VALUE ADDED TAX – supply of car parking by NHS Trust – Article 13(1) PVD – s41A VATA 1994 – whether the trust was engaged in the activity as a public authority – whether supply was provided under a special legal regime – whether treating the trust as non-taxable in respect of the activity would lead to a significant distortion of competition

UT Neutral citation number: **[2022] UKUT 267**

UT (Tax & Chancery) Case Number: UT-2021-000149

Upper Tribunal
(Tax and Chancery Chamber)

Rolls Building
Fetter Lane
London
EC4A 1NL

Heard on 17 May 2022
Judgment given on 06 October 2022

Before:

MRS JUSTICE BACON
JUDGE JONATHAN CANNAN

Between

NORTHUMBRIA HEALTHCARE
NHS FOUNDATION TRUST

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S
REVENUE AND CUSTOMS

Respondent

Representation:

For the Appellant: Michael Firth, Counsel, instructed by VATangles VAT Consultancy

For the Respondent: Howard Watkinson, Counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal (**the FTT**) released on 11 March 2021, [2021] UKFTT 71 (TC) (**the Decision**). The FTT dismissed the appeal of Northumbria Healthcare NHS Foundation Trust (**the Trust**) against HMRC's determination that VAT was chargeable by the Trust on its supplies of car parking at hospital and healthcare sites. On the basis of that determination HMRC refused to repay VAT accounted for by the Trust during the periods 05/13 to 03/16.

2. The single issue in this appeal is whether the Trust is a taxable person when making supplies of car parking in car parks at its hospitals, as the FTT found, or whether in so doing it is acting as a public authority pursuant to Article 13 of the Principal VAT Directive 2006/112/EC (**PVD**) as implemented by section 41A of the Value Added Tax Act 1994 (**VATA**). That in turn raises two questions: first, whether the Trust's supplies of car parking are made pursuant to a "special legal regime" applicable to the Trust, which is not applicable to private economic operators; and secondly, if so, whether treating the Trust as a non-taxable person would lead to a significant distortion of competition.

3. At the hearing before us on 17 May 2022 it was agreed that further submissions would be provided once the Upper Tribunal had handed down its (then pending) decision in *HMRC v Chelmsford City Council*. That was handed down on 15 June 2022 ([2022] UKUT 00149 (TCC)), following which we received written submissions from both parties. We have taken account of those submissions in this decision. HMRC also, in August, drew our attention to two passages in the decision of the Upper Tribunal in *HMRC v Mid-Ulster District Council* handed down on 19 July 2022 ([2022] UKUT 00197 (TCC)). While we have referenced that decision for completeness below, the issues in that case were quite different from the issues in the present case and do not have any material bearing on our analysis in this decision.

4. The amount of VAT at stake in this appeal is £267,443, but we understand that around 50 similar appeals by NHS bodies are stayed behind this appeal, with the total tax at stake of around £70m.

Factual background

5. The FTT heard evidence from two witnesses on behalf of the Trust, which it found to be credible; it fully accepted their evidence of fact. The material findings of fact, based on the written and oral evidence, are set out at §§11–32 of the Decision. For the purposes of this appeal, the following summary suffices, with references to the relevant paragraphs of the Decision.

6. Under the Trust's constitution, the principal purpose of the Trust is to provide goods and services for the purpose of the health service in England, but the Trust may also carry on activities for the purpose of generating additional income in order to better carry on its principal purpose (§14).

7. The Trust is required by its stakeholders and relevant guidance to ensure that its sites and services are accessible at reasonable cost. That obligation includes the provision of parking for patients and visitors at a reasonable price (§23). The area covered by the Trust is mostly rural, and availability of public transport can be limited or non-existent. Around 80% of visitors to the Trust's main hospital sites arrive by car (§11).

8. The Trust's parking facilities are mostly used by those accessing the hospital and healthcare facilities. The location of some of the Trust's sites means that they are unsuitable for parking and

visiting somewhere else. Some of the sites are, however, able to be used by people for general purposes. As an example, one of the sites was used for unofficial airport parking, following which the Trust took steps to deter such users by changing its fees for parking at that site (§27).

9. The Trust provides free parking to certain hospital users, including cancer patients and those visiting patients that are in hospital for an extended period of time. The Trust's staff pay reduced rates for parking. Free parking is provided at particular local health centres for historic reasons, with the cost met from parking charges at other sites. Some sites make a loss on the provision of parking, but the Trust makes a small surplus at three of its four major sites, which is used to improve the provision of healthcare at the Trust (§§30–31).

10. The availability of alternative parking arrangements for the Trust's sites varies and is limited. Some sites have little or no alternative parking suitable for patients, staff or visitors as it would not be close enough to the hospital. Some sites based in towns such as Hexham, Blyth and Alnwick do have alternative parking facilities. The parking areas at those sites are limited and they are often fully utilised by those using the healthcare facilities, so would not be available to shoppers or commuters visiting the towns (§25).

11. The FTT also made findings of fact in relation to the contractual arrangements pursuant to which the Trust provided services to the Northumberland and North Tyneside clinical commissioning group and certain guidance issued by the Department of Health which we summarise below. At §13 it found that the contract required the Trust to comply with or have regard to (as applicable) guidance and guidelines issued by bodies such as the Department of Health and NHS England.

The guidance documents

12. The Trust says that the provision of car parking at its sites is governed by various NHS/Department of Health guidance documents. A guidance document entitled "NHS patient, visitor and staff car parking principles", updated on 29 October 2015 (**2015 Parking Principles**), states that:

> "NHS organisations should work with their patients and staff, local authorities and public transport providers to make sure that users can get to the site (and park if necessary) as safely, conveniently and economically as possible.
>
> Charges should be reasonable for the area.
>
> Concessions, including free or reduced charges or caps, should be available for the following groups:
>
> - disabled people
> - frequent outpatient attenders
> - visitors with relatives who are gravely ill, or carers of such people
> - visitors to relatives who have an extended stay in hospital, or carers of such people
> - carers of people in the above groups where appropriate
> - staff working shifts that mean public transport cannot be used
>
> Other concessions, eg for volunteers or staff who car-share, should be considered locally.

> Priority for staff parking should be based on need, eg staff whose daily duties require them to travel by car."

13. The 2015 edition of the "Health Technical Memorandum 07-03 on NHS car-parking management: environment and sustainability" (**HTM**) states at §3.5:

> "NHS sites that are close to city/town centres may need to ensure their car-parking charges are not lower than local car-parks otherwise commuters and visitors may be tempted to use their car-parks instead. It may be necessary to increase charges if this is occurring."

14. A Department of Health guidance document dated December 2006 on "Income Generation: Car Parking Charges – Best Practice for Implementation" (**Car Parking Best Practice**) is described as providing:

> "Advice to the NHS on the factors to consider when operating car parking schemes on their premises under income generation rules, including what kind of car parking scheme to offer, what charges to impose and what concessions to consider."

15. As noted at §20 of the Decision, the Car Parking Best Practice document makes clear that the NHS body might not provide parking: see the comments in the first two paragraphs: "Car parking on healthcare sites should only be considered as part of a wider travel plan which the NHS body should have in place … assuming it is decided that car parking should be offered on healthcare sites as part of this travel plan". If car parking is offered, however, the document sets out guidance to consider, including in particular the following:

> "[The issues to consider] will probably include: … How misuse of the car park (particularly if based near a town centre or motorway) by people using healthcare facilities for free or cheap parking will be avoided; …" (§2)
>
> "NHS bodies are allowed to charge for car parking and to raise revenue from it as an income generation activity as long as certain rules are followed. Income generation activities must not interfere to a significant degree with the provision of NHS core services. They must be profitable, as it would be unacceptable for monies provided for the benefit of NHS patients to be used to support commercial activities, and this profit must be used to improve health services." (§3)
>
> "NHS bodies should look at transport and car parking in a holistic way and determine a car parking structure accordingly, taking into account the different parking needs of staff, patients and visitors. For patients and visitors consideration will need to be given to healthcare needs and ability to pay." (§20)
>
> "<u>How Much Should we Charge?</u>
>
> It must be remembered that you are in competition with both other means of transport and alternative car parking facilities. Hence attention should be given to:
>
> - the regularity of public transport and its charges;
>
> - other car parking charges in the area;
>
> - availability of free parking on nearby streets and roads;
>
> - your catchment area;
>
> - the need to cover costs;
>
> - the need to disincentivise non service users;

- the need to make a profit to be used to improve health services." (§24)

Relevant VAT legislation

16. Article 13 PVD provides:

> "1. 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.
>
> In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible.
>
> 2. Member States may regard activities, exempt under Articles 132, 135, 136, 371, 374 to 377, and Article 378(2), Article 379(2), or Articles 380 to 390, engaged in by bodies governed by public law as activities in which those bodies engage as public authorities."

