



Neutral Citation: [2023] UKFTT 00991 (TC)

Case Number: TC09002

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House

Appeal reference: TC/2021/00823

VALUE ADDED TAX – supply of services linked to the online sale of prescription contact lenses – whether the supply of medical care within Item 1, Group 7, Schedule 9, Value Added Tax Act 1994 – no – appeal dismissed

Heard on: 20-23 June 2023

Judgment date: 21 November 2023

Before

**TRIBUNAL JUDGE MARK BALDWIN
DR CAROLINE SMALL**

Between

VISION DISPENSING LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Nicola Shaw KC and Harry Winter, of counsel, instructed by Bristows LLP

For the Respondents: Brendan McGurk of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant (“VDL”) supplies services in connection with the online sale of contact lenses and this appeal is concerned with the question whether those supplies attract value added tax (“VAT”) at the standard rate (as HMRC say is the case) or are exempt (as VDL say they are) under Item 1(b) of Group 7 of Schedule 9 to the Value Added Tax Act 1994 (“VATA”).

2. The appeal is against a decision letter dated 5 June 2020, assessments covering the period 1 April 2015 to 21 March 2020 and the rejection of an error correction notice for the period 1 April to 30 June 2020. All these matters were the subject of a review, which upheld HMRC’s initial conclusions in a review conclusion letter dated 12 February 2021. For periods after 30 June 2020, VDL have been accounting for VAT pursuant to HMRC’s decision letter. Depending on the outcome of this appeal, VDL intend to seek repayment of VAT for these periods pursuant to section 80 VATA.

3. In essence, there are two questions in issue and the answer to both must be “yes” if the appeal is to be allowed. Those questions are:

- (1) Do VDL’s services constitute medical care?
- (2) Are VDL’s services wholly performed or directly supervised by appropriate persons?

4. The hearing ran over four days, during which we heard from four witnesses, whose evidence we summarise below. We were taken through several documents, including the Vision Direct website, and have reviewed videos and other material linked to it. We had detailed submissions orally and in writing before, during and after the hearing from counsel on both the law and the evidence. One specific point (the implications of the Vision Direct website being owned and operated by a company other than VDL) began to strike us as very important as we wrote this decision, and we asked both parties for additional submissions on this point. The sheer volume of material we reviewed during the hearing and contained in linked material we viewed after the hearing means that we cannot refer to every piece of evidence put before us. We summarise the (accepted and disputed) evidence to the extent necessary to explain our findings of fact and conclusions, but the fact that we do not refer to a piece of evidence should not be taken as suggesting that we have not reviewed it or taken it into account.

5. It may help briefly to explain who the various (natural and legal) persons involved in this case are:

Vision Dispensing Limited (“VDL”)	The Appellant. A UK based company which provides services linked to the sale of contact lenses by VDBV.
Vision Direct BV (“VDBV”)	A Dutch company which sells contact lenses and other optical products using a website.
Vision Direct	A group of companies, of which VDL and VDBV are members. We use this term when something is done by one or more of the group companies, but it does not matter which company
Benjamin Dumaine	A French-qualified opticien-lunetier employed by VDBV and involved with Vision Direct since 2012
Yannick Roth	A French qualified opticien-lunetier. A director of Vision Direct Sarl

	(a French company in the Vision Direct group), but who also performed duties for other Vision Direct companies including VDL until he left in 2022.
Brendan O'Brien	A UK registered optometrist. Chief Operating Officer of Vision Direct until he left in April 2022.
Damian Hall	Employed by VDL and other Vision Direct companies since March 2016, initially as Head of Customer Services and subsequently as Director of Customer Service. He has recently left Vision Direct.
Carl Greatbanks	A UK-qualified contact lens optician. Employed as a specialist contact lens consultant since October 2021 by VDL jointly with other companies in the Vision Direct group.
Kiran Gill	Head of Legal at the General Optical Council (GOC). Called as a witness by HMRC.

THE VISION DIRECT GROUP

6. In outline:

(1) VDL is a UK incorporated company and a member of the Vision Direct corporate group. VDL has a sister group company called Vision Direct BV (“VDBV”) which is based in the Netherlands.

(2) VDL provides services from physical locations in the UK. It operates (but does not lease or own – the lease is in the name of another Vision Direct group company) a large warehouse facility near York. Goods (contact lenses and other optical products) belonging to VDBV are stored in the warehouse and dispatched to purchasers by VDL, using its workforce of fulfilment operatives. VDL also employs customer assistants, who deal with a range of enquiries from customers,

(3) VDBV operates the website www.visiondirect.co.uk through which prescription contact lenses and other optical goods are supplied to UK customers.

(4) Customers purchasing prescription contact lenses or other optical products online enter two contracts: one with VDBV for the supply of contact lenses and one with VDL (solely) for the supply of dispensing services. There is also a contract between VDL and VDBV. Ms Shaw told us that VDL is not paid a fee by VDBV; its income comprises by the fee paid by customers.

(5) Of the total price paid by a customer for contact lenses or other optical products, 82% is consideration for the supply of prescription contact lenses or other products by VDBV (which is standard-rated and on which VAT has been accounted for to HMRC) and 18% is consideration for the supply of dispensing services by VDL.

(6) The same model is used by the Vision Direct group more widely: throughout the period relevant to this appeal, VDBV acted as the hub for the group’s sales of contact lenses across the EU using country-specific websites to supply different regions and VDL supplied the dispensing services to customers.

7. The reasons why the Vision Direct group operates in this way are explained in the next section of this decision (in particular at [2]).

THE BUSINESS OF SUPPLYING CONTACT LENSES AND ITS REGULATION

8. It may be helpful at this stage to explain the various stages involved in obtaining/supplying contact lenses and those involved at the various points in the chain. Mr Carl Greatbanks (whose evidence we discuss further below) provided some useful background to the way contact lenses are prescribed, which was not challenged. Firstly, he described the various roles within the optical trade.

- (1) Optical assistants work on the shop floor engaging with customers under the supervision of more qualified individuals.
- (2) Dispensing opticians have an optical qualification (a foundation degree or level 5 qualification, broadly equivalent to the first part of a bachelor's degree) and can fit and dispense spectacles. They can also provide dispensing services related to contact lenses (such as recommending brands and giving clinical advice). They will typically supervise optical assistants.
- (3) Contact lens opticians (CLOs) are dispensing opticians who have taken a further course leading to a certificate (a level 6 qualification broadly equivalent to the second part of a bachelor's degree). A CLO can undertake the initial fitting of contact lenses, carry out fit checks and examinations of the front of a customer's eye. In addition, they can do everything that a dispensing optician can do.
- (4) Optometrists (also known as ophthalmic opticians) have completed a university level course and can provide full eye tests and prescriptions to customers.
- (5) Ophthalmologists are medical doctors who specialise in eye conditions.

Mr Greatbanks said that most high street opticians would not have an optometrist or CLO in the shop permanently, but they would need a dispensing optician in order to be able to sell glasses and contact lenses to customers who have already had their initial lenses prescribed by an optometrist and fitted by an optometrist or CLO.

9. In terms of contact lenses, the process for a customer wanting to wear these for the first time involves:

- (1) A full eye test with an optometrist who will then issue a prescription.
- (2) An optometrist or CLO will take the prescription, inspect the customer's tears, lids, eyelashes, and the front of the eye (not a full eye test) and ask health and lifestyle questions, such as how often a customer intends to wear a contact lens. They will then select appropriate contact lenses and check they fit comfortably on the customer's eye. These will be used by the customer for a "trial run". This initial fitting of contact lenses for a customer (although it can be done by an optometrist) is a CLO's special area of expertise.
- (3) Then the customer will be handed over to an optical assistant who will show the customer how to put the contact lenses in and take them out, give them general handling advice and a brochure of information. The customer then leaves the store with their lenses for a two-week trial.
- (4) Most high street opticians recommend an end of trial appointment, but many now do this remotely; they will call the customer to ensure that they have suffered no discomfort.

10. In terms of subsequent purchases, lenses will generally be dispensed without the need for eye tests or the involvement of an optometrist or CLO. Most high street opticians have two options available for purchasing further contact lenses, cash purchases or direct debit.

Cash purchase buyers will call up or physically attend the shop, request a number of lenses from an optical assistant and pay for them. Direct debit buyers will simply periodically receive more contact lenses without further engagement. If a customer needs advice, they will call up or ask in the shop. Typically, an optical assistant will be able to give this, but they would seek assistance from a dispensing optician if necessary.

