



[2019] UKUT 170 (TCC)

*Value Added Tax - judicial review – whether leasing of cars to employees under salary sacrifice scheme is ‘de-supplied’ by VAT (Treatment of Transactions) Order 1992 - whether it would otherwise be ‘economic activity’ - whether cars supplied under a ‘special legal regime’ – whether claim partially time barred.*

**Appeal number: UTJR/2018/001**

**UPPER TRIBUNAL  
TAX AND CHANCERY CHAMBER**

**BETWEEN**

**NORTHUMBRIA HEALTHCARE NHS  
FOUNDATION TRUST**

**Claimant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Defendants**

**TRIBUNAL: MR JUSTICE HENRY CARR  
JUDGE GREG SINFIELD**

**Sitting in public at the Rolls Building, Fetter Lane, London EC4A 1NL on 5 April 2019**

**David Scorey QC, instructed by Deloitte LLP, for the Appellant**

**Peter Mantle, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents**

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## DECISION

### INTRODUCTION

1. The Claimant, Northumbria Healthcare NHS Foundation Trust (“the Trust”) seeks judicial review of the refusal by the Defendants (“HMRC”) to refund an amount of VAT on a claim (“the Claim”) made by the Trust under s41(3) of the Value Added Tax Act 1994 (“VATA94”).

2. The Trust made the Claim by a letter dated 31 March 2017, signed by its executive director of finance, Mr Paul Dunn. The VAT claimed had been incurred by the Trust in respect of leased and maintained cars. The Trust acquired the cars for the purpose of providing them to its employees and to employees of other NHS Trusts in the same divisional VAT registration (akin to VAT grouping) under a salary sacrifice scheme (‘the Car Scheme’). The Claim was for VAT of £14,066,191 incurred on the supply of leased and maintained cars between 1 January 2012 and 31 January 2017. During that period, HMRC had refunded VAT incurred by the Trust on the supply of the cars but restricted the Trust’s recovery to 50% of the VAT incurred. The Claim sought a refund of the remaining 50% of the VAT incurred.

3. In a decision dated 19 January 2018 (‘the Decision’), Mr Kevin Gair of HMRC rejected the Claim. The entitlement to a refund of VAT under s41(3) VATA94 is subject to the condition that the VAT has not been incurred for the purpose of any business carried on by the body claiming it. HMRC considered that the Trust was not entitled to a refund under s41(3) because the Car Scheme was a business carried on by the Trust.

4. HMRC also contended that, if the Trust were entitled to any refund, the amount payable would be subject to a four year time limit. It was agreed that the four year period had been extended by HMRC guidance which had permitted claims back to 1 October 2012. HMRC maintained that, even if the Trust’s arguments were upheld, the amount claimed for the period from 1 January 2012 to 30 September 2012 would be time barred.

5. This is the type of issue that one might expect to be dealt with at first instance by the First-tier Tribunal (Tax Chamber). However, it was common ground that a claim under s41(3) did not fall within the scope of s83(1) VATA94 or any other provision conferring a right to appeal. In the absence of a statutory right of appeal, the Trust applied for permission to apply for judicial review of the Decision. On 25 July 2018, Whipple J granted the Trust permission for judicial review on the following grounds:

- (1) HMRC erred in law in concluding that the Car Scheme constituted a business activity of the Trust such that s41(3) VATA94 was not engaged (“the Business or Economic Activity Issue”);
- (2) the Decision breached the Trust’s legitimate expectations (“the Legitimate Expectation Issue”); and
- (3) HMRC erred in law in imposing a four-year cap, as extended by the HMRC guidance, on the Trust’s Claim (“the Time Bar Issue”).

6. If the Trust succeeds on the Business or Economic Activity Issue, there is no need for us to consider the Legitimate Expectation Issue as the Trust will have succeeded in its claim. The Time Bar Issue only arises if the Trust succeeds on either Issue 1 or Issue 2.

### LEGISLATIVE FRAMEWORK

#### *The Principal VAT Directive*

7. Article 2(1)(c) of Council Directive 2006/112/EC (the Principal VAT Directive or “PVD”) provides that supplies of services for consideration within the territory of a Member

State by a taxable person acting as such are subject to VAT. Article 9(1) of the PVD defines “taxable person” as any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. The same article provides that “any activity of ... persons supplying services shall be regarded as ‘economic activity’.” Article 24(1) states that any transaction which is not a supply of goods is a supply of services.

