[2017] UKUT 51 (TCC)

Appeal number: UT/2015/0160

VAT - rental of taxis – optional insurance – Article 135(1)(a) Directive 2006/112/EC – section 31 and group 2 Schedule 9 VATA94 VAT Act 1994 – whether insurance transaction for VAT purposes – yes - whether single supply of leasing of insured vehicle or separate supplies of vehicle and insurance – separate supplies - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellant

- and –

WHEELS PRIVATE HIRE LIMITED

Respondents

Tribunal: Judge Colin Bishopp
Judge Greg Sinfield

Sitting in public in London on 27 September 2016

Brendan McGurk, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Ian Bridge, counsel, instructed by Barringtons Limited, for the Respondent

DECISION

Introduction

1. The Respondent ('Wheels') runs a taxi business in the course of which it rents cars, with a radio support service, to drivers who do not have their own vehicles. Wheels offers these drivers the option of arranging their own insurance cover against third party liability while driving the vehicle or purchasing such cover from Wheels for £45 per week in addition to the vehicle rental. At the relevant time, Wheels obtained the insurance under a contract with Collingwood Insurance Company Limited ('Collingwood') and later with another broker. Wheels charged VAT at the standard rate on the rent for the vehicles but treated the £45 as consideration for an exempt supply of insurance. The Appellants ('HMRC') decided that Wheels makes a single supply of an insured vehicle to the drivers so that VAT is chargeable at the standard rate on the whole of the consideration including the £45. In November 2011, HMRC assessed Wheels for VAT of £66,859.

2. Wheels appealed to the First-tier Tribunal (Tax Chamber) ('FTT') against HMRC's decision and the assessment. A hearing took place in May 2015. The only issue was whether Wheels makes separate standard rated and exempt supplies to the drivers or a single standard rated supply. In a decision released on 21 July 2015, [2015] UKFTT 0363 (TC), the FTT held that Wheels makes separate and independent supplies of the vehicles with the radio service, which are standard rated, and insurance which is exempt. Accordingly, the FTT allowed Wheels' appeal. HMRC now appeal, with the permission of the FTT, on the ground that the FTT erred in law in allowing the appeal. Save as otherwise indicated, paragraph references in square brackets in this decision are to the paragraphs in the FTT's decision.

3. For the reasons set out below, we have decided that Wheels makes a separate exempt supply of insurance to the drivers to whom it hires cars and who accept the offer of insurance cover arranged by Wheels. Accordingly, HMRC's appeal must be dismissed.

Facts

4. There was no challenge to the findings of fact by the FTT. The FTT summarised the material facts found as follows at [35]:

> "(i) The appellant company runs a taxi-hire business. It provides radio support for customer hire requirements, which it then relays to the drivers.
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> (ii) Most of the drivers own their own vehicles. However, the appellant hires to other drivers 70-80 vehicles. In addition to rental for the vehicle and a further sum for radio support the drivers may elect to purchase insurance cover from the appellant company to satisfy the RTA's requirements. It is at a competitive rate and the appellant does not derive any significant profit from providing it. The receipt of any additional sums for insurance cover is accounted for separately by the appellant.
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> (iii) The appellant is the insured in terms of the insurance policy. Cover notes are issued in respect of individual vehicles identified by registration number. The persons entitled to drive must be authorised by the appellant as policy holder. Vehicles may be removed if not in use and restored as appropriate. The appellant determines who may drive a particular vehicle. The insurers require details annually about the drivers, their licences and driving records. In the interim additional drivers may be added to the cover

> by the appellant provided that their driving records satisfy certain criteria prescribed by the insurers. Otherwise reference must be made to the insurer.
>
> (iv) Leeds City Council, being the local authority within whose area the appellant's taxi service operates, imposes various requirements as to licencing which are met by the appellant and its drivers."

5. The FTT accepted the evidence of Mr Stephen Howard, a director of Wheels, and [5] to [14] describing that evidence contain further findings of fact, some of which we refer to below.