11. Unsurprisingly, steps in the process of supplying contact lenses are subject to regulation. In the United Kingdom the Opticians Act 1989 (“OA89”) established the General Optical Council (“GOC”) to regulate those involved in the provision of optical appliances (including contact lenses). OA89 prohibits the testing of eyesight and the fitting of contact lenses by persons who are not appropriately registered. That Act also prohibits the sale of contact lenses for use by a person who does not have a valid specification. That prohibition is relaxed where contact lenses are sold to individuals who are at least 16 years old and where certain conditions (set out in section 27(3) of OA89) are met. Section 27(3) of OA89 provides as follows:

“(3) Those requirements are that–

(a) the seller has–

(i) the original specification;

(ii) a copy of the original specification which he verifies with the person who provided it; or

(iii) an order from the purchaser, submitted either in writing or electronically, which contains the particulars of the specification of the person who intends to wear the contact lens (“the wearer”), and the seller verifies those particulars with the person who provided the specification;

(b) the seller is reasonably satisfied that the goods ordered are for use by the person named in the specification;

(c) the sale is made before the expiry date mentioned in the specification;

(d) the seller is, or is under the general direction of, a registered medical practitioner, a registered optometrist, or a registered dispensing optician; and

(e) the wearer–

(i) is not, so far as the seller knows, registered as sight-impaired or severely sight-impaired in a register kept by a local authority under section 77(1) of the Care Act 2014 or registered as blind or registered as partially sighted in a register compiled by a local authority under section 29(4)(g) of the National Assistance Act 1948 (welfare services);

(ii) has not been certified as blind or as partially sighted and in consequence registered as blind or partially sighted in a register maintained by or on behalf of a council constituted under the Local Government (Scotland) Act 1994; or

(iii) has not been certified as blind and in consequence registered as blind in a register maintained by or on behalf of a Health and Social Services Board in Northern Ireland.”

12. It will be immediately apparent that the requirements in section 27(3) create difficulties for a business seeking to sell contact lenses remotely. Without the cooperation of the prescriber, the seller will be unable to meet the requirement in section 27(3)(a). Two of VDL’s witnesses addressed this point. Mr Dumaine said that, because optometrists refuse to verify specifications to online suppliers, using a UK-based online supplier of contact lenses is “simply not viable” and such a business had to operate from outside the UK or give up

trading. Mr Greatbanks said that, in his work in high street opticians, he had seen opticians deliberately frustrating attempts by online suppliers to verify specifications. He said this was professionally remiss of opticians, but the GOC do not do anything about it. Ms Gill (the Head of Legal at the GOC) said there was no legal obligation on high street opticians to verify prescriptions and, when asked whether she had any reason to doubt what Mr Greatbanks said on this point, replied “of course not”. That is why VHBV was established in the Netherlands, where the selling of contact lenses is not restricted; no prescription is needed for the sale of contact lenses in the Netherlands. We were told that this is the result of a deliberate policy decision by the Dutch government.

13. We heard evidence from Ms Kiran Gill, who is the Head of Legal at the GOC. There was significant discussion, both with Ms Gill and more generally, around the regulatory implications of the arrangements put in place by the Vision Direct group. VDBV’s analysis is that it sells contact lenses from the Netherlands and so the requirements in section 27(3) do not apply to it and there is no need for it to take the steps set out in that subsection to validate a specification before selling contact lenses. Ms Gill commented that VDBV’s activities would be in breach of section 27(3) if it were operating in the UK rather than the Netherlands, but confirmed that it is the GOC’s view that OA89 does not apply to sales from within the Netherlands.

14. The GOC continues to receive complaints about the visiondirect.co.uk website but has not taken any regulatory action. This is because, despite the “co.uk” website name, the sales are being made by a company incorporated in the Netherlands. Ms Gill said that, although registrants (opticians registered with the GOC) continue to raise concerns regarding the public protection risks from these sales processes, the GOC’s response is restricted by the nature of its statutory role, which involves it acting against non-registrants (even those in the UK) only where the matter is sufficiently serious. There is also the territorial complication to add in.

THE SUPPLIES MADE BY VDL

15. We have already referred to the evidence of Ms Gill, which provided useful regulatory colour to the arrangements we are considering. We also heard evidence from Benjamin Dumaine, Carl Greatbanks, Damian Shaw and Taurean Weber-Laurencio. We consider that all these witnesses were doing their best to help the Tribunal. No doubts were cast on the truth of their evidence, although there are limitations on the value and relevance of some of their evidence. Except for a very small number of points (which we indicate as we go along), we accept their evidence.

16. Ms Shaw took us on an extensive tour of the VDBV website, including the ordering process and the terms and conditions to which customers need to sign up, and we will deal with that first.

The website

17. Ms Shaw took the Tribunal through the website as it existed in 2019, which she says (and Mr McGurk did not disagree) is representative of the website in the period under consideration. There is a lot of information about the different types of lenses and other products available, starting with very basic information for people who have never used lenses before, going on to give detailed guidance as to how to choose the right lens depending on factors such as the individual’s wearing pattern. There is a guide to help users find the right lenses for them.

18. One section of the site helps users to find equivalent lenses to those sold by high street opticians. Users can match the name of the high street brand lens they are using with equivalent Vision Direct lenses and buy them from Vision Direct thus (the website asserts)

saving time and money. Users struggling to do this are pointed towards the customer service team, who can help them find the exact match.

19. There is an online resource (the Eye Care Centre) which provides clinical information and advice and details of how to get in touch with the customer services team if an individual needs help. It is described on the website like this: “Visit the Vision Direct Eye Care Centre for advice or caring for and wearing contact lenses, taking care of your eyes and enjoying healthy vision. Learn about eye tests, prescriptions and how to enjoy comfortable, clear vision.” By way of example of the information provided, there is a guide and instructional video on taking contact lenses out and putting them in, guidance on how to look after lenses and keep them clean, using eye drops and details of common complaints and how to resolve them.

20. The website asks, ““Do you need help? Our customer services team is here to help 24 hours a day, 7 days a week. Call us on [number] and we will be happy to help.” The “contact us” page gives details of five ways to get in touch: the customer service line, online chat, post, social networks and email.

21. The website makes it clear that, to find out what lenses match their prescription, a user needs to contact their optician for a contact lens eye test and fitting. As we have seen, the examination of the front of the eye, fitting lenses and the fit check are what CLOs do. Optometrists carry out eye tests. Dispensing opticians do not do any of this, nor does VDL.

22. The website does state (very prominently), “No prescription needed! Order your contact lenses with or without a prescription. We trust you to enter the right details when you order.” Clearly, to order lenses a user needs to have a specification. The website tells users that they have a “legal right to have access to your contact lens prescription immediately and automatically after an eye test”. If a user does not have one, they are told that they can request it from their optician, who must give it to them. They may also be able to find it on the side of their contact lens box or on the blister pack that contains their lenses. Once they have it, they can “order the lenses that suit your eyes and wearing habit, plus you can change lenses as often as you like without entering a trial period”. The website tells users how to read their prescription and there is a video guide to how to do this.

23. Turning now to the “Terms and Conditions” (“T&Cs”), these begin by explaining that “Our site is operated by and the products are sold by [VDBV]” which is a Netherlands registered company. It is explained that placing an order amounts to an offer to contract with VDBV to buy the lenses or other products and with VDL for the “supply of dispensing services in relation to those products”. All orders are subject to acceptance by VDBV/VDL and this will be indicated by an email confirming that the goods ordered have been dispatched. So far as the sale of goods is concerned the website indicates that the place of sale is the Netherlands, and the contract is governed by Dutch law.

24. The T&Cs indicate that 18% of the total value of the order is paid to VDL for the supply of dispensing services; there is no definition of “dispensing services”, but the provision dealing with the 18% apportioned to VDL is headed “Validation of Contact Lens Specification” (although that clause says nothing about specification validation). The T&Cs state that VDBV will receive payment of this amount on behalf of VDL and will pay the amount over to VDL on the customer’s behalf. HMRC do not suggest that the 82:18 split is disproportionate.

25. The T&Cs indicate that VDBV is the owner or licensee of all intellectual property rights in “our Site” and in the material published on it. The T&Cs are framed in terms that

the Site and material on it belong to VDBV and users offer to contract with VDBV to buy products and their offer also constitutes an offer to contract with VDL for “dispensing services”. There is no suggestion in the provisions of the T&Cs that VDL is involved with the website at all.

26. We were taken through the ordering process and saw how a customer has to enter their prescription (for each eye) into a drop-down box to be able to order lenses. Once a customer has entered the products they wish to purchase into their basket and entered their personal details (or logged in if they already have an account), they have two options. They can click "I confirm my prescription details are correct and agree for my order to be processed via Vision Direct BV - this is the quickest way to get your lenses", or they can click a box saying: "Check my prescription by uploading a prescription or contacting my optician - this can delay your order by up to 3 days." Having chosen an option, they click “Proceed”. They input their delivery address and tick a box which says that “I accept the privacy policy, cookie policy and terms and conditions. This includes the supply of dispensing services which constitutes 18 per cent of the value of my order.” Then they must click “Place order”. The next page reads: ““Order without us checking your prescription. Your order will be processed by Vision Direct BV to meet regulatory requirements. By choosing this option, you are confirming that you have entered the correct lens prescription. Next time you check out, you won't be asked about your prescription preferences. To edit them, please visit your account.” A customer’s account holds the prescription information, which the customer can update over the course of their relationship with Vision Direct. As it is VDL (not VDBV) which operates the warehouse facility and dispatches the lenses, it is not clear what “processed” refers to. As this is all VDBV does, it may simply mean ‘fulfilled’.

27. Ms Shaw explained that the website has safeguards against human error when it comes to inputting details of the lenses required. These can alert customers to the possibility that they have entered incorrect numbers for different eyes. We were shown a “pop-up” where a customer had entered positive and negative details. It is unusual for different eyes to have positive and negative prescriptions and so the pop-up asks the customer whether they meant to do this. In cross-examination, Mr Dumaine accepted that the website would not pick up a mistake involving a wrong number (lens strength), as opposed to a wrong sign, being inputted, nor is there any safeguard against an out-of-date prescription being used.