8. Article 13(1) of the PVD provides, so far as is relevant:

“States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

...”

#### VATA94

9. The provisions of the PVD have been implemented in UK law by the VATA94 and regulations made under it.

10. Under powers now contained in s5(3) VATA94, the Treasury is able to provide by order that, among other things, any transaction described in the order is to be treated as neither a supply of goods nor a supply of services. The Treasury used its power to make the Value Added Tax (Treatment of Transactions) Order 1992 (“the De-Supply Order”). Article 2 of the De-Supply Order provides:

“Where an employer gives an employee a choice between:

(a) a particular rate of wages, salary or emoluments, or

(b) in the alternative, a lower rate of wages, salary or emoluments and, in addition, the right to the private use of a motor car provided by the employer,

and the employee chooses the alternative described in paragraph (b) above, then the provision to the employee of the right to use the motor car privately shall be treated as neither a supply of goods nor a supply of services (if it otherwise would be) to the extent only that the consideration for the provision of the motor car for the employee’s private use is the difference between the wages, salary or emoluments available to him under paragraphs (a) and (b) of this article.”

11. Sections 25 and 26 VATA94 provide that a taxable person is entitled to credit for VAT (input tax) incurred on supplies of any goods or services used or to be used for the purpose of any business carried on or to be carried on by the taxable person and to the extent that the supplies are attributable to taxable supplies made in the course of that business. Section 25(7) provides that the Treasury may make an order providing that VAT charged on specified supplies is to be excluded from any credit.

12. Using its powers under s25(7), the Treasury made the Value Added Tax (Input Tax) Order 1992 (“the Blocking Order”). Article 7(1)(a) of the Blocking Order provides that VAT charged on the supply of a motor car to a taxable person is excluded from any credit under s25 VATA94. However, Article 7(2H) of the Blocking Order modifies the restriction, where the car is leased to the taxable person, by providing that only 50% of the input tax is blocked.

13. Section 41(3) VATA94 and the directions made under it were introduced to remove the disincentive (in the form of an irrecoverable VAT charge) involved in placing service contracts with external suppliers in the private sector. Section 41(3) VATA94 provides:

“(3) Where VAT is chargeable on the supply of goods or services to a Government department, on the acquisition of any goods by a Government department from another member State or on the importation of any goods by a Government department from a place outside the member States and the supply, acquisition or importation is not for the purpose –

(a) of any business carried on by the department, or

(b) of a supply by the department which, by virtue of a direction under [section 41A] is treated as a supply in the course or furtherance of a business,

then, if and to the extent that the Treasury so direct and subject to subsection (4) below, the Commissioners shall on a claim made by the department at such time and in such form and manner as the Commissioners may determine, refund to it the amount of VAT so chargeable.”

14. For this purpose, a ‘Government department’ is defined to include an NHS Trust or NHS Foundation Trust: see s41(6) and (7) VATA94.

15. The direction made by the Treasury under s41(3) is dated 2 December 2002 and was published in the London Gazette on 10 January 2003. It is known as the Contracted Out Services Direction (“COSD”). The COSD has four paragraphs and two lists. List 1 sets out the categories of “Government department” which may claim and be paid refunds of VAT. It includes NHS Trusts. List 2 describes the services in respect of which a body in List 1 may claim a refund, subject to the conditions in paragraph 3 of the COSD. At number 26 in List 2 is “Hire of vehicles including repair and maintenance”. Paragraph 3 of the COSD states:

“A tax refund will only be paid if:

(a) either the supply of those services or goods is not for the purpose of:  
(i) any business carried on by the department; or (ii) ... and (b) the department complies with the requirements of [HMRC] both as to the time, form and manner of making the claim and also on the keeping, preservation and production of records relating to the supply, acquisition or importation in question.”

16. It was common ground that “business carried on” in s41(3) and the COSD has the same meaning as “economic activity” in Article 9(1) of the PVD.

#### **EVIDENCE AND BURDEN OF PROOF**

17. The burden of proof in this application (just as it would be in a statutory appeal) is on the Trust to prove, on a balance of probabilities, all of the facts necessary to show that it is entitled to the disputed VAT under the COSD and, in particular, that the leasing of cars to its employees was not a business or economic activity. Witness statements were provided by Mr Dunn for the Trust and Mr Kevin Gair, a VAT caseworker in the NHS team, for HMRC. There was no cross-examination.