17. That provision was implemented in domestic law by section 41A VATA, which provided:

> "41A. Supply of goods or services by public bodies
>
> (1) This section applies where goods or services are supplied by a body mentioned in Article 13(1) of the VAT Directive (status of public bodies as taxable persons) in the course of activities or transactions in which it is engaged as a public authority.
>
> (2) If the supply is in respect of an activity listed in Annex I to the VAT Directive (activities in respect of which public bodies are to be taxable persons), it is to be treated for the purposes of this Act as a supply in the course or furtherance of a business unless it is on such a small scale as to be negligible.
>
> (3) If the supply is not in respect of such an activity, it is to be treated for the purposes of this Act as a supply in the course or furtherance of a business if (and only if) not charging VAT on the supply would lead to a significant distortion of competition.
>
> (4) In this section 'the VAT Directive' means Council Directive 2006/112/EC on the common system of value added tax."

18. Section 41A was amended by the Taxation (Cross-border Trade) Act 2018, but the previous version quoted above remains in effect for the VAT accounting periods relevant to this appeal.

19. It is common ground that Article 13(1) PVD and section 41A VATA set out two conditions under which (for activities not listed in Annex I to the PVD) a supply of goods and services by a public body is not treated as a supply by a taxable person: first, the supply must be made in respect of activities or transactions in which the entity is engaged "as a public authority"; and secondly, the supply must not lead to a significant distortion of competition.

20. HMRC accepts that the Trust is a public authority for the purposes of Article 13(1) and section 41A. Car parking is not one of the activities listed in Annex I. It is therefore necessary for the Trust

to meet both of the two conditions just described, in order for the Trust not to be regarded as a taxable person in its supply of car parking facilities. Both conditions are in issue in this appeal.

The FTT's Decision

21. The Trust's appeal to the FTT was made on three grounds:

(1) the Trust said that it should not be regarded as a taxable person pursuant to Article 13(1) PVD and section 41A VATA, in relation to the supply of car parking services;

(2) if the Trust was a taxable person for those purposes, the Trust said that the supply of car parking was closely related to the supply of hospital and medical care, and was therefore exempt under Article 132(1)(b) PVD and Item 4 of Group 7, Schedule 9 VATA;

(3) the Trust also said that the supply of car parking services by it did not constitute an economic activity and was therefore outside the scope of VAT.

22. The FTT dismissed the appeal on all three grounds. The second and third grounds are not pursued before us. It is therefore sufficient to summarise the FTT's decision on the first ground regarding the application of Article 13(1) PVD and section 41A VATA.

23. As to that, the FTT determined whether the Trust was providing car parking "as a public authority" by applying the concept of a "special legal regime", derived from the case-law of the CJEU. The FTT did not, however, accept that car parking was supplied by the Trust under a special legal regime. In particular, the FTT held at §59 that:

> "[Counsel for the Trust] could not point to any statutory or contractual provision that stated that the Trust must provide parking or provide it in a particular way. Unlike in *Carpaneto Piacentino*, the Trust does not have any public powers to authorise or restrict parking on a public highway but instead relies on contractual agreement with those who wish to park their cars on the Trust's own land. Such an activity is a matter of private law and not public law. I accept that the Trust must have regard to guidance issued by the NHS and Department of Health but the guidance is just that: it is not a special legal regime. The fact that the Trust is required by its contract with the Clinical Commissioning Groups and the guidance to take certain matters, eg reasonable cost and local travel plans in the area, into account that private operators are not required to consider does not elevate guidance into a public law regime."

24. As to the second condition in Article 13(1) PVD and section 41A VATA, the FTT concluded that even if the Trust was supplying car parking as a public authority, it would still be a taxable person because there would otherwise be significant distortions of competition (§66). At §64, the FTT set out its conclusions on whether there was competition:

> "I can deal with this ground of appeal shortly on the basis of facts already found …. On the basis of those facts, I have concluded … that:
>
> (1) The Trust participated in the market for car parking in areas where it provided parking; and
>
> (2) There was actual competition between the Trust's car parks and parking provided by private operators in or near those areas.
>
> Those findings would, in my view, apply equally to other NHS Trusts and bodies elsewhere in the United Kingdom such as those whose appeals are stayed behind this one."

25. The FTT then concluded at §65 that treating the Trust as a non-taxable person would lead to distortions of competition:

> "Further, on the basis of my findings of fact, I conclude that treating the Trust as a non-taxable person would lead to actual or potential distortions of competition which are more than negligible. This is shown by the fact that the HTM identified a need for bodies such as the Trust (which followed the HTM and other guidance) to ensure that their car-parking charges are the same as or higher than those charged in local car parks to discourage commuters and visitors from using the hospital and health centre car parks instead. The implication of the HTM is that lower charges (as might occur if the VAT element ceased to be chargeable) would lead to more people choosing to park in the Trust's car parks. A similar conclusion can be drawn from the extract from the Car Parking Best Practice quoted at [20] above and the fact that that one of the Trust's sites was used as parking for the local airport until the Trust increased its charges … It is, to my mind, obvious that if the Trust is not required to charge and account for VAT, it could undercut commercial car park operators by providing parking more cheaply. Whether the Trust chose to reduce its charges to patients and NHS staff by an amount equal to the VAT which was no longer chargeable or simply pocketed the additional income is nothing to the point. In both cases, there would be distortion of competition because either the cost of parking would be cheaper or the profit derived from it would be higher than in the case of parking provided by private operators. The amount of the potential difference in pricing or profit between parking provided by the Trust and that provided by commercial operators were VAT to cease to be chargeable by the Trust cannot, in my view, be described as negligible."

Grounds of appeal

26. The appellant appeals with permission from the Upper Tribunal on two grounds:

(1) The FTT erred in law in concluding that the Trust did not provide car parking under a special legal regime.

(2) The FTT erred in law in concluding that treating the Trust as a non-taxable person would lead to significant distortions of competition.

27. In the first ground of appeal, the overarching question is whether the Trust was providing car parking services "as a public authority" for the purposes of Article 13(1) PVD and s. 41A(1) VATA. As we set out below, that test has typically been applied by asking whether the relevant activity is carried out under a "special legal regime", a concept that has been elaborated in the case-law. The Trust says that the FTT erred in law in both its approach and in its conclusion that the Trust was not subject to a special legal regime.

28. Under the second ground of appeal, the Trust says that the FTT applied the wrong test in identifying both what amounts to competition and what amounts to a distortion of competition.

Ground 1: Does the Trust provide car parking under a special legal regime?

Case-law

29. The question of whether a public body provides goods and services "as a public authority" for the purposes of the first paragraph of Article 13(1) PVD (and its predecessors) has been considered extensively in the case-law of the Court of Justice of the European Union (**CJEU**), which is considered in some detail in the *Chelmsford* case at §§24–48, and we do not repeat that here. In particular, in light of the approach developed by the CJEU in Joined Cases C-231/87 and C-12/88 *Carpaneto Piacentino* [1989] ECR 3233, Case C-446/98 *Fazenda Pública v Câmera Municipal do*

Porto [2001] STC 560, Case C-288/07 *HMRC v Isle of Wight Council* [2008] STC 2964 and Case C-554/07 *Commission v Ireland* EU:C:2009:464, we gratefully adopt the following propositions summarised at §49 of the *Chelmsford* decision, with some expansion on our part:

> (1) The first paragraph of Article 13(1) of the PVD derogates from the general rule that all economic activities should be subject to VAT. It provides for circumstances in which public authorities will not be regarded as taxable persons. Given that it is a derogation, it must be interpreted strictly: *Isle of Wight*, §60.
>
> (2) The task of the national court is to analyse all the conditions laid down by national law for the pursuit of the activity in issue, to determine whether that activity is being engaged in under a special legal regime applicable to bodies governed by public law or under the same conditions as those that apply to private economic operators: *Fazenda Pública*, §21.
>
> (3) The subject matter and purpose of the activity are not relevant: *Fazenda Pública*, §19. Rather, it is the way in which the activities are carried out that is decisive: *Carpaneto Piacentino* §15.
>
> (4) The fact that a body governed by public law is authorised to carry out the activities in accordance with powers conferred by statute is not enough. Something more is required: *Commission v Ireland*, §49.
>
> (5) The activity must involve or be closely linked to the exercise of rights and powers of the public authority: *Isle of Wight*, §31; *Fazenda Pública*, §22.

30. In relation to these propositions, and in particular proposition (5), it is helpful to make some further observations.