28. Discussing the T&Cs, Mr McGurk pointed out to Mr Dumaine that “dispensing services” is not defined. He also noted that the T&Cs disclaim liability. They say that “Commentary and other materials posted on our site are not intended to amount to advice on which reliance should be placed. We therefore disclaim all liability and responsibility arising from any reliance placed on such materials by any visitor to our site, or by anyone who may be informed of any of its contents.” Again, they state that “The material provided on our site is provided without any guarantees, conditions or warranties as to its accuracy.” And later “We aim to update our site regularly and may change the content at any time. Any of the material on our site may be out of date at any given time and we are under no obligation to update such material.” The T&Cs also seek to disclaim liability for products and services. In VDL’s case its liability “in connection with the supply of dispensing services to you is strictly limited to the charge made for those services”. The companies seek to limit their liability to the maximum extent permitted by law in connection with the use of the site. Mr Dumaine suggested that these disclaimers related to material third parties (e.g., customers) post on the website, but it is clear that the disclaimers have a wider scope.

29. Ms Shaw showed us the marketing publishing process and explained how the optician team input into all the clinical content on the website, even when it is being used for marketing, and such content is only published once they are happy with it. We were told that

between June 2015 and March 2020 there were over 2 million hits to the clinical content on the website.

Arrangements between VDL and VDBV

30. In terms of the relationship between VDBV and VDL we were shown a “Contact Lens Dispensing Services Agreement” between the two companies dated 1 May 2014. Under this agreement, VDL agrees to “provide the Services to the Customers”. VDL will charge a “Dispensing Fee” (subject to review, 18% of the overall amount payable by a customer). VDBV will receive this fee from Customers as bare trustee for VDL. The “Services” are defined as “a prescription validation service – verifying contact lens specifications using the optician details provided by Customers, including the provision and maintenance of all necessary hardware, software, physical space, telecommunications facilities and trained personnel (including a qualified optician)”. Although VDL is providing the Services to Customers, it acknowledges that VDBV relies on it to support the sale of its products and agrees to provide the Services “in a first-class professional manner, with all due skill, care and diligence, and in compliance with all applicable laws” and to comply with reasonable requests made by VDBV. Each party agrees to indemnify the other for losses arising out of a breach by it of its obligations under the agreement. VDBV is the data controller (for the purposes of the Data Protection Act 1998) for personal data processed under the agreement. VDL agrees, when acting as data processor for VDBV or the Business, to act only on the instructions of VDBV.

31. The employment contracts of senior executives are commonly expressed to between all group companies and the individual. We saw that from the employment contracts of Mr Brendan O’Brien, Mr Carl Greatbanks and Mr Damian Hall.

Benjamin Dumaine

32. Mr Dumaine is a French qualified “BTS opticien-lunetier”, which is somewhere between a UK contact lens optician and optometrist.

33. Mr Dumaine is employed by VDBV and is based in Amsterdam, although he performs duties for other group companies (albeit without formal contractual arrangements being in place). He joined Vision Direct in 2012, becoming Head Optician six months later (a role he still holds) and has been Contact Lens Purchasing Manager since 2014. He advises on matters such as replacement products where lenses are discontinued, reviews optical advice on the website and is involved in training customer assistants, although Mr Greatbanks would lead on that. Brendan O’Brien, an optometrist, was the Purchasing and Operations Director, later becoming Chief Operating Officer, when Mr Dumaine joined Vision Direct. Until Mr O’Brien left (in April 2022) Mr Dumaine reported to him.

34. Mr Dumaine does not hold any UK optical qualification and has never been registered with or regulated by the GOC. The same is true in the Netherlands; he explained that there is no register of opticians in the Netherlands, although there are legal requirements applicable to those who work in the optical trade. He allowed his French registration to lapse between 2013 and 2022. As a result of not being registered with the GOC as an overseas qualified dispensing optician, Mr Dumaine agreed with Mr McGurk that he is not permitted to supervise non-registered optical assistants to whom protected functions are delegated. But, he said, Mr O’Brien was the primary person doing that. Mr Dumaine never took out any professional indemnity insurance for such supervisory activities. That said, he told Mr McGurk that he did supervise optical assistants.

35. Mr Dumaine considers that, where contact lenses are concerned, dispensing services have nine (overlapping) elements. He described these, and how VDL delivers them. We will follow Mr Dumaine’s nine elements when analysing the services VDL provides.

36. **Ongoing clinical advice:** Mr Dumaine said that a fundamental part of dispensing is the provision of ongoing clinical advice on the use of contact lenses. He said that VDL provides that through their website, which includes instructional videos, how-to guides, frequently asked questions and blogs. These cover important matters such as how to properly wear and handle contact lenses. Mr Dumaine estimates that 90% of problems with contact lenses come from users incorrectly handling them. He says that everything on the website will have been checked for accuracy by one of the opticians. He referred to a copy of VDL's publishing process, exhibited to Mr Hall's witness statement, which shows how involved opticians are in preparing the material.

37. Customer can live chat with VDL's customer assistants on the website or call its helplines. They can also send a letter or an email. A response would typically be provided by one of VDL's customer assistants who will have been given training, access to the internal intranet and the website. Together, these would cover answers to all normal questions. All the optical content here will have been reviewed by Mr Dumaine or one of the other opticians. If there is an unusual or difficult question from a customer, it will be referred to one of the opticians.

38. Mr Dumaine considers that VDL's advice service is better and more effective than what a customer would get on the high street. For example, it is open from 08:00 am to 21:00 pm on weekdays and 09:00 am to 17:30 pm on weekends. There is a wealth of information readily available and the possibility of personalised advice if a customer gets in touch. He accepts that customers will be given advice on matters such as handling contact lenses when they get their first set, but, in his experience, people do not take everything in and need to remind themselves of what to do. Mr McGurk took issue with Mr Dumaine's assertion that advice was "personalised" as VDL personnel do not know the customers or their medical history. He took Mr Dumaine to a transcript of a call with a customer assistant, which had been given to HMRC as an example of healthcare advice, but on being taken through it (the subject matter was an individual whose eye was being irritated by a contact lens with a hole in it) Mr Dumaine agreed that no healthcare advice (such as to take the lens out) had been given and the call was devoted to arrangements for sending out a replacement batch of lenses. Mr McGurk also took issue with Mr Dumaine's ability to compare what VDL does with what happens on the UK high street. Mr Dumaine agreed that he has never practised in the UK, but he was involved (alongside a Mr Patel) in looking at how small optician businesses work in the UK and so he has some familiarity with UK business practices.

39. **Vision assessment and advice.** Dispensing opticians do not give prescriptions or perform eye tests. If a customer gets in contact with VDL with vision issues, a customer assistant would ask questions such as whether they had tried other lenses from the same box. If their answer was yes, the customer would typically be sent a new box of the same lenses to try. If necessary, a customer assistant might also take the batch number to check whether issues from other customers using the same batch of lenses have been reported. If they had, this might indicate a problem at the manufacturer's end.

40. **Comfort checks.** Mr Dumaine considers that a comfortable lens should feel "invisible" all day long. However, he said that it is common for contact lens wearers to put up with levels of discomfort and one element of dispensing is to try to sort comfort difficulties out. The website contains guidance for customers on comfort issues, which discusses matters such as using eyedrops and daily disposable lenses as ways of providing comfort. If a customer gets in touch with a comfort issue, VDL has protocols for assistants to try to get to the bottom of the problem. Discomfort is often caused by the solution used rather than the lens and customer assistants have been trained to ask the right questions

(whether a customer is using a solution at all or the right one) and recommending a different solution is often the answer.

41. **Advice and recommendations on upgrades or complimentary products.** VDL does this through the website (for example, a page entitled “tips for travelling with contact lenses” which recommends using daily disposable lenses and suggests appropriate travel packs). Upgrade emails will be sent to groups of customers targeted because they are buying (say) an old version of a lens where there has been an upgrade. Email communications are sent to customers written by VDL’s customer assistants. He exhibited an email recommending that customers who use Air Optix Aqua for astigmatism consider an upgrade to Air Optix Aqua HydraGlide for astigmatism. Finally, if customers get in touch with VDL’s customer assistants, VDL has a lens finder (a page in the internal intranet) which enables assistants to identify alternative products and upgrades. Assistants are trained to talk to customers about the advantages of changing to different products.

42. There was significant discussion in cross-examination of the requirements of the Association of Optometrists when it comes to substituting lenses, swapping one type of lens for another. Although there is some ambiguity about the exact legal requirements and the GOC has indicated that it would not act in the absence of clear evidence of harm, the Association’s guidance includes the following:

"We advise our members that to manage the risk of harm appropriately and ensure patient safety:

"Where a contact lens supplier substitutes one brand or type of lens for another, the registered optical professional who oversees and authorises the substitution will be responsible for ensuring that the change of lens is clinically appropriate and in the interests of the patient, and

"Any decision to substitute lenses should therefore only be taken with clinical input from an appropriately qualified registered professional."

Mr Dumaine agreed that, although VDL had an intranet page giving optical assistants guidance on alternatives, Mr O’Brien was not involved in sales of substitute lenses. He said VDL considered that, by creating these guides, this did away with the need to consult Mr O’Brien because, if assistants followed the guidelines, the process would be safe.