18. Mr Dunn’s evidence gave some background to the Trust and described its car leasing activities and their VAT treatment. The key points were that the Trust was established under the Health and Social Care (Community Health and Standards) Act 2003. The Trust’s statutory activities include the provision of hospital and community health services in North Tyneside and hospital community, health and adult social care services in Northumberland. The carrying

out by the Trust of its statutory functions is regarded as a non-business activity for VAT purposes.

19. The Trust offers car leasing to its own employees, employees of a number of other NHS Trusts, and to employees of other public sector organisations under salary sacrifice arrangements. The Trust provides the car leasing services to other entities under the brand “NHS Fleet Solutions”. The Trust currently has approximately 21,000 vehicles within NHS Fleet Solutions and makes supplies to employees of about 170 public sector organisations. Where the Trust leases a car to another NHS Trust in the same divisional VAT registration, an employee of that other NHS Trust is regarded, for VAT purposes, as an employee of the Trust and the same VAT treatment applies.

20. Mr Dunn’s evidence was that the Trust does not provide cars to the employees under the Car Scheme for the purposes of any commercial activities or other business of the Trust. His evidence was that the activities of the Trust to which the Car Scheme is directed and for which the leased cars are used is the non-business provision of statutory healthcare. The Trust’s purpose in offering the Car Scheme to the employees is solely directed to the better discharge by the Trust of its statutory healthcare functions. The provision of properly maintained, new and reliable cars helps the Trust to ensure that the Trust’s statutory healthcare activity is carried out more effectively and efficiently, for example in areas such as making home visits. As part of the arrangements, the employees who lease cars from the Trust under the Car Scheme have the ability to use the cars for private use in addition to using them in the course of their employment activities with the Trust. When employees use the cars in the course of their employment, they are reimbursed for their mileage costs by the Trust. HMRC observe, correctly in our view, that Mr Dunn’s evidence as to purpose is directed to the subjective intention of the Trust when supplying cars, rather than to any restrictions placed on the use by the employees of such cars.

21. There is a public sector car leasing framework in place which enables the Trust to obtain leased cars on favourable commercial terms. Car maintenance and repair is included in the leases offered by the Trust to its employees.

22. Until 1 January 2012, the Trust did not account to HMRC for output tax on any of its car leasing activities under NHS Fleet Solutions and recovered 100% of the VAT incurred in relation to its car leasing activities. No adjustment was made by the Trust to reflect the private use of cars by its employees. From 1 January 2012, the Trust continued not to account to HMRC for output tax on the salary sacrifice arrangements but recovered only 50% of the VAT incurred in relation to the Car Scheme.

23. In the Claim, the Trust contended that under s41(3) VATA94 and COSD heading 26 it was entitled to a refund of all the VAT incurred on the supply of the cars under the Car Scheme. Mr Dunn, under the heading “HMRC’s position” and using the term the “Updated Guidance” to refer to an Interim Guidance Note (discussed further at [54] below) stated:

“In the Updated Guidance, HMRC state that ‘Recovery under the Contracted out Services (COS) provision is only permitted in respect of NHS statutory activities and as a salary sacrifice car will be used privately by the employee full recovery under this mechanism is not appropriate’ and this forms the basis for HMRC’s reasoning as to why the VAT cannot be recovered in full. The Trust considers that HMRC’s conclusion is wrong for the reasons outlined below.”

24. At page 3 of the Claim, under the heading “Relevance of HMRC’s guidance”, it was made clear that the Claim was based on COSD, not the Interim Guidance, stating:

“Again, it appears to us that HMRC are seeking here to achieve a result through their guidance which properly should be implemented by delegated legislation.”

25. Mr Gair’s evidence described the legislation and COSD described above and identified the HMRC guidance available online which is discussed below. Mr Gair set out the background to the Claim starting in 2015 and by reference to correspondence that Mr Gair had with the Trust’s advisers. Mr Gair was the author of the Decision and, in his statement, he sets out his reasons for concluding that the Claim should be refused. He also responded to each ground of judicial review which are discussed as separate issues below.

26. HMRC also served a witness statement of Mr David Webb which set out the background to HMRC’s policy on salary sacrifice schemes but neither party relied on or referred to it other than in passing.