31. First, the concept of a "special legal regime" derives from *Carpaneto Piacentino*. Referring to what was then Article 4(5) of the Sixth VAT Directive and is now Article 13(1) PVD, the CJEU said:

> "15. An analysis of the first subparagraph of Article 4(5) in the light of the scheme of the directive shows that it is the way in which the activities are carried out that determines the scope of the treatment of public bodies as non-taxable persons. In so far as that provision makes such treatment of bodies governed by public law conditional upon their acting 'as public authorities', it excludes therefrom activities engaged in by them not as bodies governed by public law but as persons subject to private law. Consequently, the only criterion making it possible to distinguish with certainty between those two categories of activity is the legal regime applicable under national law.
>
> 16. It follows that the bodies governed by public law referred to in the first subparagraph of Article 4(5) of the Sixth Directive engage in activities 'as public authorities' within the meaning of that provision when they do so under the special legal regime applicable to them. On the other hand, when they act under the same legal conditions as those that apply to private traders, they cannot be regarded as acting 'as public authorities'. It is for the national court to classify the activity at issue in the light of that criterion."

32. The CJEU did not in that case expand upon what was meant by a "special legal regime" applicable to public authorities. In subsequent cases, however, the CJEU said that an activity will be regarded as having been carried on under a special legal regime "where the pursuit of the activity involves the use of public powers" (*Fazenda Pública*, §§21–24) or where the activity is "closely linked to the exercise of rights and powers of public authority" (*Isle of Wight*, §31):

> “21. The national court must, in accordance with the case-law referred to in paragraphs 16 and 17 above, analyse all the conditions laid down by national law for the pursuit of the activity at issue in the main proceedings, to determine whether that activity is being engaged in under a special legal regime applicable to bodies governed by public law or under the same legal conditions as those that apply to private economic operators.
>
> 22. The fact that the pursuit of an activity such as that at issue in the main proceedings involves the use of public powers, such as authorising or restricting parking on a public highway or penalising by a fine the exceeding of the authorised parking time, shows that this activity is subject to a public law regime.
>
> 23. In view of the nature of the analysis to be carried out, however, as the Court has already held, it is for the national court to classify the activities at issue in the light of the criterion adopted by the Court (Joined Cases 231/87 and 129/88 *Comune di Carpaneto Piacentino*, paragraph 16, and Case C-4/89 *Comune di Carpaneto Piacentino*, paragraph 11).
>
> 24. The answer to the first question must therefore be that the letting of spaces for the parking of vehicles is an activity which, where it is carried on by a body governed by public law, is carried on by that body as a public authority within the meaning of the first subparagraph of Article 4(5) of the Sixth Directive if it is carried on under a special legal regime applicable to bodies governed by public law. That is the case where the pursuit of the activity involves the use of public powers.”
>
> *Fazenda Pública*
>
> “31. [The] derogation covers principally activities engaged in by bodies governed by public law acting as public authorities, which, while fully economic in nature, are closely linked to the exercise of rights and powers of public authority. In those circumstances, the fact that such bodies are not subject to VAT on those activities does not potentially have an anticompetitive effect, inasmuch as they are generally engaged in exclusively, or almost exclusively, by the public sector.”
>
> *Isle of Wight*

33. The CJEU indicated that public powers of that nature were not engaged in Case C-604/19 *Gmina Wroclaw* EU:C:2021:132. This case is not retained EU law (as the Upper Tribunal noted in *Chelmsford*, §45), but it is illustrative. It concerned the transformation of leasehold rights under a perpetual usufruct into ownership rights, in return for the payment of a fee to the relevant municipality. The CJEU noted that what was decisive was the manner in which the activities in issue were carried out (§78), and considered that the fee payable in such a case was not fixed “in an administrative procedure as a public authority under a special public law regime” (§84). The mere existence of a particular power given to the public authority was not, therefore, without more sufficient to give rise to a special legal regime. By contrast, in *Fazenda Pública*, the CJEU held that the fact that the letting of car parking spaces involved the use of public powers, such as authorising or restricting parking on a public highway or imposing a fine for exceeding the authorised parking time, showed that the activity was subject to a public law regime (§22).

34. In *Chelmsford* HMRC contended that the CJEU jurisprudence indicated that a special legal regime arose *only* where the activity involved the use of what were described as “sovereign” powers pursuant to which a local authority specifically exercises the activity, namely powers providing for the making of rules or the imposition of fines (see §§19 and 50 of the decision). The Upper Tribunal rejected that argument, following an extensive discussion of the cases relied on by HMRC (§§50–72). We note that Mr Watkinson, for HMRC, did not pursue that argument in these proceedings. As the Upper

Tribunal discussed in *Chelmsford*, while the use of public powers such as the imposition of fines will undoubtedly indicate that the activity is subject to a public law regime (as in *Fazenda Pública*), the case-law has not laid down a hard-edged test requiring the use of "sovereign" powers.

35. What is apparent, however, is that the tribunal should have regard to the way in which the activities are carried out by the public authority. In particular, what identifies an activity as being pursued "as a public authority", for the purposes of the derogation under Article 13(1), is the fact that the activity either involves or is "closely linked to" the exercise of rights and powers of public authority, thus distinguishing the public body from the situation of a private economic operator carrying out similar activities. That analysis is consistent with the approach of the Upper Tribunal in *Chelmsford* at §31, 37, 39 and 107.

36. Secondly, in *Commission v Ireland* the CJEU rejected the argument that local authorities in Ireland could be exempt simply on the basis that they acted pursuant to overarching powers conferred on them by statute (in particular the Constitution of Ireland and the provisions of the Local Government Act 2001). Concluding that Irish law in respect of VAT did not comply with the PVD, the CJEU commented at §49 that:

> "That conclusion is not affected by Ireland's argument that, in so far as they engage in economic activities, local authorities in Ireland do so uniquely pursuant to powers conferred upon them under the specific legal regime applicable to them by statute. … [I]t is to be noted that bodies governed by public law act as public authorities when they engage in activities which, while fully economic in nature, are closely linked to the exercise of rights and powers of public authority (*Isle of Wight Council and Others*, paragraph 31). Moreover, the mere fact that a body governed by public law acts within the framework of a special legal regime and in accordance with powers conferred upon it by statute does not mean that engaging in its activities necessarily involves the exercise of rights and powers of public authority."

37. The distinction between the exercise of general statutory powers and those that are specific to the activity in issue was recognised by the Upper Tribunal (Warren J) in *R (Durham Company) v HMRC* [2016] UKUT 417 (TCC) at §§70 and 106. The point was succinctly made by Patten J as he then was in *West Devon BC v HMRC* [2001] EWHC 2202 (Ch) at §15:

> "It is not enough therefore for the local authority to demonstrate that in relation to the transaction in question it acted as a local authority. That would be the case in respect of all its activities. As a statutory body a local authority cannot act in any other capacity. The determining factor seems to be whether the transaction itself is governed by the ordinary rules of private law or whether it takes effect under what the Court described as a special legal regime applicable to local authorities. This would mean that the letting of commercial premises owned by a local authority would (apart from being an exempt supply) not fall within Article 4(5) because the transaction would be governed by the same legal rules and principles as a letting by a private landlord. By contrast the provision of secure residential accommodation under the Housing Act 1985 would qualify in that the terms of the letting are applicable only to transactions involving local authorities with their particular statutory responsibilities in that field."

38. It is clear, therefore, that the mere fact that the public authority is in general terms required to act in accordance with statutory powers is not sufficient. Rather, it is necessary to show that the pursuit of the specific activities in question involves or is closely linked to the exercise of rights and powers of the public authority.

39. That distinction is reflected in the reasoning of the Upper Tribunal in *Chelmsford*, where the question was the application of Article 13(1) PVD to the provision of leisure facilities by the local

authority. The Upper Tribunal upheld the FTT's decision that the services were provided under a special legal regime, on the basis that the authority's decisions on pricing, location and scope of facilities were impacted by "intersecting statutory obligations" (§103). Those obligations constrained the exercise of the authority's powers by requiring the making of numerous decisions as to the manner and way in which the facilities were to be run, including decisions as to how best to achieve objectives to which Chelmsford was required to have regard by reason of other statutory obligations to which it was subject (§106). The Upper Tribunal therefore considered that the activities engaged in by Chelmsford were closely linked to the exercise of the rights and powers of a public authority (§107).

40. Thirdly, the Upper Tribunal made clear in *Chelmsford* that the powers of a local authority will not be transformed into a special legal regime simply because the authority has set itself conditions in policy and strategy documents. As the Upper Tribunal recorded, there was no dispute that the legal test only permits national law requirements to be taken into account in identifying whether there is a special legal regime for the purposes of Article 13(1). If the FTT had relied on the policy documents purely by virtue of their status as policy, that would therefore have been an error (§90). The Upper Tribunal did not, however, consider that the FTT had done so. Rather, the FTT had relied on the policy documents as an expression of the relevant national legal requirements operating on Chelmsford, which were comprised of intersecting statutory obligations (§§97–103).