Legislation

6. The relevant legislation can be stated quite briefly. Article 135(1)(a) of Directive 2006/112/EC (the 'Principal VAT Directive') exempts "insurance and reinsurance transactions". It is implemented in UK law by section 31 and Group 2 of Schedule 9 to the VAT Act 1994. There was no dispute about the meaning of insurance for VAT purposes, only about whether that was what Wheels supplied in return for the £45 payment.

Case law on scope of insurance exemption

7. Before we discuss the FTT's reasoning and conclusion on the nature of the supply in relation to insurance cover and the parties' submissions, it is useful to describe the two leading decisions of the Court of Justice of the European Union ('CJEU') on the subject.

8. In Case C-349/96 *Card Protection Plan Limited v HM Customs and Excise* [1999] STC 270 ('*CPP'*), the appellant company supplied various services and some small goods of low value under a plan to protect its customers from loss or inconvenience resulting from the loss or theft of their credit cards. The services included insurance indemnifying the customers against financial loss caused by the loss or theft of credit cards together with other non-insurance assistance services. In relation to the insurance element, CPP obtained block cover from an insurance company, Continental. The customers were the named "assured" under the policy. When a customer purchased CPP's services, his name was added to the schedule of assured. CPP paid an annual premium to the insurer and adjustments to reflect cardholders joining or leaving the plan were made at the end of the policy year. One of the questions referred to the CJEU by the House of Lords was whether supplies of services such as those provided by CPP to its customers constituted insurance transactions or related services of insurance agents within the exemption in what is now Article 135(1)(a) of the Principal VAT Directive.

9. *CPP* was the first time that the CJEU had been asked to interpret the scope of the insurance exemption in VAT law. The CJEU dealt with that issue in paragraphs 13 to 25 of the judgment but the core of its reasoning is in paragraphs 21 to 23:

> "21. In those circumstances, it must be noted that CPP is the holder of a block insurance policy under which its customers are the insured. It procures for those customers, for payment, in its own name and on its own account, to the extent of the services mentioned in the Continental policy, insurance cover by having recourse to an insurer. Consequently, for the purposes of VAT, there is a supply of services between Continental and CPP on the one hand, and between CPP and its customers on the other, and the fact that Continental under the terms of its contract with CPP provides insurance cover directly to CPP's customers is not material in this respect.

> 22. Such a supply of services by CPP constitutes an insurance transaction within the meaning of Article 13B(a). It is true that the exemptions provided for by Article 13 of the Sixth Directive are to be construed strictly (see *Stichting Uitvoering Financiële Acties*, paragraph 13). However, the expression 'insurance transactions' is broad enough in principle to include the provision of insurance cover by a taxable person who is not himself an insurer but, in the context of a block policy, procures such cover for his customers by making use of the supplies of an insurer who assumes the risk insured.
>
> 23. That interpretation is supported by the purpose of the Sixth Directive, which exempts insurance transactions but gives member states, in Article 33, the possibility of maintaining or introducing a tax on insurance contracts. Consequently, if 'insurance transactions' refers solely to transactions performed by insurers themselves, the final consumer might have to pay not only that tax but also VAT, in the case of block policies. Such a result would be contrary to the purpose of the exemption provided for by Article 13B(a)."

10. In view of its conclusion that CPP's supplies were an insurance transaction within the exemption, the CJEU stated that it did not need to consider whether CPP carried on the activity of an insurance agent.