#### **BUSINESS ACTIVITY ISSUE**

27. The key question is whether the Car Scheme is an ‘economic activity’ within the meaning of Article 9 PVD. It is common ground that when the Trust provides healthcare free, or within the scope of Article 13 PVD, it is not carrying on an economic activity. There is no dispute that when the Trust leases cars to non-NHS public sector bodies (for use in salary sacrifice car leasing) or to NHS Trusts that are outside the national divisional VAT registration, it is carrying on an economic activity for VAT purposes. The issue is whether the leasing of cars by the Trust to its employees under the Car Scheme or to employees of other NHS Trusts within the divisional registration is an economic activity or part of an economic activity.

28. Mr Scorey put forward three reasons why the Trust’s car leasing activities are not a business or economic activity for VAT purposes. First, that the De-Supply Order is a complete answer to this issue because it deems the provision of a car for an employee’s private use under a salary sacrifice scheme activity of leasing not to be a supply of services and, if there is no supply of services, there can be no economic activity. Secondly, and alternatively, that the Car Scheme is not an economic activity. Thirdly, that the Trust entered into the Car Scheme arrangements as a public authority, i.e. under a special legal regime, which means that, by virtue of Article 13 of the PVD, the Trust could not be regarded as a taxable person in respect of those activities or transactions.

29. We shall consider the effect of the De-Supply Order first. Then, in case our conclusion is wrong, we shall consider Mr Scorey’s further submissions, identified above.

#### **Effect of the De-Supply Order**

##### *Submissions of the parties in outline*

30. The Trust’s primary argument is that where an employer provides for the use of a leased car by way of a salary sacrifice scheme, it is ‘de-supplied’ for VAT purposes by the De-Supply Order; the supply is deemed not to have taken place. The effect of the De-Supply Order is to deem what would otherwise be a taxable supply for VAT purposes to be a non-supply, i.e. a transaction outside the scope of the VATA94. The consequence is that no output tax is due on the provision of a car by the employer to the employee. In those circumstances, the condition in s41(3)(a) of VATA94 that the supply must not be for the purpose of any business carried on by the Trust is satisfied.

31. HMRC accept that the effect of the De-Supply Order is that the provision of the car by an employer to its employee under a salary sacrifice scheme is treated as not being a supply for VAT purposes. HMRC also accept that the De-Supply Order does not remove an existing entitlement to a refund of VAT incurred on the car under COSD, if one exists. HMRC contend that the De-Supply Order deems relevant transactions not to be supplies for consideration. It

does not state that the de-supplied transactions are no longer to be treated as an economic activity or part of an economic activity. HMRC submit that, where a transaction is deemed not to be a supply, it does not follow that the transaction is not part of the Trust's economic activity. They contend that the effect of the De-Supply Order is simply that part of the Trust's economic activity is deemed not to be a supply for consideration. As the provision of the cars to employees was part of the economic activity of the Trust, the condition in s41(3)(a) of VATA94 that the supply must not be for the purpose of any business carried on by the Trust and paragraph 3 of the COSD is not satisfied.

32. Mr Mantle relied on the decision of the Supreme Court in *DCC Holdings (UK) Ltd v HMRC* [2011] STC 326 in which, at [38], Lord Walker cited with approval the words of Peter Gibson J in *Marshall (HM Inspector of Taxes) v Kerr* (1993) 67 TC 56 at 79:

“For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.”

#### *Discussion*

33. We take the view that provision of the cars by the Trust to the employees under the salary sacrifice scheme cannot be regarded as a supply of services because it has been de-supplied by the De-Supply Order. It follows that the leasing of the cars by the Trust cannot be an economic activity because that requires a supply of services. Since the effect of the De-Supply Order is that any “business” or “economic activity” relating to the Car Scheme is ignored for VAT purposes, the Trust is deemed to be, or reverts to being, a purely non-business operation. In those circumstances, the terms of section 41(3)(a) VATA94 are deemed to be satisfied pursuant to the De-Supply order.