43. **Eye test appointments** Although dispensing opticians do not carry out eye tests, it is part of their role to recommend customers get eye tests on a regular basis and in specific circumstances. The website has a page entitled “An Eye Test Explained”, and these recommend that customers should get their eyes tested every couple of years. This element of dispensing might also be provided when customers get in contact. For example, if someone has blurry vision and VDL has checked that they have received the right contact lenses, the customer assistant might suggest that they get an eye test. VDL does not send customers automatic, periodic reminders to go and have their eyes tested. Mr Dumaine agreed that this was because VDL do not know when a customer’s next test is due.

44. **Clinical irregularity safeguards** Dispensing opticians do not issue prescriptions, but they do take steps to make sure that the lenses provided to a customer accord with their specification (the type of lens they need including its power). They do this in one of three ways, obtaining a copy of a customer’s prescription, a customer providing details of their optometrist and giving authorisation to call their optometrist to obtain their specification and finally getting a customer to provide their specification in electronic form via an online system. VDL’s customers can choose any of these three routes; that is clear from the ordering process on the website. However, almost all customers opt for the third route. Mr Dumaine said that it is important to note that, if a customer chose the second option, their

optometrist, when contacted, will often refuse to provide the specification as they see online dispensing services as in competition with the high street. He says that it is highly unlikely that a customer will deliberately provide incorrect information, so he sees these three options as being broadly equivalent. He did concede that mistakes are more likely with the third option, but there are processes in place to catch mistakes. For example, a customer might input a positive figure for lens power for one eye and a negative for the other. The website would flag this as a potential error to the customer and ask them to confirm the figure. The other part of making sure the customer gets the lenses that accord with their specification is ensuring that the product dispatched to them reflects the specification received. VDL has a customised IT system (with optical input from Mr O'Brien and to a lesser extent Mr Dumaine) which tracks barcodes corresponding to specifications and ensures that the box always matches the specification received. This is over 99% accurate.

45. **Contact lens aftercare** Contact lens dispensing involves providing clinical advice (such as reminding customers to renew or repurchase their lenses on time or directing them to make an appointment with an optician as necessary). This is done through the website and multi-channel customer service. Automated emails and text messages are used to remind customers to renew or repurchase their lenses. Mr Dumaine says that people are often tempted to wear their lenses for longer than they should, which can cause severe complications, and that is why it is important to remind them to buy new lenses.

46. **Emergency advice and infection protocols** Dispensing services also include helping customers where things go wrong in an emergency. A typical problem is where a contact lens gets stuck in an eye. The website has a page entitled "Can a Contact Lens Get Stuck Behind my Eye?" and this contains a step-by-step guide on how to remove contact lenses that get stuck. If a customer got in touch, the customer assistant would use the website to guide the customer through the process and provide relevant links. Turning to eye infections, the website has a page entitled "Contact Lenses and Eye Infections" which provides all the information a customer would need from a dispensing optician, including identifying symptoms, how to prevent infection and a recommendation that any suspected eye infection should be assessed as a matter of urgency by a medical professional. In cross-examination, Mr McGurk drew Mr Dumaine's attention to examples of calls already shown to the Tribunal with customer assistants where eye issues had been articulated but none of them featured assistants giving even rudimentary advice and (he put to Mr Dumaine) no examples had been given of this occurring or of cases where customers had got in contact about serious issues.

47. **Clinical record keeping.** VDL has access to records of every specification input by a customer and every order they have made. So, if a customer gets in touch with a problem, the customer assistant knows immediately what lenses they have bought, how old the lenses are and important details of their eyes (from their specification). The record system also tracks and records customer interactions. These records would not identify batch or lot numbers of lenses sent out to customers. So, if a problem is identified with a batch of lenses, VDL need to send out to all customers who bought the lenses in question while the batch was in use telling them to stop using the lenses and send them back to be replaced.

48. Mr Dumaine explained that he was involved in training customer assistants in optical matters, although this was historically led by Mr O'Brien. Training materials had evolved over time; they were not always as detailed as they are now. He explained that, when a customer assistant has an enquiry they feel unable to deal with, it would be escalated through others before going to an optician. Sales managers directly supervise customer assistants. In terms of supervising assistants out of normal hours, he explained that team leaders are in place to answer most queries, but opticians have Slack on their phones and will receive notifications on the very rare occasions that something is very urgent.

49. Mr Dumaine explained that until recently there had been three qualified opticians, him, Mr O'Brien and Mr Roth. All three worked together in what they called the "Optical Council" and they would consult with each other on particularly complex issues from customers. If a customer assistant had an unusual or difficult question, one of them (usually Mr O'Brien, who was the default responder) would pick it up and a member of the Council would always be available. They took steps (e.g. co-ordinating holidays) to make sure one of them was always available.

Carl Greatbanks

50. Mr Greatbanks is a UK qualified contact lens optician registered with the GOC and a dispensing optician with a contact lens speciality. He joined Vision Direct (he is employed jointly by VDL and other group companies) as their specialist contact lens consultant in October 2021. Before that he worked in Specsavers (a traditional high street optician) for 11 years. He still occasionally works at Specsavers on weekends and is familiar with how high street opticians operate.

51. Mr Greatbanks understands that his role is broadly the same as that of his predecessor, Mr Brendan O'Brien. He describes himself as the "go to guy" on the internal messaging service if any customer assistants have a question on optical matters. They have a direct line to him for difficult technical questions which they cannot answer. He regards VDL's customer assistants as being of the same standard (or possibly superior to) those in a high street optician's shop in terms of training, competence, and supervision. Secondly, he makes sure that any optical information on the website is correct and up to date. Thirdly, he ensures that the internal intranet that the customer assistants use to help customers is correct and up to date with optical information. Finally, he trains customer assistants (with the assistance of an optical trainer, Danielle Goodfellow). He explained that he leads on the initial training himself and has put in place processes to embed and facilitate the use of the knowledge that is gained.

52. Mr Greatbanks described VDL's services as "stepping in after a customer's first purchase of contact lenses and providing the dispensing services".

53. Mr Greatbanks ran through the nine elements of contact lens dispensing Mr Dumaine had explained and commented on this in the light of his experience of VDL.

54. He considers that customers get a better service in terms of ongoing clinical advice from VDL because of the way so much information is available on the website and the many ways customers can easily get in contact. He exhibited a record of the large number of visits between June 2015 and March 2020 to pages from the website that are predominantly informational. He is responsible for reviewing the updated optical information and understands from his discussion with Mr O'Brien that the website has always had clinical content which is reviewed on an ad hoc but frequent basis by opticians.

55. Mr Greatbanks agreed with Mr Dumaine's comments about the other aspects of dispensing and how VDL operates. As far as the position in prior years is concerned, Mr Greatbanks said that he has no reason to believe that there were material differences between how things operate now and how they operated when Mr O'Brien was in charge.

56. Turning to supervision, he agrees with what Mr Dumaine and Mr Hall have said about the supervision of customer assistants.

57. He elaborated on how customer assistants get in touch with him as part of their supervision. They do this by a mixture of telephone, email, or Slack (VDL's internal messaging application). Mr Greatbanks is in the Manchester office two or three times a week and he might be asked occasional questions in person when he is there. He has Slack

installed on his mobile phone and encourages customer assistants to send questions to him. His normal working hours are 7am to 4:30pm Monday to Friday. He would almost always respond straightaway to any question in that time. If he gets a question outside those hours, he will try to respond straightaway, but he may occasionally need to tell people that he will not be able to get back to them until the following day if the query requires a more detailed response. He says that in the first few weeks after new joiners have started, he will typically get a lot of questions from them, but gradually this will reduce as they get more experienced.

58. Mr Greatbanks considers that the training that customer assistants receive is superior to that available to optical assistants on the high street. High street training almost exclusively focusses on glasses and only involves absolute basic training on contact lenses, whereas VDL's training focuses on contact lenses.

59. Mr Greatbanks considers that VDL complies with the GOC guidance on supervision. Performance of customer assistants is monitored, and he exhibited an example of a customer assistance optical coaching in action plan for development. Supervisors are not carefully watching everything an optical assistant does in the high street, nor do they with VDL's customer assistants. A supervisor is readily available to provide help as needed.

Damian Hall

60. Mr Hall joined Vision Direct as Head of Customer Service in March 2016, subsequently being promoted to Director of Customer Service. He was jointly employed by VDL and other group companies. He had previously worked in multi-channel retail and customer services, including as a manager in Asda's contact centres and then as Head of Customer Contact at Dunelm. The two main areas of his role are service delivery (making sure that there are the right people in the right place and ensuring that contact lenses and related services reach customers) and service development (improving various parts of the business). He recently left VDL to work in another industry.

61. Mr Hall is responsible for the management of the internal intranet which tells customer assistants how to deal with various questions coming from customers. Mr Hall says that there has always been clinical content on the website, but this has evolved to upskill and educate the website content writers, each of whom has an introductory product knowledge session and follow-up detailed sessions with opticians.

62. Mr Hall said that about 8% of customers get in contact with VDL. Of those customer contacts, approximately 30% are about pre-sale or post-sale advice (for example, an issue with a faulty lens). He said the contact rates were higher when he first joined as the website was not as well put together and the delivery services VDL used were not as reliable. In cross examination he agreed that about a third of the 30% would be making orders on the phone or checking that things are still the same as they were before; not all of the 30% would be clinical questions.

63. Beyond these points, Mr Hall did not have a great deal to add to what Mr Dumaine and Mr Greatbanks had to say about the services VDL supplies.