41. The FTT's reasoning in *Chelmsford* was thus that "in providing its services, the authority was (through the policies which in turn derived from legal obligations) subject to different requirements when deciding what services to provide, at what price, where to provide them and to whom, by comparison with a private sector operator" (§103). The FTT did not, therefore, err in its approach.

42. At §104 the Upper Tribunal added that even if the FTT had erred, either in relying solely on Chelmsford's policies without considering the need for the obligations to stem from national law, or in not explicitly linking the material parts of the policies back to national law, neither error would result in a different outcome, since if the Upper Tribunal were to set aside the decision and remake it, there would be "sufficient elements deriving from national law reflected in the policies" to reach the same result – specifically the "best value obligation, the fiduciary obligations and the other statutory obligations to which we have referred (the obligations under s17 Crime and Disorder 1998 Act, s11 Children Act 2004 and s4 Local Government Act 2000)".

The Trust's case

43. It is not disputed that the Trust was established by and takes its powers from the National Health Service Act 2006. Before the FTT, the Trust contended that this Act amounted to a special legal regime. However, the substance of Mr Firth's argument at the hearing before us did not rely on that Act. Instead Mr Firth submitted that where a local authority is bound to take into account and act upon external guidance in carrying out the activity, then it will be carrying out that activity pursuant to a special legal regime. That is because it will be subject to public law obligations (enforceable by way of judicial review) to follow the guidance or only to depart from the guidance for good reason: see for example *R (Somerset County Council) v S of S for Education* [2020] EWHC 1675 (Admin).

44. Mr Firth said that the FTT was therefore wrong to find that the guidance issued to the Trust by the NHS and the Department of Health was not a special legal regime. In oral submissions he relied, in particular, on the decision of the FTT in *Chelmsford*, which he interpreted as establishing a special legal regime on the basis of the objectives set out in Chelmsford's own policy documents. At one stage, Mr Firth argued that the Trust was also required to comply with the guidance pursuant to the terms of its NHS contract, however he did not pursue that submission.

45. In his post-hearing written submissions, in light of the approach taken by the Upper Tribunal in *Chelmsford*, Mr Firth emphasised that the guidance relied upon in this case was external rather than policy set by the Trust itself. He also sought to introduce a new argument (not raised in the Trust's grounds of appeal or at the hearing before us) that the Trust was subject to a series of statutory constraints derived from the NHS Act 2006, the Equality Act 2010, the Care Act 2014 and the Children Act 2004. On that basis, he said, the Trust was in an equivalent position to that of Chelmsford, such that the reasoning of the Upper Tribunal in that case applied equally in the present case.

46. We will address separately Mr Firth's arguments on the guidance and the new arguments on statutory constraints.

The car parking guidance

47. Mr Firth pointed to the fact that the car parking guidance which we have set out at §§12–15 above is given in mandatory terms and requires the Trust to provide concessions for certain categories of visitors, to make the charges reasonable for the area, and to ensure that income generation does not interfere to a significant degree with the provision of NHS core services. In the circumstances, he submitted that the guidance establishes public law obligations on the Trust which do not apply to private operators.

48. Mr Firth sought to rely on two main propositions said to apply in considering whether a public authority is engaged in activities as a public authority. His first proposition was that what matters is whether the public authority is governed *only* by the ordinary rules of private law in respect of the activity.

49. In support of that proposition, Mr Firth relied heavily on the judgment of the Court of Session (Inner House) in *Edinburgh Telford College v HM Revenue & Customs* [2006] CSIH 13. In that case the Court of Session was concerned with whether a college was a taxable person in respect of the provision of further education courses, grant funded by the Scottish Education Funding Council. The college provided courses pursuant to the Further and Higher Education (Scotland) Act 1992. At §25 the Court said that:

> "… In our judgment the legal regime in question is special. It is special to the colleges which provide the courses in question. If there were private traders, which there are not in Scotland, who provided such courses they would not do so under that legal regime. Another way of putting matters perhaps is that once it is accepted that the College is a public authority, it is clear that in providing the funded courses, having regard to the provisions of the statutory framework, it does so as an act of public administration and not as an act governed solely by the rules of private law."

50. Mr Watkinson submitted that *Edinburgh Telford College* was not authority for a test of whether the activity was governed solely by rules of private law.

51. We agree with Mr Watkinson. It is in the nature of a public authority that its activities will be governed to a greater or lesser extent by both public law and private law. The Court of Session was not saying that a particular activity would be engaged in as a public authority if the activity was governed to some extent by public law. Quite the opposite: what the Court of Session went on to say at §25 (immediately following the extract cited above) was that:

> "While our system of law does not always, and for all purposes, recognise a strict dichotomy between public and private law, we have no difficulty in reaching the view that, having regard to the jurisprudence of the European Court of Justice, the activity of the College in question

> would be regarded as being governed to a significant extent under that jurisprudence by public, as opposed to private, law."

52. Its conclusion was thus based on a finding that the activity of the College was governed "to a significant extent" by public law. That is consistent with the position which (as discussed above) has emerged from the jurisprudence of the CJEU, including case-law post-dating the *Edinburgh Telford College* judgment, which requires the tribunal to consider whether the way in which the activity is carried out involves or is closely linked to the exercise of rights and powers of public authority.

53. Mr Firth's second proposition was originally formulated on the basis that a special legal regime would arise where there was a "legal framework" which impacts on the way in which the service is provided, and which does not apply to private operators. He interpreted this as being the case where a public authority is bound by its own guidance or bound to take into account external guidance that does not apply to private traders. Mr Firth reformulated this proposition in his post-hearing submissions, to say that the key question is whether the "legal conditions" under which the public authority carries on the activity are different from the legal conditions to which a private sector operator providing the same service would be subject.

54. Mr Firth's starting point in this regard was a submission that we could and should give a wide interpretation to the first paragraph of Article 13(1) when considering whether public authorities are engaging in activities "as public authorities". It should, he said, come as no surprise that public authorities often engage in activities as a public authority. He submitted that a broad interpretation would still be meaningful because not every activity which a public authority engages in is subject to public law principles.

55. The relevant legal conditions to which a public authority is subject should not therefore, in Mr Firth's submission, be limited to conditions deriving from statute law, but should encompass public law duties to follow guidance, and to depart from guidance or policy requirements only for good and properly articulated reasons. He pointed out that in *Chelmsford* the Upper Tribunal included not only statutory obligations but also fiduciary obligations to ratepayers derived from case-law in its description of the obligations that applied to Chelmsford but not to private sector operators.

56. Mr Firth submitted that disregarding the way in which legal conditions arise, in this case by virtue of public administrative law, would be unprincipled. The way in which the legal obligation arises should not affect the operation of Article 13(1). For example, unlike the UK, some member states have a written constitution. The fact that an obligation derives from common law and not from statute or by reference to a written constitution should not be relevant. In that context we were referred to the observations of the Supreme Court in *R (Miller) v The Prime Minister* [2019] UKSC 41, §§39–40 for the proposition that whilst the UK does not have a written constitution it does possess a constitution that is not confined to statutory rules, but includes constitutional principles developed by the common law.

57. Mr Watkinson submitted that insofar as policies are relied on as part of the basis of an asserted special legal regime, it follows from *Chelmsford* that there must be "sufficient elements deriving from national law" reflected in those policies for them to have a place in the analysis. In that regard, it is not sufficient that the public authority is subject to a generic public law obligation to follow guidance. Rather, it is necessary to identify with precision the specific provisions of national law that give rise to the special legal regime. He noted that insofar as *Chelmsford* referred to fiduciary duties, those were imported by the FTT as part of the identified statutory constraint in s. 19 Local Government (Miscellaneous Provisions) Act 1976 (§59 of the FTT decision), and likewise regarded by the Upper Tribunal as part of the matrix of statutory obligations to which Chelmsford was subject, hence the

reference in §104 of the decision to the "best value obligation, the fiduciary obligation and the other statutory obligations to which we have referred".

58. We accept Mr Watkinson's submissions on this point. As Mr Watkinson pointed out, ordinary principles of public law will apply to any body governed by public law. It is difficult to envisage any public body supplying goods or services which would not be subject to at least some public law obligations. If Mr Firth were correct then all or almost all the activities of a public authority would be carried on pursuant to a special legal regime, and the requirement in Article 13(1) for the public authority to be acting as a public authority would be deprived of any meaningful effect. The CJEU has, moreover, emphasised that the first paragraph of Article 13(1), being a derogation, should be interpreted strictly.

59. It seems to us that Mr Firth's submissions were very close to the approach that was conspicuously rejected in *Commission v Ireland.* If the fact that a public body acts in accordance with powers conferred on it by statute is insufficient to establish that its activities involve or are closely linked to the exercise of rights and powers by a public authority, the same must also be true of the fact that the public authority is subject to general principles of public and administrative law, including the general duty to follow guidance.