11. Mr Brendan McGurk, who appeared for HMRC, submitted that HMRC fully accept the analysis of the CJEU in *CPP* and have given effect to it in Notice 701/36 Insurance. Section 2.5 states that CPP were holders of a block insurance policy and the decision of the CJEU in *CPP* has implications for supplies made by holders of such policies. HMRC state in section 2.5.1 of Notice 701/36, the four key criteria of such a block policy are:

> "The key characteristics of a block policy are that:
>
> - there is a contract between the block policyholder and the insurer which allows the block policyholder to effect insurance cover subject to certain conditions
> - the block policyholder, acting in their own name, procures insurance cover for third parties from the insurer
> - there is a contractual relationship between the block policyholder and third parties under which the insurance is procured
> - the block policyholder stands in place of the insurer in effecting the supply of insurance to the third parties."

12. It appears from section 2.5 of Notice 701/36 and the submissions made to us by Mr McGurk that HMRC regard the existence of a block policy as a precondition of the application of the CJEU's broad interpretation of insurance transaction in *CPP*. We do not read the CJEU's decision that way. We do not consider that the use of the phrase "in the context of a block policy of which he is the holder" by the CJEU was intended to limit the expanded meaning of insurance transaction to situations where there is a block policy. There was a block policy in *CPP* and that was the context in which the question for determination arose. The CJEU's application of the exemption to supplies by taxable persons who are not insurers but procure cover for their customers from insurers was not predicated on the existence of a block policy as opposed to any other type of policy. In our view, whether a taxable person who is not an insurer procures insurance for a customer using a policy of a particular type, such as a block policy or a group policy (both terms were used in *CPP*) or a fleet policy (as referred to before the FTT in this case), is not a determinative factor in deciding whether the supply is an exempt insurance transaction. That the CJEU's broad interpretation of insurance transaction

can apply to supplies by persons who procure insurance cover other than by means of a block policy is shown by the CJEU's decision in Case C-224/11 *BGŻ Leasing sp. zoo. v Dyrektor Izby Skarbowej w Warszawie* [2013] STC 2162 ('*BGZ*').

13. The scope of the insurance exemption was examined again by the CJEU in *BGZ*. BGZ was a leasing company that leased goods to its customers in return for rent. The lessees were liable for any loss or damage to the leased goods, other than normal wear and tear. BGZ required the leased goods to be insured at the cost of the lessee. BGZ offered to provide the insurance but the lessee also had the option of insuring the leased goods with an insurance company of its choice. If the lessee accepted BGZ's offer of insurance then BGZ would take out insurance on the goods with an insurer and re-invoice the cost of that insurance to the lessee. BGZ took the view that the re-invoiced cost of the insurance was consideration for an exempt insurance transaction. The Polish tax authority disagreed and the matter was ultimately referred to the CJEU. The CJEU was asked two questions, one of which was whether a transaction under which the lessor insured a leased item with a third-party and re-invoiced the cost of that insurance to the lessee constituted an exempt insurance transaction.

14. Lest it cause any confusion, we point out that the first sentence of paragraph 52 of the CJEU's judgment contains a typographical error. It states (emphasis supplied):

> "As a preliminary point, it must be recalled that, in the case in the main proceedings, the classification of the insurance service supplied by the lessor for the item leased as an insurance transaction within the meaning of Article 135(1)(a) is not challenged."

As the French text makes clear, it should say "supplied to the lessor".

15. It is clear from paragraph 63 of the judgment that BGZ was the insured under the policy and simply re-invoiced the cost of the insurance to its customers, the lessees who, it seems (see paragraph 53) were not the insured under the policy. Having pointed out that the terms of an exemption must be interpreted strictly, the CJEU then turned, in paragraph 60, to consider whether 'insurance transactions' also covers the grant of insurance cover taken out by an insured party such as a lessor, who re-invoices, in the context of a leasing transaction, the cost of that insurance to the lessee, which enjoys that cover against risks with respect to the lessor. In paragraph 61, the CJEU simply stated that, in principle, the answer is yes. The CJEU explained in paragraphs 65 to 68 that the application of the principle of fiscal neutrality meant that:

> "… the supplies of insurance for the leased item, in respect of which the owner remains the lessor, cannot, in circumstances such as those at issue in the main proceedings, be treated differently according to whether such services are supplied directly to the lessee by an insurance company or whether the latter obtains such insurance cover through the lessor which procures it from an insurer and re-invoices its cost to the lessee for the same amount."