64. As far as supervision and training is concerned, he said that this breaks down into two parts, initial training to provide a knowledge base and then ongoing access to the internal intranet and website which act as reference manuals. The opticians are available to help or intervene on difficult matters. As far as initial training is concerned, all new customer assistants receive five weeks of training, which includes three days of specific optical training covering matters such as the layers of the eye, water content and base curves. He exhibited the timetable for the first three weeks of training which includes the theoretical optical material. After the initial three weeks of training, new customer assistants are put into what

is referred to as “Gradbay” where they put their knowledge into practice but are supported and tested to ensure that they can provide correct responses to questions from customers. They receive training and feedback throughout this process.

65. In 2019, VDL employed an optical trainer (Danielle Goodfellow) to manage the training process. She has worked in a high street optician in a variety of roles, although she is not herself a registered optician. She ensures that materials are in an attractive format, but the substance of the training is the same as before she joined.

66. As far as the internal intranet is concerned, this is an ongoing knowledge resource for VDL’s customer assistants which supports them in helping customers. It includes product information, policies, guidelines, and standard operating procedures. Mr Hall exhibited a set of pages from the “optical zone” which gives optical guidance and technical knowledge. This allows updates to be circulated by the opticians, for example, when there are new product launches.

Taurean Weber-Laurencio

67. Mr Weber-Laurencio is a director of a due diligence and investigations firm. He carried out an investigation into high street optician services, by operating as what might be described as a “mystery shopper”.

68. He visited four firms of high street opticians, Specsavers, Boots, Vision Express and David Clulow, and reported back on the purchase of contact lenses and specific contact lens care questions.

69. In each of his visits, he used his own prescription to purchase contact lenses.

70. The first thing he looked at was the amount of VAT charged on his purchase. In Boots, he purchased contact lenses for £21.50, split into contact lens products (including VAT) at £19.35 and dispensing services at £2.15.

71. In Vision Express, the price of the contact lenses was £19.50 split into goods (standard rated) of £9.55 and dispensing services (exempt) £9.95.

72. In Specsavers the contact lenses cost £20, split into taxable goods of £8 and exempt services of £12.

73. In David Clulow, the contact lenses cost £23.50, and the VAT description shows taxable goods of zero and services exempt from VAT totalling £23.50.

74. As well as purchasing the contact lenses, Mr Weber-Laurencio asked members of staff what he could do to make his lenses more comfortable. In all cases, he was given an answer to his question and, when asked, some of those he spoke to were opticians and some were not.

75. In each of the discussions he said to the member of staff he was speaking to that he thought he might have an eye infection and was experiencing some itching, blurred vision, and dry eyes. He asked them what he should do. In all cases, he was given advice by the person he spoke to, the general tenor of which was to refer him to an optometrist.

76. In all cases, he asked the member of staff for general health information for contact lenses he could take away. In Boots he was given three brochures. In Vision Express, Specsavers and David Clulow, he was not provided with any information at all.

THE LAW

77. In the UK, section 4(2) and Schedule 9 to VATA provide for the exemption of certain supplies from VAT.

78. At all material times, Group 7 of Schedule 9, entitled “Health and Welfare”, has provided relevantly as follows:

“1. The supply of services consisting in the provision of medical care by a person registered or enrolled in any of the following— ...

(b) either of the registers of ophthalmic opticians or the register of dispensing opticians kept under the Opticians Act 1989 or either of the lists kept under section 9 of that Act of bodies corporate carrying on business as ophthalmic opticians or as dispensing opticians; ...

Notes: ...

(2) Paragraphs (a) to (d) of item 1 and paragraphs (a) and (b) of item 2 include supplies of services made by a person who is not registered or enrolled in any of the registers or rolls specified in those paragraphs where the services are wholly performed or directly supervised by a person who is so registered or enrolled.”

79. At all material times, Article 132(1) of EU Directive 2006/112/EC (“Article 132(1)”) (which VATA implements) has provided materially as follows:

“1. Member States shall exempt the following transactions:

(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;”

The first issue: medical care

80. There was agreement as to the proper approach to be taken to the interpretation of “medical care” in Article 132(1). It is well established that exemptions from VAT are to be strictly construed “since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person” (see paragraph 28 of the Judgment of the Court of Justice of the European Union (“CJEU”) in Case C-2/95 *Ambulanter Pflegedienst Kügler GmbH v. Finanzamt für Körperschaften I in Berlin* (“Kügler”). A strict construction is not the same as a narrow construction. Indeed, in the context of “medical care” it has been expressly acknowledged that the term should not be narrowly construed (see Case C-45/01 *Christoph-Dornier-Stiftung für Klinische Psychologie v. Finanzamt Gießen* (“*Christoph-Dornier*”) at [48]). Nonetheless, exemptions must be interpreted consistently with the objectives pursued. In the case of Article 132(1)(c), the objective of the exemption is to reduce the cost of medical care, making it more accessible to individuals (see *Kügler* at [29]).

81. It is common ground that for services to qualify as “medical care” they must have as their purpose “the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders”, including the provision of clinical psychological treatments (see *Christoph-Dornier* at [48] and [49]). A supply which forms a distinct part of an overall process of medical care (in that case the removal of cartilage material to extract cells which will then be multiplied for re-implantation in a patient) can amount to medical care, even where supplied by a person not otherwise involved in the process, where the services are “an essential,

inherent and inseparable part of the process, none of the stages of which can usefully be performed in isolation from the others”; judgment of the CJEU in *Finanzamt Leverkusen v Verigen Transplantation Service International AG* (Case C-156/09) (“*Verigen*”) at [26]. A similar conclusion was reached in *LuP GmbH v Finanzamt Bodium-Mitte* (Case C-106/05) in relation to testing services provided by laboratories affiliated with doctors, who prescribed the tests while looking after their patients. These two cases also make it clear that medical care can be provided at a remove from the patient.

82. Caselaw in the UK has established that, notwithstanding the close link between the supply of corrective spectacles and dispensing services which are each dependent on the other, there are two separate supplies, an exempt supply of dispensing services and a standard supply of spectacles, even where the goods and services are supplied by the same person; see *Customs & Excise Commissioners v Leightons Ltd* [1995] STC 458. McCullough J described the agreed facts as to how Leightons provided its services as follows (at p461c-f):

“It is agreed that the stages in the sale of a pair of corrective spectacles can be summarised as follows:

- (i) The patient is first seen by a dispensing optician who examines the patient’s existing spectacles (if any), prepares a record card and decides on the appropriate next step.
- (ii) Usually, the patient has his eyes tested by an ophthalmologist (who is a registered medical practitioner) or an ophthalmic optician who writes out a prescription.
- (iii) The patient takes the prescription to the dispensing optician who then or later may discuss matters with the prescriber.
- (iv) The dispensing optician takes detailed measurements of the patient’s eyes and other features and prepares detailed notes.
- (v) The dispensing optician advises the patient on the options available in respect of lenses and frames.
- (vi) The dispensing optician draws up a specification for the lenses and frames from the measurements which he has taken.
- (vii) The specification is sent to a laboratory which produces the lenses and frames to specification.
- (viii) When the spectacles are returned the dispensing optician will check whether they conform to the specifications sent.
- (ix) And finally, the dispensing optician will fit the spectacles with 20 the patient and make any minor modifications required.”

83. In *Prescription Eyewear v HMRC*, [2013] UKFTT 357 (TC), the FTT held, in the context of online supplies of prescription glasses, that the remote services provided by dispensing opticians also amount to a separate supply of exempt medical care. There have been no cases (until now) analysing the supply of dispensing services relating to contact lenses. However, HMRC’s position on this is set out at paragraph VATHLT2200 of the VAT Health Manual:

“Although the Leightons case specifically excluded contact lenses, we now recognise that other than the sight test which is and always has been wholly exempt, supplies of contact lenses are a mixed supply of goods and services in which the service element extends to all types of professional services, including, measuring, trialling, fitting contact lenses, training patients in

contact lens insertion and removal and informing patients about hygiene and safe care regimes and aftercare.”

84. It is not entirely clear to us whether the exemption discussed in this passage was intended to extend to the services of dispensing opticians in connection with repeat prescriptions where no CLO is involved and the services supplied merely extends to the sale of the lenses, albeit that advice is available if asked for. The description of the service element in this passage closely reflects Mr Greatbanks’ account of what happens after an eye-test when new lenses are being dispensed (which in many ways closely resembles the process for testing eyes and dispensing spectacles discussed in *Leightons* and *Prescription Eyewear*), but the process on subsequent purchases of contact lenses is quite different and much more mechanical. In practice the exemption is taken to extend to subsequent purchases (as Mr Weber-Laurencio’s “mystery shopper” research very clearly demonstrates) and Mr McGurk was very clear that HMRC’s case does not rest on VDL’s services not involving an optometrist or a CLO.

85. It is also well established that the relevant legislation must be interpreted in accordance with the general principles of EU law and, in particular, the principle of fiscal neutrality, which requires that similar supplies of services, which are thus in competition with each other, are to be treated the same for VAT purposes: see *Rank Group Plc v. HMRC* (Cases C-259/10 and C-260/10) at [32]-[35] and [42]-[44]; also *Solleveld and van den Hout-van Eijnsbergen v Staatsecretaris van Financiën* (Cases C-443/04 and C-444/04) at [35]-[41], where the principle of fiscal neutrality was considered in the context of the medical care exemption and it was held that whether services are similar is to be evaluated by asking whether the disputed supply is of equivalent quality from the point of view of recipients. In *Prescription Eyewear* at [53(9)], the FTT held that Item 1(b) Group 7 of Schedule 9 VATA must be interpreted in accordance with the principle of fiscal neutrality. The potential relevance of fiscal neutrality will be obvious in the light of the points made in [83]-[84] above.