60. We see no meaningful distinction in that regard between guidance drawn up by the public body itself, and external guidance. The point remains the same, that the general public law obligation to follow guidance does not amount to a "condition laid down by national law" for the pursuit of the activity at issue, to determine whether that activity is being engaged in under a special legal regime, to use the wording of *Fazenda Pública*, §21.

61. We do not rule out that, in an appropriate case, a specific obligation imposed on a public body by case-law (as opposed to a statutory obligation) might either in itself or alongside other obligations establish that the activity either involves or is closely linked to the exercise of rights and powers by a public authority, so as to give rise to a special legal regime. But the public law principle requiring public bodies to have regard to guidance, and to follow it unless there are clear reasons for departing from it, does not impose any such specific legal obligation. Nothing in that general principle distinguishes the activity under scrutiny – in this case the provision of car parking facilities – from any other activity of the public authority, or shows that the pursuit of that specific activity involves or is linked to the exercise of rights and powers of public authority.

The new argument on statutory constraints

62. Mr Firth's alternative argument, introduced in his written submissions following the decision in *Chelmsford*, was that the statutory constraints referred to in that case were similar to the statutory constraints that apply to the Trust in the present case. Even if, therefore, it was necessary to identify a special legal regime on the basis of something more than general public law principles, he said that the statutory constraints upon the Trust in the present case gave rise to a special legal regime. Specifically, he referred to:

(1) The requirement in s. 63 of the NHS Act 2006 for NHS foundation trusts to exercise their functions "effectively, efficiently and economically".

(2) The requirement in s. 43(3) of the NHS Act 2006 for NHS foundation trusts to carry on activities for the purpose of making additional income only in order to better carry on their principal purpose.

(3) The requirement in s. 149 of the Equality Act 2010 for public authorities to exercise their functions having regard to the need to eliminate discrimination and advance equality of opportunity.

(4) The fact that the 2015 Parking Principles require concessions for carers which are defined by reference to the Care Act 2014, and the requirements in that Act for relevant partners to cooperate with local authorities in the exercise of their functions relating to carers.

(5) The duty to safeguard and promote the welfare of children, under the Children Act 2004.

63. Mr Watkinson objected that the Trust's case on statutory constraints was a change of case for which no application had been made. It was not within the scope of the grounds of appeal, nor was it advanced at the hearing. At an early stage of the proceedings before the FTT, HMRC specifically requested particulars of the precise statutory basis on which the Trust asserted a special legal regime. The Trust simply identified s. 9 of the NHS Act 2006, under which the Trust is authorised to engage in an NHS contract. On appeal, however, even that limited point had not been pursued by the Trust. Instead Mr Firth had forcefully argued, in submissions recorded and addressed above, that it should not be necessary to identify any specific statutory provisions in order to establish a special legal regime. Moreover, no mention had been made of the Equality Act, the Care Act or the Children Act at any stage of the proceedings before now.

64. We consider those objections to be well founded. It is well-established that an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court: see e.g. *Singh v Dass* [2019] EWCA Civ 360, §§15–18, and *Sivier v Riley* [2021] EWCA Civ 713, §18. The Trust has now had two bites of the cherry, in its appeal to the FTT and its further appeal to this Tribunal. The argument now formulated as to statutory constraints arising from the provisions set out above has not appeared at any point of the proceedings before now. There has therefore not been any investigation – nor indeed has there been any evidence – as to the manner and extent to which the Trust is in practice constrained in its decision-making by the statutory provisions now relied upon.

65. Mr Firth argued that the Trust should not be criticised for failing to anticipate the decision in *Chelmsford*, and that the Trust was simply seeking to apply that decision to its own circumstances. He submitted that it was not necessary to consider evidence on the impact of the statutory obligation; rather, he said it was simply a matter of objective interpretation whether the guidance relied upon in a given case reflects the statutory obligations.

66. We disagree. The Upper Tribunal made clear in *Chelmsford* that the decision of the FTT was based on the detailed evidence before it as to how the statutory obligations constrained Chelmsford's powers and decision-making. The Upper Tribunal in turn repeatedly emphasised that evidence in its judgment: see e.g. §§75, 79, 80, 94–95, 97, 100, 102–103 and 106. While it appears that some of the statutory provisions relied upon before the Upper Tribunal may not have been highlighted to the FTT (as noted at §101 of *Chelmsford*), the Upper Tribunal explained that the evidence before the FTT, and the FTT's findings on that evidence, did nevertheless address the way in which Chelmsford "necessarily took account" of the obligations in question (§102). It does not appear that there was any such evidence before the FTT in the present case.

67. Mr Firth is therefore not simply advancing a new legal argument in light of *Chelmsford*; rather he is attempting to introduce an argument which has no foundation whatsoever in the evidence. In our judgment, it is far too late to do so and in the circumstances it would not be fair on HMRC to permit the Trust to do so. Without evidence on the matter we cannot properly reach any conclusions as to

the manner and extent to which the obligations are reflected in the guidance or the decision-making of the Trust in its provision of car parking facilities, so as to inform our analysis of whether the Trust is in that regard acting under a special legal regime that is not applicable to private economic operators.

Conclusion on the first ground of appeal

68. For the reasons given above, the Trust has not established any error of law by the FTT in finding that the Trust did not provide car parking under a special legal regime.

Ground 2: Does the supply lead to a significant distortion of competition?

69. The second ground of appeal is that the FTT erred in law in concluding that treating the Trust as non-taxable would lead to a significant distortion of competition. This ground arises only if we are wrong in our conclusion on the first ground. The submissions we have received on this ground go well beyond the submissions made to the FTT. In those circumstances we set out our conclusions on the issues with some diffidence, as they do not form part of our primary reasons for dismissing the appeal.

70. The Trust makes the following criticisms of the FTT's conclusion that, if the Trust is a non-taxable person, there would be a significant distortion of competition:

> (1) The facts found by the FTT, taken as a whole, should have led to a conclusion that the Trust was not in actual or potential competition with private operators.
>
> (2) The facts found by the FTT, taken as a whole, should have led to a conclusion that (a) there would be no distortion of competition, or at least (b) that any distortion would be negligible.
>
> (3) There was no or insufficient evidence for the FTT to conclude that HMRC had discharged the burden of proof on this issue.

71. The way in which the grounds of appeal are expressed suggest a challenge to the FTT's findings of fact. Mr Firth emphasised that, save in relation to the last of those criticisms, the challenge was to the test which the FTT applied in reaching its conclusions on whether there was a significant distortion of competition. In relation to the last criticism, this was essentially a challenge based on *Edwards v Bairstow* [1956] AC 14.

72. It is common ground that HMRC bears the burden of proving that if the Trust is treated as a non-taxable person then this would lead to a significant distortion of competition. The following further propositions derived from the CJEU case-law were also common ground:

> (1) The existence of a significant distortion of competition must be evaluated by reference to the activity in question, as such, without evaluating any local market in particular: *Isle of Wight*, §§40–53; Case C-174/14 *Saudaçor* EU:C:2015:733, §74; Case C-344/15 *National Roads Authority v Revenue Commissioners* EU:C:2017:28, §41.
>
> (2) The expression in the second paragraph of Article 13(1) "would lead to significant distortions of competition" encompasses not only actual competition, but also potential competition, provided that the possibility of a private operator entering the relevant market is real, and not purely hypothetical: *Isle of Wight*, §§64–5; *Saudaçor*, §74; *National Roads Authority*, §41.

(3) The reference to "significant" distortions of competition means that actual or potential distortions must be more than negligible: *Isle of Wight*, §76.

73. It is also clear from the CJEU's case-law that:

(4) The purpose of the second paragraph of Article 13(1) is to protect the commercial position of private operators, by ensuring that they are not placed at a disadvantage because they are taxed whilst bodies governed by public law are not taxed: *National Roads Authority*, §39.

(5) The second paragraph cannot be construed narrowly, since by contrast with the derogation in the first paragraph, the second paragraph restores the general rule that any activity of an economic nature should be subjected to VAT: *Isle of Wight*, §60.

(6) An analysis of the existence of a significant distortion of competition must involve an assessment of the economic circumstances, and cannot be demonstrated by the mere presence of private operators on a market: *National Roads Authority*, §§40–44.

74. Proposition (5) was also noted by the Upper Tribunal in the *Mid-Ulster* decision, in a passage drawn to our attention by HMRC (see §43, and also §§51–52 of the decision).

75. It is in the light of these propositions that we will consider the Trust's various criticisms of the Decision under Ground 2.

Ground 2(1): Actual or potential competition

76. It follows from proposition (1) at §72 above that we are not specifically concerned with competition between the Trust and private car park operators in Northumberland and North Tyneside. Rather, we are concerned with NHS trusts generally and the national market in the UK, or at least in England.