16. The CJEU explained, in paragraph 67, that its interpretation avoided the possibility of a final consumer, such as the lessee, having to pay both VAT and insurance premium tax. Paragraph 68 shows that the CJEU's reasoning was, however, predicated on the assumption that the lessor invoices the lessee for the exact amount of the insurance. The CJEU stated that its reasoning in *BGZ* could not apply if the lessor invoiced the lessee for more than the amount invoiced to the lessor by the insurer.

17. As Mr Bridge, who appeared for Wheels, acknowledged, it is unfortunate that *BGZ* was not drawn to the FTT's attention. The FTT considered the decisions of the VAT and Duties Tribunal in *Global Self Drive Ltd v HMRC* (2005) VTD 19162 ('*Global Self Drive*') and the Court of Appeal in *Ford Motor Company Ltd v HMRC* [2007] EWCA Civ 1370, [2008] STC 1016 ('*Ford*'). Those cases were decided before the CJEU gave its judgment in *BGZ* and, in any event, are not inconsistent with *BGZ*. It follows that we do not need to discuss those cases.

Case law on single supply and separate supplies

18. As every tax practitioner knows, *CPP* is the first and leading case on the issue of whether a transaction which comprises a bundle of features and acts should be regarded as a single supply or two or more distinct supplies. In *CPP*, at [30], the CJEU held that there is a single supply where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which do not constitute for customers an end in themselves but a means of better enjoying the principal service supplied. Although *CPP* was the first, it was not the last word and, in Case C-41/04 *Levob Verzekeringen and OV Bank v Staatssecretaris van Financien* [2006] STC 766 ('*Levob*') at [22], the CJEU held that where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split, they constitute a single supply.

19. The issue of whether there was a single supply of leasing insured goods or separate supplies of leasing and insurance was considered by the CJEU in *BGZ* and, given the similarity in the facts of that case to the facts of this appeal, it is convenient to examine the CJEU's approach to the issue in that case. In *BGZ*, the CJEU began by referring to the circumstances, first established in *CPP* and *Levob*, in which formally distinct services constitute a single supply of services. The CJEU acknowledged that the leasing of the goods and the supply of insurance of the leased goods by the lessor are linked because the insurance is only of any use with respect to the leased goods. The CJEU observed that insurance is by its nature linked to the item insured but that connection is not sufficient in itself to determine whether or not there is a single supply. The CJEU stated at [36]:

> "If any insurance transaction were subject to VAT because the services relating to the item it covers were subject to VAT, the very aim of Article 135(1)(a) of the VAT Directive, that is the exemption of insurance transactions, would be called into question."

20. The CJEU then observed, at [38], that leasing transactions are generally subject to VAT and insurance services are normally exempt from VAT. This observation led the CJEU to conclude, at [39], that, applying the general rule that each supply must normally be regarded as separate and independent:

> "… as a general rule, a leasing service and the supply of insurance for the leased item cannot be regarded as being so closely linked that they form a single transaction. The fact of assessing such supplies separately cannot constitute in itself an artificial splitting of a single financial transaction, capable of distorting the functioning of the VAT system."

21. The CJEU then followed that statement of the general rule with an analysis of whether, in the particular circumstances of *BGZ*, there was a single supply. The CJEU

began by considering the *CPP* principal/ancillary test at [41] - [47]. The CJEU held, at [42], that:

> "In that connection, although it is true that as a result of the insurance for the leased item, the risks faced by the lessee are normally reduced as compared with those incurred in a situation in which such insurance is lacking, it remains the case that that derives from the very nature of the insurance. That, in itself, does not mean that such insurance must be regarded as being ancillary to the leasing service of which it forms part. Although such insurance supplied to the lessee through the lessor facilitates the enjoyment of the leasing service, in the manner described above, it must be held that [it] constitutes essentially an end in itself for the lessee and not only the means to enjoy that service under the best conditions."