34. This, in our view, is clear from the ordinary and natural meaning of Article 9(1) of the PVD which states that “any activity of ... persons *supplying services* shall be regarded as ‘economic activity’” (emphasis added). There is nothing in Article 9 to suggest that a person who does not supply any services (whether as a matter of fact or by operation of a deeming provision) should or could be regarded as carrying on an economic activity. If the Trust's only activity were the provision of cars to employees under the salary sacrifice arrangements, there would be no economic activity as a result of the De-Supply Order. Accordingly, the supplies of the leased and maintained cars to the Trust for the purpose of providing those cars to employees cannot have been for the purpose of any business carried on by the Trust. That is also the position if the Trust's wider activities are taken into account. That is because those other activities of the Trust are not business activities and do not constitute an economic activity.

35. It also necessary to consider the relationship between the De-Supply Order and the Blocking Order. For taxable persons subject to the Blocking Order, the effect of the De-Supply Order is that:

- (1) the employer (if acting as a taxable person) is not entitled to deduct input tax incurred on the acquisition of the car;

(2) alternatively, an employer acting as a taxable person is limited to recovery of 50% of the input tax where the car is leased; but no output tax is due on the onwards provision of the car to the employee pursuant to a salary sacrifice scheme; and

(3) thus, salary deductions for employer leased car schemes are treated as outside the scope of UK VAT and no output tax is deemed to be due.

36. The Blocking Order expressly applies only to taxable persons carrying on a business activity, but the De-Supply Order is not so limited and applies to all ‘employers,’ irrespective of whether they are carrying on a business for the purposes of VATA94. Thus, where an entity such as the Trust is not subject to the Blocking Order, the effect of the De-Supply Order is that:

(1) the Trust is entitled to a full refund of the VAT incurred on the inward supply of the leased car pursuant to section 41(3) VATA94 (not limited to a recovery of 50%); and

(2) no output tax is due in respect of the onward supply to its employees pursuant to a salary sacrifice scheme, such as the Trust’s Car Scheme.

37. Mr Mantle submitted that the Trust’s interpretation of the De-Supply Order would not be consistent with the purpose of that Order. It would produce the result that final consumption of the leased car by an employee of the Trust would go untaxed while the Trust would recover all the VAT charged to it on the supply of the leased and maintained cars. This argument, in our judgment, cannot be accepted in the light of the clear provisions of the PVD and s41(3)(a) of VATA94. The remedy to the alleged inconsistency is not a strained interpretation of the legislation but an amendment to the De-Supply Order, if that is considered by the legislature to be justified.

38. In conclusion, although we accept that an activity that is not a supply may nevertheless be part of a wider economic activity, we do not accept that the provision of the cars to employees under the salary sacrifice arrangement in this case was an economic activity in its own right or part of an the economic activity of the Trust. We consider that the condition in s41(3)(a) of VATA94 and paragraph 3 of the COSD is satisfied. Accordingly, the Trust succeeds on the Business Activity Issue and is entitled to recover all of the VAT incurred on the supplies of leased and maintained cars for the purpose of providing cars to employees under the Car Scheme.

### **Disregarding the De-Supply Order, is the Car Scheme an economic activity?**

#### *Submissions of the parties in outline*

39. In Case C-40/09 *Astra Zeneca UK Ltd v HMRC* [2010] STC 2298, which concerned the VAT treatment of childcare vouchers given in return for a reduction in salary paid, the Court of Justice of the European Union (the “CJEU”) held that there was a supply for consideration when an employee sacrificed salary in return for receiving a supply of goods or services. Mr Mantle explained that it was not HMRC’s case that whenever a transaction is a supply for consideration it must be an economic activity. Nonetheless this will frequently be the result, given that the *Astra Zeneca* case held that a sacrifice of salary was consideration, and that consumer goods or services are typically provided to an employee in return for the sacrifice. However, the normal approach to, and criteria for, deciding whether a transaction is an economic activity apply, as set out, for example, by the CJEU in Case C-520/14 *Gemeente Borsele v Staatssecretaris van Financiën* [2016] STC 1570 (*‘Borsele’*) and as reviewed by the Court of Appeal in *Wakefield College v HMRC* [2018] STC 1170 (*‘Wakefield’*).

40. Mr Scorey submitted that a salary sacrifice arrangement is not necessarily an economic activity for the purposes of Article 9(1) PVD and therefore not necessarily a ‘business’. He contended that the Trust was not otherwise engaged in any business activities and the provision of cars to the employees under the salary sacrifice arrangements did not transform the Trust’s



non-economic activities into an economic activity or business. The Trust's case was that it was not engaged in the Car Scheme *qua* economic activity or business.