77. At §64 of the Decision (cited above) the FTT found that there was actual competition between the Trust's car parks and parking provided by private operators. That finding was based on various facts found by the FTT included in our summary above. On the basis of those facts the FTT had already concluded (in the context of whether the Trust's supplies were an economic activity) that there was actual competition between the Trust and private car park operators:

> "41. … I do not need to decide whether the existence of purely theoretical or potential competition is sufficient to establish the existence of a market for this purpose as it is clear on the evidence that there was actual competition. The Car Parking Best Practice states explicitly in paragraph 24 that car parking on NHS sites is in competition with alternative car parking facilities. Paragraph 3.5 of the HTM warns NHS bodies that sites close to city/town centres may be used by persons not attending the healthcare facility, eg commuters and visitors to the area, if the car parking charges are lower than local car parks. This shows that the market for car parking includes both the Trust's car parks and other car parks or parking areas in or near the Trust's hospitals and health centres. Further, until it changed its charges, one of the Trust's sites was used by persons traveling from the local airport and thus was in competition with airport parking."

78. Mr Firth submitted that the FTT's findings of fact ought to have led the FTT to find instead that the Trust was not in actual or potential competition with private car park operators. His principal submission was that opportunities for competition were limited, and where they did arise, the Trust was required by guidance to take steps to avoid competition. He submitted that this was the very opposite of competition. Further, the FTT failed to appreciate that the mere presence of private operators in a market does not demonstrate the existence of either actual or potential competition. In

particular, the FTT did not consider whether the restrictions on how the Trust was required to operate prevented it from being in competition with private operators.

79. We do not know whether the FTT was invited to find that there was no actual competition on the basis that the Trust was required to take steps to avoid competition. It is unlikely that it was, because there is no discussion of the point by the FTT. However, as a matter of principle it does not seem to us that the existence of guidance pursuant to which a public authority *may* take steps to avoid competition can negate the existence of actual or potential competition. Quite simply, the guidance may or may not be followed, and whatever steps are taken may or may not be effective in precluding a situation of competition with other facilities.

80. In circumstances where the guidance itself acknowledges the existence of competition with private operators, we consider that the FTT was entitled to approach the question of actual competition in the way it did. The FTT's conclusion was supported by the evidence to which it had referred at §41. We do not consider that the FTT made any error of law in finding actual competition between the Trust's car parks and parking provided by private operators in or near those areas.

Ground 2(2)(a): Distortion of competition: the parties' arguments

81. At §§65–66 of the Decision (also cited above) the FTT found that treating the Trust as a non-taxable person would lead to a significant distortion of competition.

82. Mr Firth said that in reaching that conclusion the FTT applied the wrong test or misapplied the test. In particular, Mr Firth submitted that:

> (1) Distortion of competition must involve a situation where non-taxation would lead public authorities to behave differently in the market from the manner in which they would behave in circumstances of taxation, as a result of which the commercial position of private operators would be affected. Mr Firth said that this "test" could be identified from the domestic decisions in the *Isle of Wight* litigation which followed the judgment of the CJEU, referred to above. On that basis he said that the FTT erred in basing its conclusions on a finding that lower charges "might" occur if the VAT element ceased to be payable by the Trust, and that the Trust "could" in those circumstances undercut commercial operators.
>
> (2) The FTT erred in finding that whether the Trust chose to reduce its charges or simply pocketed the additional income was "nothing to the point" because in both cases there would be distortion of competition. Mr Firth submitted that the FTT ought to have found that if the Trust retained the additional income, there would be no effect on the car parking market and non-taxation of the Trust would not distort competition.
>
> (3) Since the FTT recognised that the Trust was required to ensure that charges were the same or higher than local car parks to discourage non-hospital use, the logical conclusion was that non-taxation would *not* lead the Trust to behave differently if it were treated as non-taxable.

83. Mr Watkinson did not accept that the test described by Mr Firth was an exhaustive test to be applied to determine whether there was a distortion of competition for the purposes of the second paragraph of Article 13(1). He submitted that the FTT did not err when it said that lower charges "might" occur, and that the Trust "could" undercut commercial operators. All that was required was the possibility of a significant distortion of competition.

84. To address these points it is necessary to consider, in addition to the propositions that we have set out at §§72–73 above, the analysis in the domestic *Isle of Wight* cases following the judgment of the CJEU, on which Mr Firth placed particular reliance.

The Isle of Wight cases

85. The starting point is that when the case returned to the High Court, following the preliminary ruling of the CJEU, HMRC made a submission that the local authorities' appeals should be dismissed on the basis of a presumption, where the activity was more than negligible, that the differential tax treatment of supplies of off-street parking by local authorities and commercial operators would lead to distortions of competition. Rimer LJ rejected that proposition, finding that the inquiry into distortions of competition required a factual investigation, not the application of a presumption. He therefore remitted the case to the FTT to be considered on the evidence: [2009] EWHC 586 (Ch).

86. There was then an interlocutory hearing before the FTT at which HMRC again contended that once it was established that there was more than negligible competition between public and private providers of a given service, non-taxation of the public body was "conclusively presumed" to distort competition. On that basis, HMRC submitted that the only evidence required for the purposes of the enquiry mandated by the CJEU judgment was evidence of the scale of provision of off-street parking nationwide, evidence of the degree to which that was provided by local authorities, and evidence at a "high level of abstraction" of the existence of actual or potential competition by private operators. The appellant local authorities by contrast contended that non-taxation would not lead local authorities to behave differently as regards their pricing, and that motorists were not sufficiently price-sensitive for commercial operators to be affected in any event.

87. The FTT gave the appellants permission to adduce evidence on the points on which they relied, concluding on the basis of Rimer LJ's decision that the appellants were plainly entitled to adduce the evidence that they sought. The FTT also noted that in any event the CJEU judgment did not support the proposition that non-taxation was irrebuttably presumed to distort competition: [2010] UKFTT 264 (TC). On that basis, considerable evidence (including expert evidence) was adduced by both the local authorities and HMRC.

88. The FTT's substantive decision following the remittal was given in *Isle of Wight Council v HMRC* [2012] UKFTT 648 (TC). At the outset, the FTT considered the argument by counsel for HMRC yet again that there was a presumption that where there was actual competition, differential taxation would lead to distortion, relying in particular on a new decision of the CJEU in C-259/10 *Rank v HMRC* EU:C:2011:719. The FTT again rejected that proposition as a presumption of law, but considered that it would be likely that, as a matter of fact, differential tax treatment of similar offerings would distort competition in any market:

> "61. We agree with Mr Vajda that the way in which the Court dealt with potential competition in the present case makes it likely that the Court did take it for granted that differential tax treatment would distort competition in the off-street car parking market; differential tax treatment of similar offerings generally does distort competition, as the Court observed at paragraph 35 of *Rank*. The fact that we have been driven to conclude as a matter of fact that differential tax treatment would distort competition in the off-street car parking market, despite the particular features of the market urged upon us by Mr Ghosh, gives us a considerable degree of confidence in the suggestion that differential tax treatment of similar offerings will distort competition in any market. But if that is correct, it is a proposition of fact. We agree with Mr Ghosh that what Mr Vajda is contending for amounts to a presumption of law. We also find it salutary to remember that the presumption will only make a difference in a case in which distortion of competition cannot be established. Like Rimer LJ and the members who gave the interlocutory decision of this Tribunal, we are all unpersuaded that it

is possible to spell out of the ECJ's judgment a proposition of law that differential tax treatment of competing suppliers amounts to distortion of competition without more."

89. The FTT went on to say:

> "72. There was no discussion before us specifically of the meaning of the expression 'distortion of competition'; we do not consider that any was required. Mr Ghosh's formulation of the two alternative negative propositions that, if accepted, would bring his clients success … implicitly accepts that there would be distortion of competition if (1) a situation of non-taxation would lead Local Authorities to behave differently on the market from the manner in which they would behave in circumstances of taxation and (2) the commercial position of private operators of car parks would be affected as a result. We consider that that is correct.
>
> …
>
> 74. Mr Vajda submitted, however, in connection with his submission that distortion of competition was to be presumed, that the exercise that the Court of Justice had entrusted to us involved looking at the issues with a high degree of abstraction; he pointed out that we are a tax tribunal and not the Competition Commission and that the test which the ECJ judgment required national courts and tribunals to apply was one designed for tax tribunals and not competition authorities. Though we have rejected his submission that distortion of competition is to be presumed, we find those points to be well made. We add that we do not have either the resources or the information-gathering powers of the Competition Commission and that the question that we are required to answer is more difficult to answer with precision than the questions faced by the Competition Commission. The Commission is required to reach conclusions about circumstances in actual markets that can be investigated; in a merger case it is also faced with the more difficult task of predicting the consequences of a future event (namely the proposed merger). We have to answer the even more abstract question, not of the consequences of an event, but of the consequences of a different order of reality.
>
> 75. On the basis of the various considerations discussed in this section of our Decision, we consider that the question that article 4(5)(2) requires us to answer is whether, in the event that Local Authority off-street car parking were not taxable, there would be in the United Kingdom as a whole a degree of distortion of competition that could not be dismissed as negligible. In doing so we are simply to compare a situation in which the activity is non-taxable with the situation in which it is taxable. The question is in our view a question of fact; it is, however, a question of secondary or inferential fact to be judged on the basis of conclusions of primary fact."