22. At [43], the CJEU referred to the fact that the lessee does not have to take the insurance offered by BGZ but can insure with the insurance company of its choice. The CJEU stated that this showed that the requirement that the goods are insured does not, in itself, mean that a supply of insurance by the lessor is indivisible or ancillary to the supply of the leasing services. We consider that this indicates that the ability of the customer to choose whether or not to be supplied with a particular element of a transaction is an important factor in determining whether there is a single composite supply or several independent supplies, although it is not decisive. At [44], the CJEU stated that separate invoicing and pricing of services supported the view that the services are independent, without being decisive. The CJEU then referred, at [45], to the separate pricing and invoicing reflecting the interests of the parties in *BGZ*. The CJEU also stated that the lessee's decision to obtain insurance from the lessor was made independently of the decision to lease the goods.

23. The CJEU in *BGZ* rejected the idea that the leasing and insurance cannot be separate services simply because the lease provided that BGZ may terminate the lease if the lessee does not pay the re-invoiced cost of the insurance. The CJEU stated that while such a provision may indicate that there is a single supply in other circumstances, it does not do so where the transactions cannot be objectively regarded as constituting a single service.

24. Finally, at [48], the CJEU addressed the *Levob* test and held that "the insurance and leasing services at issue in the main proceedings cannot be regarded as being so closely linked that, objectively, they form a single indivisible economic supply which it would be artificial to split."

25. This Tribunal summarised the key principles for determining whether a particular transaction should be regarded as a single composite supply or as several independent supplies in *Honourable Society of the Middle Temple v HMRC* [2013] UKUT 250 (TCC), [2013] STC 1998 ('*Middle Temple*') at [60] as follows:

> "(1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.
>
> (2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.
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> (3) There is no absolute rule and all the circumstances must be considered in every transaction.

> (4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.
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> (5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.
>
> (6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.
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> (7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.
>
> (8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.
>
> (9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.
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> (10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.
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> (11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.
>
> (12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality."

26. As the Tribunal noted in *Middle Temple*, it appears that a key distinction between *BGZ* and other cases where there was held to be a single supply was whether the customers had a choice whether to receive all the services from the principal supplier or obtain some services optionally from a third party. It appeared to the Tribunal in *Middle Temple* (and we take the same view) that the CJEU cases show that where there is genuine contractual freedom to obtain a service from a third party and, consequently, a separately identified charge is made for the service, this supports the existence of several independent supplies rather than a single composite supply.

FTT's decision

27. Having set out the facts and the parties' submissions, the FTT discussed the application of the guidance given by the CJEU in *CPP* on what constitutes an insurance transaction. At [38] to [40], the FTT held as follows:

> "38. … The term 'block policy' is not defined but the description is not restrictive in our view. The suggested characteristics are a contract between insurer and policy holder, who in turns (sic) can procure insurance or insurance cover for third parties with whom they in turn have a contractual relationship. We consider that, in the context of Group 2 it is capable of including a 'fleet' policy of the type featuring in the present dispute.
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> 39. The ECJ in *Card Protection Plan* adopts a broad interpretation of 'insurance' as qualifying for exempt status. We have noted in para 22 *supra* the interpretation of 'insurance transactions' set out by the ECJ [in paragraph 22 of its judgment set out at [9] above].

> 40. We would observe also the ECJ's further guidance in *CPP* (at para 25) –
>
> > '… Article 13(b)(a) of the Sixth Directive is to be interpreted as meaning that a taxable person, not being an insurer, who, in the context of a block policy of which he is the holder, procures for his customers, who are the insured, insurance cover from an insurer who assumes the risk covered performs an insurance transaction within the meaning of that provision.'"