86. It seems well settled now that the overall process by which an individual is provided with glasses (or contact lenses) to correct a defect in their eyesight is a therapeutic process. It is a process which starts with the diagnosis of the defect in question, following an eye test, the selection, measuring and fitting of corrective glasses or lenses to correct the defect and the supply of those glasses or lenses. We cannot understand how anyone could seriously dispute that point. The various stages in that process, so far as glasses are concerned, were described clearly by McCullough J in *Leightons* and (as we have seen) he decided that there are two separate supplies, one of corrective spectacles, the other of the services of the dispensing optician (which fall within Item 1(b)), even where both are supplied by the same person. His only reservation on the treatment of the optician’s services was as regards the relatively small element of service provided when the patient came in to collect his spectacles. He resolved that doubt by concluding that this was ancillary to the service of measuring and specifying, so that it too was exempt; [1995] STC 458 at p465. The FTT reached the same conclusion as regards the services provided remotely by dispensing opticians in *Precision Eyewear*.

87. The question for us is whether the services supplied by VDL amount to medical care within Item 1(b), but in so doing our starting point is that the process of providing an individual with appropriate contact lenses is a therapeutic one. There are obvious differences between the fact pattern in *Leightons* and the position here. Most obviously, we are looking at the sale/dispensing of contact lenses, which is different (particularly where repeat orders are concerned) from the process for providing glasses, the process is remote (which is not in itself a problem, as *Prescription Eyewear* makes clear) and VDL and VDBV have divided up

the functions involved. We are concerned only with what VDL does, and here we remind ourselves that services which only form part of the therapeutic process can qualify as medical care if the services concerned are not too remote from the therapeutic purpose.

The second issue: direct supervision

88. The second issue is whether VDL's dispensing services fall within Note (2) of Group 7 to Schedule 9 VATA 1994, i.e. whether the dispensing services are "wholly performed or directly supervised" by appropriately qualified persons.

89. In *Elder Home Care Ltd v C & E Comrs* (1993) VAT Decision 11185 ("Elder Home Care") the VAT Tribunal held:

"It seems to us that supervision does not necessarily involve standing over an employee at all times but simply checking on the employee as often as is necessary in the circumstances and having a system to enable the employee to contact the supervisor as required. We see no necessity for the supervisor and the employee to be in the same premises if ready communication is available. We take the word "direct" to have been inserted to ensure that the supervision is not made via third party (who may not be qualified) but on a one-to-one basis."

90. *Land v C & E Comrs* (1998) VAT Decision 15547 ("Land"), is a case specifically about the supervision by opticians of non-opticians, the VAT Tribunal held:

"26. We are therefore faced with the interpretation of two ordinary English words. So far as "direct" is concerned we are happy to accept the view of the Tribunal in *Elder Home Care* that the word is inserted to ensure that the supervision is not made via a third party. There is no third party here. If Dr De Silva supervises the Appellant himself, he clearly does so directly; if he supervises the Appellant's staff he is not doing this via the Appellant, or Crown, or anyone else; they may also be doing some supervising, but that is for their own purposes and not in any way as agents or intermediaries of Dr De Silva. We do not accept that "direct" supervision implies continuous proactive personal involvement and intervention.

27. What, then, is "supervision"? ...

28. We must therefore adopt a purposive approach, as is more and more commonly being done in tax matters: what was the intention of the legislators? Or, to put it in more traditionally English terms: what is the mischief aimed at? There can be little doubt about that: the mischief aimed at, both by the Opticians Act and by the VAT Act, is the unsupervised unqualified person - the "cowboy", if we may be permitted the cant expression. The Opticians Act says that cowboys are not to be allowed near children or contact lenses; the VAT Act says that, whatever they may be doing, cowboys are not to expect exemption from VAT.

29. Crown's franchisees and their staff are not cowboys; they are meticulously trained operatives who need only the lightest of supervision - and get it, in this case. They are engaged on entirely different tasks from those of the home carers in *Elder Home Care*, and need an entirely different kind of supervision. The fact that Dr De Silva has never once in five years had to intervene does not prove that he is not supervising - it proves that his supervision is hardly necessary. However, the law says that supervision must be provided - and so he provides it, appropriately (one of 21 the words in the guidelines with which we can whole-heartedly agree). When Dr De Silva sits in the outer room, which he does whenever he is not performing eye tests, he

is bound to observe what is going on, and to observe it with the eye of a trained medical man; he could not help doing so, even if he wanted to..."

91. In *Allergycare (Testing) Ltd*, [2003]BVC 2409, commenting on *Elder Care* and *Land*, the VAT Tribunal had this to say (at paragraphs 7 and 72) about supervision of staff:

"Those two cases differ in certain important respects from the present. In *Elder Home Care* it was clear that there was a considerable degree of supervision by the manager at all times, including frequent and regular visits, and availability on call. The work that the carers had to do was very different from that of the testers in the present case. But in the present case there is no element of checking up on the unqualified testers, or, at the supervisor's own initiative making sure that all is going as it should. The situation in the present case is more closely akin to that in *Land*, where, though unqualified, the persons concerned have had training. But again, in our view, what distinguishes *Land* from the present case is that Dr De Silva was, to some degree, overseeing the case of each patient, and had a say in the treatment provided. That is not the case in the present appeal. Also, Dr De Silva, being present on the premises a good deal of the time, and being available on the telephone, could take action in an emergency, or recommend it. There was no suggestion that any of the supervisors would ever take action to assist the testers, nor were they ever present at the test premises. Both *Land* and *Elder Home Care* were decided in the context of their facts, and we have not found that either of them can be taken as a general rule on the construction of Note (2). We agree that the word 'direct' indicates simply that the supervision should not be given through an intermediary.

In our judgment, supervision involves some degree of oversight of another person's work, and implies that the supervisor has some kind of authority to ensure that the work is being carried out properly at all times. Supervision is not limited to occasions of emergency. We agree that it does not necessarily involve constant presence and active intervention, but we consider that the initiative should properly come from the supervisor. A source of advice available on the telephone from a person who has not seen the patient and will have, in the ordinary way, nothing to do with the patient's case, the advice being sought by the person who needs it if he considers that he needs it, does not, in our view, amount to supervision. The supervision was said to be most necessary at the counselling stage, though there was no evidence as to what the nature of any such supervision may be. Suppose that the worst were to happen, that an unqualified tester were to consider that all was as it should be, and wrongly to consider that no advice or supervision was necessary in a given case. The supervisor, who should be in a position to prevent such an occurrence, does not even know that the situation exists."

92. In *E Moss v HMRC* (2006) VAT Decision 19510 ("Moss"), the VAT Tribunal held, at [52]:

"From these authorities we derive the principles that "direct" means not through a third party and "supervision" means the appropriate level of supervision depending upon the circumstances of the case; the proper extent of supervision is a question of degree and relates to the level of risk. Direct supervision does not have to be constant, unremitting supervision."

93. There is much common ground between Mr McGurk and Ms Shaw on the question of "direct supervision". Both accept that it does not require constant, unremitting oversight and both agree that supervision can be provided through training (or, perhaps, that training can reduce the need for supervision – the higher a person's level of skill and training, the less supervision they need) and that having access to a qualified professional for help at all times

is necessary. We agree with these propositions. Where Mr McGurk and Ms Shaw part company is the need for oversight seen in the passage from *Allergycare* cited above.

HMRC's SUBMISSIONS

94. As a preliminary point HMRC criticise the evidence produced by VDL, which they say is patchy or incomplete. They point, for example, to the fact that we have been shown many internal emails within VDL, but no evidence of exactly what was supplied (in the form of advice) to customers.

95. Most of the documentation that has been produced was created in the second half of 2019, right at the end of the period to which the assessments were late. There is a significant dearth of evidence of training and practices prior to June 2019. It was only at the end of that period that VDL took steps to address what by then it had clearly recognised were severe shortcomings. Mr Dumaine's evidence is that training before this time would have been "in person" and much of it would have involved him or Mr O'Brien giving talks to assistants in a room. This is why no one can find formal records of the training. Mr McGurk says that this is simply implausible; any serious healthcare provider would document and evidence the clinical training it provides. Mr McGurk suggests that it was HMRC's investigation that led to the employment of Miss Goodfellow, who was brought in to "rationalise" training (even though she has no healthcare qualification). He submits that it would be rash of the tribunal to assume, contrary to what we were told, that VDL was operating in the same way throughout the relevant period.

96. HMRC criticise VDL's failure to call Mr O'Brien, who was the Chief Operating Officer throughout the relevant period and was the only person who, during the investigation itself, VDL held out as directly supervising sales assistants. He left VDL in April 2022, just over a year after VDL filed its notice of appeal. VDL made no effort to produce a witness statement from him or call him in evidence.