90. The FTT went on to review, in considerable detail, the evidence before it as to the decision-making of local authorities and the consequences of those decisions, concluding that the evidence established (contrary to the contentions of the appellant local authorities) that there would be a non-negligible distortion of competition. In particular, the FTT reasoned that taking into account upward and downward pressures on parking charges, local authorities would lower prices if VAT was not chargeable; this would lead to correspondingly lower prices for commercial operators; and that the effect on prices would be a reduction of at least 7.5% which was not negligible.

91. On appeal to the Upper Tribunal (*Isle of Wight Council v HMRC* [2014] UKUT 446 (TCC)) the Upper Tribunal noted that:

> "9. … Although the FTT accepted … that it was 'likely that the court did take it for granted that differential tax treatment would distort competition in the off-street car parking market', it rejected again, and consistently with what Rimer LJ said when remitting the case for rehearing, the argument that what the court said gave rise to a presumption of law. Rather, it

> considered that any presumption there might be would be a presumption of fact; and it is a clear inference that the FTT took the view that if there should be such a presumption, it was rebuttable. Indeed, there would have been no purpose to its examination of the extensive evidence before it had it thought otherwise. HMRC have not renewed their earlier argument before us, and we are content to proceed from the assumption that the FTT's analysis is correct."

92. At §12, the Upper Tribunal cited §75 of the FTT's judgment, noting that neither party had disagreed with "that formulation of the question, with the FTT's statement of the proper approach, or with its description of the question as one of fact." The Upper Tribunal repeated at §53 that the parties had rightly accepted that the FTT had identified and applied the correct test and the correct approach to that test. The question was therefore whether the FTT had erred in its understanding of the way in which local authority decision-making was undertaken. Following a discussion of the evidence before the FTT, the Upper Tribunal ultimately concluded that there was no error in the FTT's analysis of that evidence (§57).

93. That decision was appealed to the Court of Appeal (*Isle of Wight Council v HMRC* [2015] EWCA Civ 1303). Given the position taken in the Upper Tribunal, the question of whether there was a presumption of law was not in issue. Rather, the Court of Appeal noted at §15 that the question was one of fact. As to the legal test, the Chancellor found that:

> "63. The principal focus of Mr Ghosh's submission was inevitably and correctly on the findings of the FTT since the critical issue is whether the FTT made an error of law in the light of its legitimate findings of fact …
>
> 64. At the heart of the FTT's decision was the conclusion that, in a hypothetical world in which VAT had never been imposed on OSCP [off-street car parking] charges, those charges would have been lower. That conclusion was based on two principal matters.
>
> 65. The first was that, in fixing the level of charges, local authorities are bound to have regard to the need to meet costs. The second was that, if VAT had never been payable on OSCP charges, local authorities would have been able to, and would have wished to, keep charges lower in order to boost the local economy by attracting shoppers with cars while maintaining the same spending priorities and the same allocation of the general fund as between the different activities financed out of the general fund."

94. The Court upheld both of those conclusions. The Chancellor's judgment continued:

> "76. I would, therefore, dismiss this appeal since the appellants have not contended that, if the FTT was entitled to reach its conclusion on pricing, it was not also entitled to conclude that the non-taxation would lead to significant distortion of competition within Article 4.5(2). It is plain that if one supplier in the market for OSCP is able to have lower prices over time because of its special tax status that is likely significantly to distort competition."

Discussion

95. There is no doubt that the situation described by the FTT at §72 of its decision in *Isle of Wight*, and relied upon by Mr Firth, is one in which a distortion of competition would arise, as the Chancellor made clear at §76. It would, however, be wrong to describe that as an exhaustive test as to what amounts to distortion of competition: indeed the FTT made clear at §72 that it was not necessary specifically to define the meaning of that expression.

96. Mr Firth contended that the Upper Tribunal had endorsed his "test" when it said at §53 that "the FTT identified the correct test and the correct approach to that test". That is a misreading of the Upper

Tribunal's decision. The only "test" referred to by the Upper Tribunal was at §12 where it referred to §75 of the FTT's decision. §72 of the FTT's decision was not mentioned in the decision of the Upper Tribunal, or indeed in the judgment of the Court of Appeal. Mr Firth also contended that the §72 "test" for distortion was the premise of the Court of Appeal's judgment, relying on §§63–4. We do not read those paragraphs in that way. All that the Court of Appeal was saying was that the focus was on the factual findings of the FTT, and that the FTT had concluded that charges would have been lower if VAT had not been imposed on the local authorities.

97. In so far as the *Isle of Wight* series of cases established any test for a distortion of competition, the key point of principle is that there is no irrebuttable presumption of law to the effect that differential taxation of public bodies and private operators will distort competition between them, once actual or potential competition has been established. Rather, it is a matter of fact in every case, albeit that it is likely (as a matter of fact) that differential taxation will have that effect. The public body and HMRC are therefore in principle entitled to adduce evidence directed at showing whether, on the particular facts of the case, distortion would occur.

98. We therefore reject Mr Firth's submissions as to the "test" for a distortion of competition to be derived from this line of cases.

99. Equally, however, we do not consider that the case-law supports Mr Watkinson's contention that a mere "possibility" of a distortion of competition is sufficient. Mr Watkinson relied on the statement of the principle originally set out in *Carpaneto* at §24:

> "… bodies governed by public law are treated as taxable persons in respect of activities in which they engage as public authorities where those activities may also be engaged in, in competition with them, by private individuals, in cases in which the treatment of those bodies as non-taxable persons could lead to significant distortions of competition, but they are not obliged to transpose that criterion literally into their national law or to lay down precise quantitative limits for such treatment."

100. The CJEU was specifically asked, in the second question referred in *Isle of Wight*, what degree of probability or level of certainty is required by the expression "would lead to". The UK government submitted that "would" was interchangeable with "could" in this context, relying on *Carpaneto*. The CJEU did not answer that question, confining its answer instead to the question of whether potential competition was sufficient or whether actual competition was required. Conspicuously, however, it did not repeat the *Carpaneto* formulation of "could lead to"; on the contrary, at §53 it expressly referred to "the significant distortions of competition, to which the treatment as non-taxable persons of bodies governed by public law acting as public authorities would lead". That language was repeated in subsequent cases, e.g. Case C-79/09 *Commission v Netherlands* EU:C:2010:171, §91; *Saudaçor* §74; and *National Roads Authority*, §41.

101. The point was put even more clearly at §43 of *National Roads Authority*:

> "As follows from the wording of the second subparagraph of Article 13(1) of the VAT Directive and from the case-law on that provision, its application presupposes, first, that the activity in question is carried on in competition, actual or potential, with that carried on by private operators and, secondly, that the different treatment of those activities for VAT purposes leads to significant distortions of competition, which must be assessed having regard to economic circumstances."

102. The highest that Mr Watkinson was able to put his case on this point was by reference to a comment of Advocate General Colomer in his opinion in Case C-246/08 *Commission v Finland*, §73,

that "it is sufficient that there is a glimpse of a future distortion of competition." It is clear from the context, however, that the Advocate General was referring to the principle established by *Isle of Wight* that the distortion of competition required will encompass not only actual competition, but also potential competition, provided that it is real and not purely hypothetical. In any event the CJEU did not adopt the Advocate General's formulation in its judgment in *Commission v Finland* (EU:C:2009:671); nor has that formulation been adopted in any subsequent judgment to which we have been referred.

103.The relevant question is therefore whether the different treatment of the activity for VAT purposes would lead to a significant distortion of competition, including a distortion of potential competition provided that there is a real and not hypothetical possibility of market entry by a private operator.

104.That is the test which the FTT adopted in the present case. It concluded, at §§65–66, that treating the Trust as a non-taxable person would lead to a significant distortion of competition. The supporting discussion in §65 of the different ways in which the Trust might react if the supply was not subject to VAT (i.e. by introducing lower charges or simply retaining the additional income) did not turn on any different test. On the contrary, the FTT's point was that in either case there "would" be a distortion of competition. In our view, the FTT did not err in the test that it adopted.

105.Mr Firth's second submission set out at §82 above was a criticism of the FTT's conclusion that if the Trust simply took the additional income without lowering its charges, that would distort competition. Mr Firth argued that the fact that the Trust might earn a higher profit cannot in itself amount to a distortion of competition. Something more is needed, he said, such as evidence that higher profits would lead to expansion of the activity, to the disadvantage of private operators.