41. Mr Scorey relied on the decision of the CJEU in *Borsele* which was considered by the Court of Appeal in *Wakefield*. He submitted that the Trust was not carrying out an economic activity because, taking account of all the relevant circumstances:

- (1) the Trust does not offer cars to the general car leasing market; instead, it is akin to the final consumer of the leased vehicles (as in *Borsele*, at [55]);
- (2) the Trust does not supply at market rates and is thus not a 'service' that could economically be supplied by a third party; and
- (3) the Car Scheme is merely ancillary to the statutory and public law functions of the Trust and is therefore comparable to the ancillary nature of the transportation services provided by the municipality in *Borsele*.

42. Mr Mantle noted that, in *Wakefield*, the Court of Appeal made a systematic attempt to identify the factors taken into account in *Borsele* and in Case C-246/08 *Commission v Finland* [2009] ECR I-10605 ('*Finland*'), which explained the rulings in those cases that the supplier did not carry on any economic activity. At [75], the Court of Appeal identified the following factors:

- (1) the charges paid were fixed by reference to the means of the recipients;
- (2) the charges were only partly fixed by reference to the cost of the service;
- (3) the total amount raised by charges was insubstantial, both in absolute terms and relative to the cost of the service;
- (4) in *Borsele* the municipality did not offer services on the general passenger transport market and appeared more to be the final consumer of the transport services provided by the transport undertakings engaged by it; and
- (5) other factors mentioned in those cases were that a comparison of the supply in question with the circumstances in which the relevant type of service is usually provided, and the number of customers.

Mr Mantle contended that these factors were not features of the supplies of the cars by the Trust under the Car Scheme.

### *Discussion*

43. We agree with Mr Scorey that supplies under a salary sacrifice arrangement do not necessarily constitute an economic activity. However, depending on the facts, they may do. Ignoring the effect of the De-Supply Order, the leasing of cars for a consideration on a continuing basis is, in our judgment, an economic activity. Mr Mantle provided a helpful distillation of the principles established by the case-law. In particular:

- (1) the scope of the term 'economic activity' in Article 9(1) PVD is broad (*Finland* at [37]);
- (2) the correct approach to determining whether transactions constitute economic activities is objective, and whether the supplier is aiming to make a profit is irrelevant (*Wakefield* at [55]);
- (3) since the approach is objective, the fact that the activity of a public body consists in the performance of duties which are conferred and regulated by law, in the public interest, and without any business or commercial objective, is irrelevant to whether the activity is an economic activity within Article 9(1) (*Finland* at [40]);

(4) whether Article 9(1) is satisfied requires a wide-ranging enquiry where all of the objective circumstances in which the goods or services are supplied must be examined (*Wakefield* at [55]);

(5) the relevant enquiry is whether the supply is made for the purpose of obtaining income, which does not mean making a profit (*Wakefield* at [58] and [26]);

(6) each case requires a fact sensitive enquiry. Whilst *Finland* and *Borsele* can provide helpful pointers to relevant factors, there is no checklist of factors, nor any fixed hierarchy of relative importance (*Wakefield* at [59]); and

(7) whilst all objective circumstances must be considered, the following factors may be of significance:

(a) the existence of a market for the supply (*Wakefield* at [85]);

(b) whether the service provider is operating in a market where similar services are provided on a commercial basis (*HMRC v Longridge on the Thames* [2016] STC 2362 at [93]);

(c) the structure and level of the fee income (*Borsele, Finland*); and

(d) whether the activity is one of the principal activities of the entity or ancillary to its main activities (*Wakefield* at [79]).

44. Considering the facts of the present case, and whilst we accept that the Trust's car leasing activities are ancillary to its main activities:

(1) there is a market for the leasing of cars to individuals for their exclusive use;

(2) leasing of cars under salary sacrifice schemes by employers to employees is very common, and the evidence served by the Trust does not suggest to the contrary. There is no evidence that such schemes are confined to the public sector;

(3) whilst we note that the public sector car leasing framework enables the Trust to lease cars on favourable commercial terms, the evidence served by the Trust does not establish that its employees could not have leased the same vehicles on similar terms from commercial car leasing companies;

(4) the Trust is operating in a market where very similar services are provided on a commercial basis, and where cars are leased to individuals by commercial car leasing companies;

(5) the Trust has not served evidence as to its fee income, nor as to whether the amounts of salary sacrifice by employees in return for cars is less than the costs incurred by the Trust in leasing those cars and administering the Car Scheme. Therefore, it is not possible to determine this factor.