28. Having noted that this broad interpretation was consistent with the views of the VAT and Duties Tribunal in *Global Self Drive* and the Court of Appeal in *Ford*, the FTT held at [44] and [45]:

> "44. We consider that the nature of the insurance provision here under the "fleet" policy falls naturally within the extended sense of "insurance" set out by the ECJ and Court of Appeal. The provision here protects the interests of the driver against liabilities to third parties which is required in terms of the Road Traffic Acts. It is inconceivable, in our view, that the insurers would not meet such claims and that, if necessary, the appellant company would not assist its drivers in pursuing indemnification. In this context we are unimpressed by Mr McGurk's seeking to distinguish being insured and having the benefit of insurance, which latter, he claimed, was the consequence here. Given the pronouncements of the courts which we have noted, such a distinction seems strained. It is necessary to identify the vehicles by their registration numbers to satisfy the RTA's insurance provisions, but that should be viewed in conjunction with the appellant's strict regulation of who is permitted to drive them. Thus the drivers become insured against third party liability. They have a defence to any prosecution for driving uninsured.
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> 45. Accordingly we agree with the stance of Mr Bridge that the insurance provision made by the appellant here did qualify for exemption in terms of Schedule 9, Group 2. …"

29. The FTT dealt only briefly with the issue of whether the provision of the insurance cover was a separate supply at [43] and [45] as follows:

> "43. The extra payment for insurance in the present case is optional. While a rental is paid for the vehicle and radio support, a driver may negotiate his own insurance cover personally, and a few drivers do indeed do this. We appreciate that most prefer to elect for the appellant's cover given that its cost is competitive. (The appellant does not derive any 'significant' profit from providing it.)
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> …
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> 45. … It is in our view a separate and independent supply, optional from the viewpoint of the driver, and separate from the supply of the vehicle and the supporting radio service. Whether the driver obtained his own independent insurance cover or not, the supplies of the vehicle and the radio service could be enjoyed similarly."

Issues

30. The two issues in this case are as follows:

(1) Assuming that it is capable of being a separate and independent supply, is the supply made by Wheels to the drivers who do not have their own insurance cover in consideration for the payment of £45 an exempt insurance transaction?

(2) If so, is it a separate supply independent of the supply of the vehicle or part of a single supply of an insured car?

31. If the supply made by Wheels in return for the £45 payment does not fall within the exemption then the second issue falls away as, whether there is one supply or several independent supplies, VAT will be chargeable at the standard rate on all the consideration received by Wheels. Equally, if the two elements are a single supply then there was no dispute that it would be a standard rated supply but we consider that it makes sense to determine the liability of the insurance related supply first as that may influence whether it should be viewed as a single supply or two separate supplies.

Nature and liability of the supply

32. As stated above, the FTT concluded that Wheels made supplies of services that were within the expanded definition of insurance transactions applied by the CJEU in *CPP*.

33. Mr McGurk submitted that the FTT erred in law in failing to recognise that Wheels could not supply insurance, even under the expanded definition of insurance transactions in *CPP*. He contended that CPP was expressly permitted to extend cover to its customers and bind cover on behalf of the insurers. Wheels was not in the same position as CPP. Collingwood had expressly prohibited Wheels from binding cover on its behalf and effecting insurance on its behalf.