106.We do not accept that criticism. The consistent approach taken by the CJEU to the question of whether a distortion of competition arises in the VAT context is that where two identical or similar supplies which meet the same needs are treated differently for the purpose of VAT, that gives rise, as a general rule, to a distortion of competition: *Rank*, §35. The FTT endorsed that proposition at §61 in its decision in *Isle of Wight*, cited above, albeit emphasising that this was a proposition of fact rather than a presumption of law. The Upper Tribunal in *Isle of Wight* made no criticism of the FTT in that regard, and we respectfully agree with the approach taken by the FTT in that case.

107.Put another way, the disadvantage to private operators does not depend on the decision taken by the public body as to the way in which it will reflect the fiscal advantage in its pricing. Rather, the disadvantage flows from the fact of the differential treatment of identical or similar activities meeting the same needs. That disadvantage cannot be excluded where the public body chooses to maintain its pricing but retain a higher profit from that: we agree with the FTT that the ability of a public body to make a greater profit from the relevant activity by comparison with the competing private operator, as a result of differential fiscal treatment, will in principle produce a distortion of competition. This does not amount to "an impossible test" as suggested by Mr Firth. It is open to a public authority to adduce evidence that there is in fact no distortion of competition in the circumstances of a particular case.

108.Moreover, if one were to read into the test a requirement to carry out an inquiry into the consequences, in terms of the decision-making of the public body, of the fiscal advantage obtained by treatment as a non-taxable person, that would run plainly counter to the requirement of legal certainty emphasised by the CJEU in *Isle of Wight* (§§47–58), because it would render the taxation of public bodies under Article 13 dependent on decisions that might vary from time to time. The CJEU in *Isle of Wight* concluded, in that regard, that the principle of legal certainty precluded an

assessment based on the conditions of competition on local markets, giving rise to disputes following any change in those conditions of competition. Even greater uncertainty would result from an assessment based on the decision-making of public bodies, which could change at will at any time.

109.We also note the repeated emphasis in the case-law on an evaluation by reference to the "activity" in question, without that activity relating to any particular local market: see proposition (1) at §72 above. As the FTT noted at §74 of its decision in *Isle of Wight*, that involves looking at the issues at a fairly high degree of abstraction, rather than conducting a detailed competition investigation of the sort that might be embarked upon by the competition authorities. There is no suggestion in the case-law of the CJEU that the application of the second paragraph of Article 13(1) requires an assessment of the future decisions that might be taken by a public body as a consequence of the non-imposition of VAT, and in particular a determination of whether those decisions are likely to involve the setting of lower charges rather than the retention of profits to be used for the provision of other services.

110.It is quite true that in the domestic *Isle of Wight* decisions there was considerable (and, at first instance, very detailed) discussion of the way in which the local authorities would have behaved in a situation of non-taxation. That was, however, because of the evidence before the FTT and the way in which the parties' arguments had evolved, as we have set out above.

111.Those conclusions also answer Mr Firth's third submission set out at §82 above, which we reject for the same reasons. In any event (and for completeness) we do not agree that the Trust is *required* to ensure that its charges were the same or higher than local car parks. The guidance that we have described at §13 above simply states that NHS sites that are close to city/town centres "may" need to ensure their car-parking charges are not lower than local car parks, to discourage commuters and others from using the NHS car parks. It provides no sufficient basis for a finding that there would be no distortion of competition.

112.We therefore reject Mr Firth's three criticisms summarised at §82 above. We are satisfied that the FTT did not err in law when it concluded on the facts as found that there would be distortion of competition.

Ground 2(2)(b): "Significant" distortion of competition

113.Mr Firth pointed to the detailed analysis by the FTT in *Isle of Wight* in reaching its conclusion that the distortion of competition in that case would be significant. It found that non-taxation of local authorities would depress pricing by at least 7.5%. Mr Firth submitted that there had been no such analysis in the present case, and that without considering what effect the distortion of competition would have, the finding at §65 of the Decision that the distortion of competition could not be described as negligible was unsupported.

114.We reject this submission for similar reasons to those set out above. While the CJEU case-law establishes that actual or potential distortions of competition must be more than negligible, that is to be assessed by reference to the activity in question and an analysis of the market. It does not require an assessment of the effect of non-taxation on the pricing decisions of the public bodies in question. While the FTT in *Isle of Wight* did reach conclusions on that point, as we have already explained that was because of the particular arguments and evidence before it.

115.The FTT was therefore not required to conduct the sort of assessment that the FTT in *Isle of Wight* embarked upon. The analysis at §65 was sufficient and there was no error in its approach.

Ground 2(3): Insufficient evidence to discharge the burden of proof

116.The remaining question is whether the FTT's conclusion is susceptible to an *Edwards v Bairstow* challenge, on the grounds that there was insufficient evidence to find a significant distortion of competition.

117.Mr Firth again relied on the approach taken in the *Isle of Wight* cases. Mr Watkinson submitted that the evidence before the FTT was sufficient for it to make its findings at §65 to the effect that there would be significant distortion of competition if the Trust was non-taxable.

118.It follows from our comments above that we do not regard the detailed factual and expert evidence before the FTT in *Isle of Wight* as epitomising the sort of evidence that is required to determine the existence of a distortion of competition for the purposes of the second paragraph of Article 13(1) PVD. That evidence was adduced as a consequence of the way in which the appellant local authorities put their case. But it is notable that the FTT's starting point was that the CJEU in *Isle of Wight* did likely take it for granted that differential tax treatment would distort competition in the off-street car parking market, such that the FTT had "a considerable degree of confidence" in the proposition as a matter of fact that differential tax treatment of similar offerings would distort competition (§61). That passage of the FTT's judgment was referred to by the Upper Tribunal, which proceeded on the assumption that that analysis was correct (§9 of the Upper Tribunal decision).

119.We agree with the comments of the Upper Tribunal in *Loughborough Student's Union v HMRC* [2013] UKUT 0517 (TCC) in the context of an exemption from VAT for certain fund-raising events:

> "64. We consider that *Isle of Wight* and *Rank* show that whether there is distortion of competition must be determined by reference to the nature of the activity and without regard to the particular market in which it is supplied. It is not necessary to show that there is actual competition between the two activities provided that the potential competition is a real and not purely hypothetical possibility. If the two activities are identical or similar from the point of view of the consumer and meet the same needs of the consumer then they are in competition with each other. If, further, the two activities are treated differently for the purposes of VAT then, as a general rule, that will be regarded as giving rise to a distortion of competition."

120. Contrary to Mr Firth's submissions, we do not consider that this is inconsistent with the later ruling of the CJEU in *National Roads Authority*. That ruling made clear that it is necessary to consider the "economic circumstances" of the individual case. It is clear, however, from the judgment in that case that what was meant by this was, firstly, an evaluation of the "activity in question, as such" (§41), and secondly an evaluation of the facts, objective evidence and market analysis to support any conclusion on the existence of actual or potential competition (§42). It is for that reason that the CJEU said that potential competition could not be established on the basis of a "purely theoretical possibility" of market entry by a private operator.

121.The CJEU did not, however, suggest that it is necessary to carry out a granular analysis of the competitive conditions of the specific local market or markets on which public authorities are present, supported by factual and expert evidence, in order to establish the existence of a significant distortion of competition. Indeed any such proposition would have run counter to its emphasis at §41 that the existence of a significant distortion of competition "must be evaluated by reference to the activity in question, without that evaluation relating to any particular market". As the FTT in *Isle of Wight* suggested, the required analysis is at a high level of abstraction.

122.Accordingly, we consider that the starting point was correctly set out at §64 of *Loughborough Student's Union*. The existence of distortion can, of course, be rebutted on the facts of the individual

case, as the *Isle of Wight* series of cases made clear. That is a fact sensitive analysis, and the evidence that may be relevant for that assessment will turn on the circumstances of the individual case.

123.In the present case, the FTT assessed the existence of a significant distortion of competition on the basis of the facts and matters set out in §§64–65 of the Decision. Having concluded (by reference to its earlier findings at §41) that there was actual competition between the Trust's car parks and parking provided by private operators, the FTT went on to find that there would be a distortion of competition through the ability of the Trust to provide cheaper parking or the higher profit derived from that service. It considered that the amount of the potential difference in pricing or profit between parking provided by the Trust and that provided by commercial operators if VAT ceased to be chargeable could not be described as negligible.

124.We have already concluded above that the FTT did not err in its approach. As to the substance of its factual conclusions, we consider that those are clearly conclusions that the FTT was entitled to reach on the evidence before it, and cannot be impugned on appeal.

Conclusion

125.For the reasons given above, we dismiss the appeal on Ground 1. If necessary, we would also have dismissed the appeal on Ground 2.

MRS JUSTICE BACON
JUDGE JONATHAN CANNAN

RELEASE DATE: 07 October 2022