97. HMRC criticise the repeated statements by Mr Greatbanks, Mr Dumaine and Mr Hall that the services supplied by VDL are superior to those available on the high street. Mr Dumaine has never qualified or practiced in the UK. His experience is limited to working with Mr Patel and visiting several independent UK opticians, which was not mentioned in his witness statement. He is in no real position to comment on this at all. Mr Weber-Laurencio's extremely limited mystery shopper day out is no substitute for proper evidence of training and practices.

98. As far as the group structure is concerned, HMRC say there must be serious questions about whether healthcare services are being supplied when the group goes to such lengths to make sure that it does not need to comply with the requirements of section 27 OA89 or other regulatory requirements.

99. VDBV operates the website. This is both the destination for people seeking to buy contact lenses and the location of much of the content of VDL says amounts to clinical advice.

100. As far as the regulatory arbitrage point is concerned, HMRC say that the tribunal should proceed on the basis that there is some doubt about whether Vision Direct's method of operating in fact complies with the law. What is clear, regardless of the position on that point, is that Vision Direct's decision to engage in this regulatory arbitrage does not promote healthcare in the UK. There is a much greater risk that someone would end up with lenses which do not meet their actual prescription at the time of order. No other UK based high street optician can avoid the need to check prescriptions. Secondly, the T&Cs make it clear that recourse against VDL is in the Dutch courts and there is a serious risk, if something did

go wrong, that UK customers would not have any practical recourse or remedy because of the contractual arrangements. VDL could have arranged its affairs to register with the GOC. Many bodies corporate have opted to register with the GOC. Deciding not to do so is a choice, designed to cut costs.

101. HMRC do not say that VDL does not supply dispensing services because they do not offer the services of ophthalmologists, optometrists or CLOs. HMRC's case is that the supplies that VDL make which it describes as dispensing services cannot properly be described as a professional clinical advice or therapeutic care.

102. Looking at the nine alleged elements of dispensing discussed by Mr Dumaine, HMRC say first the VDL never sees a single customer. HMRC say that clinical advice cannot be delivered in an impersonal or generic way. This would radically expand the scope of the exemption, which must be strictly interpreted. Healthcare, in HMRC's submission, involves professional intervention and advice given to a person who presents seeking diagnosis, treatment or cure for a disease or health disorder. Visiting a website does not fulfil the notion of professional engagement that the healthcare exemption plainly must rest on. What might count, but there was no evidence of this, is if a sales assistant was contacted by a customer who explained a specific problem and the salesperson consulted an optician and then provided more specific advice.

103. Turning to the VAT legislation, there is no direct link between the use of the website and payments to VDL. For there to be a supply, there must be a direct link between the supplier and the recipient, including by way of consideration. So far as the website is concerned, this is totally lacking as it is freely available to anyone without payment. Here Mr McGurk refers us to the decision of the Upper Tribunal in *National Car Parks Limited v HMRC*, [2017] UKUT 247 (TCC). The Upper Tribunal's decision was confirmed by the Court of Appeal, at [2019] EWCA Civ 854, but the fuller discussion of the supply/consideration issue is in the Upper Tribunal decision.

104. In addition, the website makes it clear that VDL is giving no advice on which visitors can rely. HMRC say that VDL cannot rely on the website as evidence of medical care if they are saying that users cannot rely on anything posted on the website and they are not prepared to take responsibility for its accuracy.

105. In deciding whether VDL is supplying healthcare, the Tribunal should have regard to the GOC's and professional bodies' standards for optical businesses, such as the guidance on swapping one type of contact lens for another, and HMRC's own guidance on what is expected from the suppliers of exempt medical care. If VDL were supplying healthcare, one would expect compliance with applicable standards and an acceptance of a full duty of care and responsibility. One would also expect them to have full professional indemnity insurance. The cover obtained by Mr O'Brien would appear to be personal cover not extending to his activities on behalf of VDL in the UK. The group's corporate policies are confined to selling lenses and solutions.

106. The very substantial evidence of complaints from consumers and other practitioners also indicates, HMRC say, that VDL cannot be supplying exempt healthcare.

107. Turning to the nine elements, as far as clinical advice is concerned, this largely relies on the website, which (for the reasons already explained) HMRC say VDL cannot rely on. VDL takes no account of, and does not ask for, a customer's individual medical or eye history; they are simply ensuring that the customer gets what they ask for. As far as the advice given by sales assistants is concerned, Mr McGurk says that the evidence of this is embarrassingly slim. The examples produced by Mr Dumaine (which HMRC assume have been

cherry-picked as the best examples) do not provide convincing examples of healthcare advice. Automated reminders to require new lenses cannot be healthcare.

108. As far as vision assessment and advice is concerned, the Tribunal were shown examples of two customer interactions, where the customer had an eye issue as a result of using lenses supplied by Vision Direct. In neither instance did the sales assistant give the basic advice, to stop wearing the lenses now, which Mr Dumaine accepted they should have done. The product defect protocol does not assist either. It is evidence that the standard response would be new lenses or a refund, not eye health advice. When questioned by the Tribunal, Mr Dumaine said that their recordkeeping was such that, even if VDL was aware of a faulty batch number, they would not be able to know which customers to contact.

109. Mr Dumaine accepted that there was no evidence of customers getting in touch with VDL in relation to comfort issues. Mr Dumaine accepted he could point to no protocols or guidance to assist in relation to comfort issues. The only point relied on here is the website.

110. The lens finder tool merely told sales assistants what products VDL stocked and what their features were. There is no evidence of VDL training sales assistants on the need to comply with the principle that “if the supplier is unable to supply lenses that exactly meet the contact lens specification of the patient, refitting is required before an alternative lens is supplied”. Nothing stops customers buying an alternative lens that is outside the parameters of their contact lens specification. Without any verification process, there is absolutely nothing stopping customers from simply “trying something new”. In one exchange with a customer produced by VDL, the assistant suggests that it may be worth checking with their optician as to whether a particular lens would be suitable, the customer says that they do not want to go back to the prescriber and so the assistant provides a link to facilitate the purchase. If VDL took seriously the requirement for a fitting, it would not be making or facilitating the sale of alternative lenses.

111. Information about eye test appointments or reminders that a person may need to see their own optician is not healthcare. As Mr Dumaine conceded, VDL’s customers already know what an eye test is (they will already have had one).

112. As far as clinical irregularity safeguards are concerned, Vision Direct does not verify the prescription details of 99.9% of its customers. The website sought to “tout” the virtues of speedy delivery where customers were incentivised not to request verification. There is no evidence of the extent to which the website popup intervenes to correct an ordering error. This is simply not logged. There are many situations (for example, expired specifications/prescriptions) for which there are no safeguards.

113. As far as aftercare is concerned, text reminders to buy more lenses is no form of clinical care. VDL will not necessarily know how many lenses a customer has left and, if they are about to run out, customers are unlikely to need to be reminded to buy more lenses.

114. As far as emergency advice is concerned, Mr Dumaine accepted that there was no evidence before the Tribunal of customers getting in touch with VDL and asking a sales assistant for guidance to help them resolve an eye issue. Nor of them providing advice on personal injury or other eye issues.

115. As far as recordkeeping is concerned, Mr McGurk says that there is nothing remotely akin to a running record that captures information about a customer’s eye health and its progression.

116. In the round, HMRC say that the heavy reliance on the website across all nine activities, the fact that there is a de minimis number of customer interactions in relation to all orders (2.4%) and the fact that there is, in relation to interactions, no real evidence of any

advice at all means that what VDL does cannot be regarded as healthcare. Even if the Tribunal considers the odd interaction might cross the threshold of health advice, it is such a small amount (both in number and percentage terms) as against the 250,000 transactions a month, that it cannot possibly be a foundation on which VDL can claim to be providing a supply of healthcare to its customers.

VDL'S SUBMISSIONS

117. By way of preliminary point, Ms Shaw challenged HMRC's claim that VDL's internal communications cannot be evidence of making supplies to customers. She regards it as a common-sense inference that, having gone to all this trouble to discuss a point internally, appropriate advice would be given to customers.

118. Both in their witness statements and in cross-examination, witnesses have confirmed that documents produced (even when they were not produced during the period which is the subject of the appeal) are representative of what VDL did throughout the period. Similarly, the substance of the training has remained the same, as has the intranet and website materials. VDL rejects HMRC's suggestion that it was their investigation which spurred them to "put their house in order".

119. As to VDL's witnesses' explanations of how its dispensing services are (generally) superior to those available on the High Street. Mr Greatbanks has extensive experience of the UK high street, as, Ms Shaw says, does Mr Dumaine. They are well placed to comment on this. Although only a small snapshot, Mr Weber-Laurencio's evidence is a useful validation of their position.

120. As far as the wider group is concerned, Ms Shaw is anxious to stress that neither VDL nor VDBV have ever been convicted of any criminal offense and that neither company was acting unlawfully or in contravention of any provision of OA89. To the extent HMRC complain about VDBV not being subject to section 27 OA89, this is simply misconceived. The question is whether VDL is providing medical care, not whether the Dutch-based VDBV is complying with UK requirements for the sale of contact lenses.

121. VDL dispute HMRC's claim that not verifying prescriptions gives rise to a much greater risk that someone will end up with lenses which do not match their actual prescription. Ms Shaw says that obtaining the customer's specification (or self-certification) deals with this. VDL have appropriate checks in place to catch mistakes. Secondly, VDL has extremely accurate customised IT systems to make sure that the product despatched matches the specification received.