34. We do not accept this submission. The FTT found (and it was not challenged before us) that Wheels could add new drivers to the schedule during the policy year without notifying the insurer provided that certain prescribed criteria were met. As the policy document makes clear, Collingwood covered such drivers for their legal liability to third parties for death, bodily injury or damage to property arising out of the use of the insured vehicles. Mr McGurk sought to rely on a statement in the preamble to the policy document that "Nobody other than you (the Insured [ie Wheels]) and us (Collingwood Insurance Company Limited) has any rights that they can enforce under this contract except those rights that they have under road traffic law …". We do not regard this as providing any support for Mr McGurk's submissions. The relevant question, as the CJEU in *BGZ* expressly recognises, is whether the third parties obtain insurance cover against risks and in this case the drivers are so covered by Collingwood. It seems to us that Wheels, as well as insuring the vehicles, procured cover for those drivers by making use of the policy agreed with the insurer, Collingwood, even if the drivers would have to rely on Wheels to enforce that cover. In this respect, the arrangements between Wheels, Collingwood and the drivers seem indistinguishable from those between BGZ, its insurers and the lessees. Mr McGurk submitted that *BGZ* could be distinguished on the ground that the requirement that there should be insurance was not something that the lessee required but it was imposed by the lessor, BGZ. In this case, however, the drivers needed the insurance cover in order to drive legally on the roads. He also contended that there was nothing in the insurance contract to prevent BGZ providing insurance to the lessee. We do not consider that these factors justify departing from the approach taken by the CJEU in *BGZ*. There is nothing in the CJEU's judgment to indicate that whether the requirement for insurance is imposed by the lessor, as in BGZ, or by law, as in Wheels, is relevant in determining the nature of the supply. We consider that such a distinction is unlikely to be regarded as relevant by the CJEU as it would seem to be contrary to the principle of fiscal neutrality to treat objectively identical transactions differently for VAT purposes. As to whether the contract in *BGZ* allowed the lessor to provide insurance, we have already observed that

the policy document in this case shows that the drivers were covered against certain risks.

35. Mr McGurk also submitted that the extended definition of insurance and insurance transactions set out by the CJEU in *CPP* could not apply in this case because CPP held a block policy which allowed CPP to arrange for their customers to become insured under the policy whereas the Collingwood fleet policy could never be a block policy precisely because Collingwood prohibited Wheels from effecting insurance on its behalf. We have already indicated above that we do not consider that whether insurance is procured by a taxable person for third parties under a block policy, a group policy or a fleet policy is relevant to the issue of whether the supply is an insurance transaction.

36. Mr Bridge submitted that the FTT reached a conclusion that was open to it on the facts and made no error of law. He contended that the FTT's conclusion was supported by the decision of the CJEU in *BGZ* which was on all fours with this case. He said that HMRC had been unable to identify any material distinctions between this appeal and *BGZ*. Mr Bridge also submitted that Wheels had the power to bind Collingwood in that Wheels could grant permission to a person to drive the vehicle and that person would be covered under the insurance policy.

37. Mr McGurk did not accept that, by allowing someone to drive one of the vehicles, Wheels was binding Collingwood to provide insurance. He submitted that Wheels was not extending the scope of the cover and, therefore, could not make any separate supply of insurance. As a separate point (but we discuss this in more detail below), he contended that what Wheels supplied under the rental agreement with the drivers was and could only be a supply of an insured car.

38. The FTT found that, like *CPP* in relation to its customers, Wheels was not required to notify the names of the drivers covered by the insurance in advance of cover being extended to them. At the annual review of the policy, Wheels would send the details of all the insured drivers to Collingwood but, during the policy year, new drivers could be added by Wheels without reference to Collingwood if they met criteria as to age, licence points, etc. That was essentially the same as in *CPP*. It appears to us that the CJEU's reasoning in *CPP* applies to Wheels. Applying the CJEU's answer in *CPP* to Wheels leads to the conclusion that Wheels, not being an insurer, performs an exempt insurance transaction when it procures insurance cover for the drivers against certain risks from Collingwood under a policy that Wheels has with Collingwood.

