. One of those classes is described in the Brief as "Toll Operators". It is clear from the description in the Brief that Piramal falls within this class. That is not disputed by HMRC. It is therefore against the class of Toll Operators as a whole that the treatment of Piramal must be compared.

117. As we have explained, HMRC accepted in the Brief that its previous guidance on the availability of import VAT as an input tax credit had not been clear and that it would not therefore pursue historical VAT deductions as long as certain conditions were satisfied. By historical, this meant deductions made before 15 July 2019 – i.e. within three months and three days after the publication of the Brief.

118. Although HMRC initially suggested that Piramal did not satisfy some of the conditions set out in the Brief, Mr Puzey did not pursue this at the hearing. The sole question therefore is whether Piramal should have been given a similar transitional period as was given to other Toll Operators.

119. Mr Hetherington submitted that this should mean that Piramal would be entitled to deduct as input tax import VAT incurred before 15 July 2019. As an alternative, he suggested that

Piramal should be given the same transitional period (three months and three days) from the date of HMRC's decision that import VAT could not be claimed as input tax. Mr Hetherington argues that, for this purpose, the relevant date is the date of HMRC's formal decision letter which was written on 4 October 2018.

120. If this submission were accepted, it would mean that all of the import VAT for the 11/18 VAT period could be claimed as an input tax credit and either some or all (depending on which approach is adopted) of the import VAT for the 02/19 period could also be credited.

121. On behalf of HMRC, Mr Puzey submits that, from at least April 2018, Piramal was aware that HMRC was questioning the claims for the import VAT as an input tax credit and that, unlike other Toll Operators who only became aware of the issue as a result of the publication of Revenue and Customs Brief 02/19, it was aware of HMRC's possible challenges at a much earlier stage. Essentially, HMRC are saying that Piramal was not in a similar position as it had advance notice of HMRC's concerns.

122. HMRC's subsidiary position is that Piramal became aware of HMRC's settled view no later than 2 August 2018 when Ms Robson of HMRC wrote to Ms Allison at Piramal informing her of HMRC's conclusions. In effect, Mr Puzey says that Piramal was therefore given a transitional period between 2 August 2018 – 4 October 2018 (as the input VAT credits were only denied after that date) and that, although this was less than the period of just over three months given to other Toll Operators, this could be justified on the basis that Piramal had in any event known since April 2018 that the ability to claim a credit for the import VAT was being considered by HMRC.

123. Mr Puzey accepts that the purpose of the transitional period was to allow taxpayers the opportunity to adjust their practices which, based on HMRC's explanation set out in Revenue and Customs Brief 02/2019, would require the owner of the goods to be the importer, to pay the VAT and then to make a reclaim. However, based on the above, Mr Puzey argues that Piramal had been given that opportunity.

124. In our view, given the purpose of offering a transitional period (to allow a taxpayer time to adjust their procedures), the relevant comparison in determining whether taxpayers are in a similar situation is to look at the point at which the taxpayer became aware that HMRC did not consider that import VAT paid on goods which belong to a third party was available as an input tax credit. The fact that a taxpayer (such as Piramal) may have known that HMRC were considering their position does not put that taxpayer in a different position.

125. The reason for this is that it cannot objectively be expected that a taxpayer would change their processes and procedures for the import of goods where all that was known was that HMRC were thinking about the point. This is particularly the case for Piramal given that Ms Allison was told by HMRC in January 2018 that its treatment of the import VAT was correct.

126. The fact that Piramal knew, possibly in April 2018 when HMRC visited Piramal and certainly on 25 June 2018 when Ms Allison was contacted by Ms Robson, that HMRC were themselves unsure of the correct treatment and that further advice was being sought internally cannot therefore be relied on to justify treating Piramal in a different way to other taxpayers.

127. Indeed, the clear message given in the Brief was that HMRC's previous guidance had been unclear and that, as a result, some Toll Operators had incorrectly claimed import VAT as an input tax credit. In that sense, it can be said that all members of the class of taxpayers were in exactly the same position as Piramal in that, based on HMRC guidance, they could not be sure of the correct treatment. Whether or not HMRC were already in discussions with any particular taxpayer would not change this until they were notified by HMRC of their view of the correct treatment.

128. In order to be treated in the same way as other Toll Operators, Piramal should therefore be given the same transitional period as those other taxpayers. In our view, however, this should not be a transitional period allowing input tax credits for import VAT incurred before 15 July 2019, as was the case for Toll Operators who only became aware of HMRC's position on 11 April 2019 but should be a transitional period of three months and three days calculated from the date Piramal actually became aware of HMRC's position.

129. We agree with Mr Puzey that this was 2 August 2018 as HMRC wrote to Piramal on that date setting out in clear terms what their position was and, in particular, that the import VAT was not available as an input tax credit. Although that letter was not a formal decision by HMRC (as confirmed by the fact that Ms Robson rejected a request for an independent review prior to the date when the formal decision letter was issued on 4 October 2018), the comparison with other Toll Operators is, as we have said, based on the date when Piramal knew HMRC's position and not the date when HMRC made a formal, appealable decision.

130. On this basis, Piramal should be allowed a transitional period of three months and three days from 2 August 2018 – i.e. up to and including 5 November 2018. The result of this is that any import VAT incurred on or before 5 November 2018 should be allowed as an input tax credit on the basis of the principle of equal treatment. However, any import VAT incurred after that date will not be allowed as a credit.

CONCLUSION

131. Piramal's appeal against HMRC's decision on 4 October 2018 that import VAT incurred in relation to goods which remained in the ownership of its customers is not available as an input tax credit is rejected for the reasons we have explained,

132. Similarly, Piramal's appeal against HMRC's decision dated 23 May 2019 to withhold a repayment of import VAT in the sum of £77,683.23 for the VAT period 2/19 also fails.

133. Piramal's appeal against HMRC's decision dated 28 August 2019 to deny input tax credit and to assess VAT which HMRC considered to be overclaimed for the VAT period 11/18 in the sum of £118,571 is allowed to the extent that the import VAT in question was incurred on or before 5 November 2018. We leave it to the parties to agree the amount of the reduced assessment but with liberty to apply to the Tribunal for a determination should it not be possible to reach agreement.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

134. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ROBIN VOS
TRIBUNAL JUDGE

Release date: 17th OCTOBER 2023