45. In the circumstances, we consider that the Trust's reliance on *Finland* and *Borsele* is misplaced. As explained by the Court of Appeal in *Wakefield*, there were particular factors which were taken into account in those cases which led to the conclusion that the supplier did not carry on an economic activity. In those cases; the charges paid were fixed by reference to the means of the recipients; the charges were only partly fixed by reference to the cost of the service; the total amount raised by the charges was insubstantial both in absolute terms and relative to the cost of the service; in *Borsele*, the municipality which provided school buses did not offer services on the general passenger transport market and was more akin to the final consumer of the transport services provided by the transport undertakings engaged by it; and other factors were relevant, such as a comparison of the supply in question with the

circumstances in which the relevant type of service is usually provided, and the number of customers.

46. In the present case, the charges paid for car leasing are not fixed by reference to the means of the recipient; nor were they only partly fixed by reference to the cost of the service; the total amount raised by the charges is substantial. Furthermore, we do not consider that the Car Scheme is materially different to the leasing of cars by commercial car leasing companies to individuals for their use. In addition, the Trust's car leasing activities have been provided to a substantial number of customers as shown by the fact that it leased approximately 21,000 cars by March 2018.

47. Finally, we reject the submission that the Trust is akin to a final consumer of a car supplied under a lease. It is the employee of the Trust who is entitled to use the lease car, pursuant to the grant in the lease, so long as the lease remains in force. There is no evidence that the Trust has any right to the use of the car itself, or any right to require the employee to use it in the course of his employment. Where an employee chooses to use the car leased him by the Trust when travelling from location to location to do his job, there is a separate arrangement with the employee, who is paid a mileage charge by the Trust. In our view, the Trust is the supplier of cars under leases, rather than the final consumer who is granted the right to use the car under the lease.

48. In conclusion, we consider that, disregarding the effect of the De-Supply Order, the provision of cars by the Trust under the Car Scheme would be an economic activity.

#### **Are the cars supplied under a special legal regime?**

##### *The parties' submissions in outline*

49. Mr Scorey submitted that the Trust entered into the Car Scheme arrangements as a public authority, i.e. under a special legal regime, which means that, by virtue of Article 13(1) of the PVD, the Trust could not be regarded as a taxable person in respect of those activities or transactions. In particular, he contended that the Trust established the Car Scheme under the legal regime which provided for NHS foundation trusts in the NHS Act, i.e. s47(1) NHS Act 2006.

50. Mr Mantle pointed out that activities within Article 13(1) do not include activities pursued by the public authorities under the same legal conditions as those that apply to private economic operators (see Case C-446/98 *Fazenda Pública v Câmara Municipal do Porto* [2001] STC 560 at [17]).

##### *Discussion*

51. We agree with HMRC. It is clear from the language of Article 13(1) that public authorities that engage in activities or transactions under a special legal regime are to be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition. There is no doubt that the ability of the Trust to recover VAT that would be irrecoverable by commercial car leasing businesses would lead to significant distortions of competition. In any event, the cars are not provided under a special legal regime because they are provided under the same legal conditions as those that apply to taxable persons leasing cars to businesses or private individuals and the Trust did not provide any evidence or submissions to the contrary.

#### **LEGITIMATE EXPECTATION ISSUE**

52. As the Trust has succeeded on the Business Activity Issue and thus succeeded in its claim, there is no need for us to consider the Legitimate Expectation Issue.

## TIME BAR ISSUE

### *The parties' submissions in outline*

53. As the Trust has succeeded on the Business or Economic Activity Issue, it is necessary for us to consider the Time Bar Issue.

54. The Trust made the Claim on 31 March 2017. The period covered by the Claim is 1 January 2012 to 31 January 2017. The Trust states that HMRC contend that any claim is subject to the four year time limit in s80 VATA94. However, HMRC accept that the Trust can make a claim from 1 October 2012 (i.e. more than four years from the date of the Claim on 31 March 2017) because of the express terms of the Interim Guidance Note which permitted claims back to October 2012. HMRC contend, however, that the claim for the period between 1 January 2012 and 30 September 2012 is time-barred.