39. It appears to us that the CJEU's reasoning in *BGZ* also applies to Wheels save in one respect. BGZ leased goods to its customers. Wheels hired cars to the drivers. Both BGZ and Wheels entered into contracts of insurance with insurers to which the lessees or drivers were not parties. It appears, however, that the only insured in *BGZ* was the lessor. The lessee benefited from the insurance but it does not appear that it was the recipient of any insurance cover in relation to risks. The only insured mentioned by the CJEU is BGZ itself. Notwithstanding that fact, the CJEU held that BGZ made an exempt supply of insurance but only because BGZ recharged the exact cost of the insurance to the lessee. That was not the case in this appeal. Wheels made a small profit when it charged the drivers for the insurance. The FTT found, at [35(11)] and [43] that Wheels did not derive any "significant profit" from providing the insurance. The FTT did not find that Wheels recharged the exact cost of the insurance or made no profit from it. This is consistent with the second witness statement of Mr Howard

which stated that the company did make a small profit on the insurance but that it did not try to shift profit in the car hire to the insurance in order to pay less VAT.

40. The fact that Wheels made a profit does not, however, preclude the reasoning of the CJEU in *CPP* from applying to this case because, as the FTT found, Wheels could add drivers to the policy and they were covered by it against the risk of liability for death, bodily injury or damage to property while using the insured vehicles. The FTT were, in our view, entitled to make that finding and, on the basis of it, conclude that Wheels provided insurance to the drivers. Accordingly, we consider that the supply by Wheels in this case is an insurance transaction within the exemption in Article 135(1)(a) of the Principal VAT Directive.

Single supply or separate supplies

41. Our decision in relation to the nature and liability of the supply does not dispose of the appeal. We must now consider whether there are separate supplies of a vehicle, which is standard rated, and insurance, which is exempt, or a single standard rated supply of an insured vehicle. In discussing this issue, we assume that the consideration paid by the drivers in relation to insurance cover would be consideration for an exempt supply of insurance if it is a separate supply.

42. We have set out the principles to be applied above. The FTT found, in [43], that the £45 payment for insurance was optional and a driver could negotiate his own insurance cover personally. Although a few drivers had their own insurance, most chose to use the cover offered by Wheels as its cost was competitive. On the basis that the insurance cover was optional from the viewpoint of the driver and separate from the supply of the car and radio service, which could be enjoyed whether the driver used the cover offered by Wheels or his own insurance, the FTT held that it was a separate and independent supply.

43. Mr McGurk submitted that the FTT went wrong in ignoring HMRC's submissions and the FTT's own findings in relation to the need imposed by the licensing authority for the vehicles to be appropriately insured before they could be let to and used by the drivers. At [11], the FTT accepted the evidence of Mr Howard that, at the point of hire, the driver obtained a fully insured and licensed vehicle. In our view, the requirements of the licensing authority and the need for the vehicles to be insured do not compel the conclusion that the two elements of leasing of the car and insurance should be regarded as a single supply. We consider that we must apply the principles that we have described in [25] above and, in particular, the guidance given by the CJEU in *BGZ*.

44. Our starting point is the CJEU's statement in *BGZ* that, as a general rule, a leasing service and the supply of insurance for the leased item cannot be regarded as being so closely linked that they form a single transaction. There must, therefore be some other factor beyond the obvious link between insurance and the item insured that makes them a single transaction. In this case, the FTT found that the drivers had the ability to choose whether to pay Wheels for insurance cover or arrange their own. That is a significant indicator that there are independent supplies, although it is not decisive. Wheels made a separate additional charge of £45 for the insurance cover which supports the view that the insurance cover is an independent transaction, again without being decisive. We consider that the separate pricing of the insurance cover reflects the interests of the parties in that it allows drivers who have cover to hire vehicles without incurring the cost of insurance, which they already have, as part of the overheads, while

enabling Wheels to ensure that all the vehicles are properly insured without risk of paying for cover for a vehicle whose driver already has such cover. Taking all those factors into account, we consider that the supply of the vehicle, with radio service, and the provision of insurance cover must be regarded as separate and independent supplies.

Disposition

45. For the reasons given above, HMRC's appeal against the FTT's decision is dismissed.

Colin Bishopp
Upper Tribunal Judge

Greg Sinfield
Upper Tribunal Judge

Release date: 8 February 2017

Amended under Rule 42: 29 March 2017