55. Mr Scorey submitted that a claim under s41(3) VATA94 falls outside s 80 VATA94 and is not the subject of any time limit within VATA94. Mr Mantle's response was that HMRC do not rely on the time limit in s80 VATA94. HMRC rely on s41(3) VATA94 and the COSD. Section 41(3) provides that HMRC are only liable to make a refund:

“... on a claim made by the department at such time and in such form and manner as the [HMRC] may determine ...”

Paragraph 3 of the COSD provides that:

“A tax refund will only be paid if:

...

(b) the department complies with the requirements of [HMRC] both as to the time, form and manner of making the claim ...”

56. Mr Mantle submitted that it is clear from s41(3) and the COSD that HMRC:

- (1) have a discretion to impose requirements as to the time by which a claim under the COSD should be made; and
- (2) in the exercise of that discretion, could lay down such time requirements in advance.

57. Time limits for claims by NHS bodies under the COSD, applicable at the date the Trust made its Claim, were set down in HMRC's publicly available internal manual VAT Government and Public Bodies at VATGPB9720, “COS Headings Introduction”, published on 24 August 2012 (“the COS Manual”). The COS Manual stated that VAT claimed under the COSD should normally be claimed within 3 months of the end of the financial year in which the relevant supply was received by the claimant. The only exceptions (including one where HMRC had erroneously advised there was no entitlement to claim) required a claim to be made within 4 years from the end of the prescribed VAT accounting period in which the relevant supply was received by the claimant. By publishing the COS Manual HMRC had exercised its discretion in line with its powers in s41(3) VATA94 and paragraph 3 of the COSD.

58. Mr Scorey submitted that the issue was whether a statement in internal guidance is enough to set a time limit. Mr Mantle relied on the decision of Sales J, as he then was, in *R (oao) Capital Accommodation (London) Ltd v HMRC* [2013] STC 303 which concerned a time limit for correcting errors under regulation 35 of the VAT Regulations 1995 which was contained in Notice 700/45/93. At [42(iii)], Sales J held that:

“By issuing the HMRC Guidance (and previous versions of it, such as Notice 700/45/93), with its requirements as to the time within which applications to correct errors should be made, HMRC has exercised its discretion in line with its powers identified ... above. The time limits imposed by the HMRC

Guidance are in line with the time limits in other relevant and connected provisions in the regime set out in the governing legislation (in particular, the time limits in section 80(4) and in regulations 29 and 34) and have the effect that corrections to be made under regulation 35 will be made at a time and in a manner which produces a coherent overall time limit regime for the recovery of over-paid VAT, and does not undermine the effect of the time limits in the primary legislation and the Regulations. The imposition of those time limits in the Guidance is therefore lawful and a proper exercise of HMRC's discretion under regulation 35 ...”

59. Mr Scorey accepted that what Sales J said in *Capital Accommodation* was correct but submitted that the time limit in that case had been imposed by a public notice whereas there was no such notice in this case. He submitted that this was an issue of legal certainty.

#### *Discussion*

60. We agree that, under s41(3) and paragraph 3 of the COSD, HMRC are able to impose (reasonable) conditions and time limits for the making of a claim by government departments and public bodies, such as the Trust, for a refund under the COSD. The relevant time limit of four years was set down in VATGPB9720, “COS Headings Introduction” which was a publicly available document. That time limit simply put government departments and public bodies, such as the Trust, making claims under the COSD, in the same position as ordinary taxable persons making claims under s 80 VATA94. Mr Scorey rightly did not suggest that there was anything inherently unreasonable about a four year time limit for such claims. In our view, the four year time limit is reasonable and the Claim in relation to the period between 1 January 2012 and 30 September 2012 is time-barred.

#### **DISPOSITION AND COSTS**

61. For the reasons we have given, the Trust's Claim is allowed to the extent that it relates to the period 1 October 2012 to 31 January 2017. Accordingly, we make an order that, in so far as it relates to the period, the Decision be quashed and HMRC pay the amount claimed within 28 days of the date of release of this decision.

62. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision. As any order in respect of costs will, if not agreed, be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

**MR JUSTICE HENRY CARR**

**JUDGE GREG SINFIELD**

**Release date: 5 June 2019**