122. She disputes Mr McGurk's assertion that UK customers would have no practical recourse against VDL in the event of negligence, which she says is irrelevant to whether VDL is supplying medical care, and she explained why, in her submission, the T&Cs are not able to exclude the jurisdiction of the English courts: a choice of Dutch law cannot deprive a consumer of mandatory customer protections under English law and so the provisions of the T&Cs (which in terms accept that they cannot exclude liability which cannot lawfully be excluded) which purport to exclude liability would be of very limited effect.

123. Turning to the nine alleged elements of contact lens dispensing, HMRC rely on the fact that on average 97.6% of VDL's customers do not take advantage of its personalised customer services in any given month. Ms Shaw says that whether they do that or not is neither here nor there; what matters is that the service is there if they want it.

124. In response to HMRC's contention that the clinical advice on the website is available to the public for free and therefore cannot amount to a supply of medical care, Ms Shaw says firstly that there is no evidence that many of the visitors to the website are people who do not

use Vision Direct's services. Secondly, the clinical content of the website is one element of the dispensing service which VDL provides. The fact that it is also available to the general public does not detract from the fact that it is part of what the customer pays for, in the same way that high street opticians produce leaflets and booklets for their customers but will provide them to non-customers for free if they walk in and ask. Thirdly, VDL's customers get access to much more than just the website. They can contact VDL with clinical and other queries and receive advice by text and email. Fourthly, the other function of the website is to act as a clinical reference resource for customer assistants. Finally, VDL is in business, it is not a public information service. The purpose of the clinical content on the website is to communicate its expertise to its customers. The fact that the public can access it is a bi-product of using the website as the medium through which to make this information available to its customers and attract potential new customers.

125. In any event, HMRC accept that a customer assistant pointing a customer at the website in response to a query would amount to clinical/medical care. In evidence, Mr Greatbanks explained that on occasions he would tell the customer assistants to direct customers with problems to particular pages on the website.

126. The question of whether the group is adequately insured is not relevant to the question of whether VDL is providing medical care, but the evidence shows that VDL and VDBV were both insured as a member of the larger group of which they were members.

127. HMRC say that the UK statutory and regulatory framework affect what constitutes medical care. That, Ms Shaw says, is obviously wrong as the concept of medical care must have a uniform meaning across the EU. It cannot possibly be informed by reference to the regulatory regime in place in one member state.

128. Turning now to the nine alleged elements of contact lens dispensing, the first is **ongoing clinical advice on the use of contact lenses**. Ms Shaw repeats her point that the contents of the website can be considered here. HMRC say that the material on the website is not sufficiently personalised to count as medical care. However, in his evidence, Mr Dumaine explained that the website tries to deal with every issue that might arise, so that people can find the answer to whatever question or concern they have. Several examples were given in evidence of clinical advice being given by customer assistants. For example, there is a transcript of a phone call in which a customer assistant recommends a clinically suitable alternative lens. A customer record recounts an interaction as follows: "customer emailed in for advice on eyedrops due to sickly residue on the eyelids. Have suggested rinsing the lens before replacing or possible try Blink contact eyedrops".

129. HMRC say the reminders to buy more contact lenses cannot be healthcare, but Mr Dumaine explained that this is important because of the medical complications that can arise if customers wear lenses for too long. HMRC have suggested that VDL do not have information to give tailored advice to customers, but Mr Dumaine explained that this was wrong. Because contact lens technology is so streamlined, it is very easy to identify the lenses that a person would need if the customer assistant knew what the individual wants to do (for example, to play sport and use the same lenses whilst working). The Tribunal asked Mr Dumaine whether, if he had someone's prescription that would be enough, and he replied that it would be; even without someone's medical history it is possible to work out an individual's personality and needs from their prescription.

130. **Vision assessment and advice.** There are examples in the material provided of a live chat in which a customer asks whether it matters what base curve their lenses have and is told that it does as this is the size of the contact lens they need. Without the correct size/base curve, the lens may move around the eye and cause discomfort. That, Ms Shaw says, is an

example of VDL giving advice on vision issues. VDL's product defect protocol was exhibited in the hearing bundle. This illustrates how new lenses would be sent on an initial occurrence of poor vision, but if the problem persisted then an alternative product would be offered as the problematic lenses might have been incorrectly fitted or prescribed. Batch numbers would also be sought from the customer to enable checks to be made to see whether issues from others using the same batch of lenses had been reported. If VDL identified a problem with the batch, it would email all customers who might have lenses from that batch to tell them to stop using them.

131. **Comfort checks.** HMRC say that there is no evidence of customers getting in touch with VDL with comfort issues, but that is not right. In the bundle there is an example of a customer service line chat where a customer suffers from discomfort ("my eyes are irritated"), which a customer assistant identifies as caused by a bad batch of lenses. This is an example of a chat which was reviewed as part of the customer assistant's monitoring by Danielle Goodfellow when the assistant was in "Gradbay" and it is pointed out by the reviewer that the customer's solution (the liquid to clean lenses) should also have been checked.

132. HMRC criticise the way that VDL recommends appropriate alternative lenses to customers, including using the lens finder tool, which is a page on the internal intranet, which was included in the hearing bundle. Customer assistants should use this with "product sheets" for particular lenses, which would indicate suitable upgrades. In answer to a question from the Tribunal, Mr Dumaine commented that creating these guides did away with the need to talk to an optician because the material gave optical assistants the tramlines they needed and, if they followed the guidance, their advice would be safe.

133. **Advice and recommendations on upgrades or complementary products.** HMRC make a number of complaints about the way VDL recommends alternative lenses and complementary products. Ms Shaw says that we should "cut through the noise". By recommending suitable lens upgrades and complementary products, VDL is clearly helping with the treatment of defective eyesight. VDL uses the website, email communications to customers and personalised customer support to provide advice and recommendations on upgrades and complementary products (for example, cleaning solutions or eyedrops). Ms Gill in her evidence commented that recommending eyedrops, a different wearing regime, or anything else that might be recommended to a customer constituted "an exercise of clinical judgment". There are examples in the bundle of website pages dealing with matters such as contact lenses and complementary products for travelling, cleaning solutions and eyedrops. There is an example of an email recommending a specific upgrade to a particular product with astigmatism and Mr Dumaine explained that such emails would only be sent to customers using identified inferior lenses – these emails were sent out in a targeted way. There were examples in the bundle of a customer query about gels, a complementary product, being dealt with and a customer record which recounts a customer service interaction where the customer was provided with information about alternative lenses.

134. **Eye test appointments.** VDL recommends customers get eye tests through information on its website and the advice it gives to customers who get in contact.

135. **Clinical irregularity safeguards.** VDL takes steps to make sure that the lenses provided to a customer accord with their specification, even though only a very small number of customers ask VDL to verify their specification. Customers are offered three ways of the specification being verified. The first is to supply the prescription (which states the specification). The next is to supply details of the customer's optometrist and VDL can call them. Finally, there is customer self-certification. In the vast majority of cases customers

choose the third option. If they do that, VDL's opticians have ensured that appropriate checks are in place on the website to catch mistakes, and we were shown the pop up that verifies that a customer really did intend to use positive figures for one lens and negative for another. In Mr Dumaine's view, the three options are broadly equivalent. The second step of this element of dispensing is to take reasonable steps to make sure that the product despatched matches the specification received and here VDL has an extremely accurate customised IT system (with optician input) which virtually eliminates the human error frequently found in the high street. We saw a step-by-step description of how this works and Mr Greatbanks said that he had seen countless examples of human error on the high street leading to people being given the wrong boxes of lenses.

136. **Aftercare** There is a significant amount of material on the website. HMRC say that reminding people to renew lenses is not medical care, but Ms Shaw says that it is important to remember that this is not the only aftercare that VDL provide. Reminding people to renew their lenses and have a contact lens check-up are both important. VDL may not provide check-ups but reminding people of the need to have them is an important component of giving advice as is advice about renewing lenses given the complications that can arise if customers wear old lenses for too long. Mr Dumaine explained that people regularly wear their lenses for longer than they should, and these reminders were important. Several examples of clinical advice had been produced and Mr Greatbanks in his evidence says that VDL's "aftercare" involves talking about little points such as making sure that people understand how to clean their lenses. The website deals with this and staff are trained to talk about it with customers. The website discusses issues such as conjunctivitis, which is a common condition that people who wear contact lenses can suffer from.

137. **Emergency advice and infection protocols.** HMRC say that VDL do not help customers when things go wrong, but Ms Shaw says that this is simply wrong. For example, the website deals with a common issue, how to remove lenses that have got stuck. Again, the website also deals with eye infections, which are another potential source of problems. Website pages in the bundle list symptoms of eye conditions and explain what to do to address them. This would include (as would be the case on the high street) recommending a customer to go and seek professional help. There is an example of Mr Dumaine speaking to a customer assistant and advising that, if a particular gel he recommends does not work, the eye might be infected, and the customer should go to a doctor (ophthalmologist) who would be able to provide a special antibiotic gel.

138. **Record keeping.** VDL's records system tracks the data and orders of its customers, so that customer assistants are better placed to help customers who seek help. Records were seen in the bundle by way of example and these show factors such as base curve, diameter, and power figures for both of the customer's eyes being recorded, together with details of customer interactions. Mr Greatbanks says that VDL's record keeping is superior to that of the high street optician. He says that, when a customer comes into a high street optician with a simple query or complaint and is advised by an optical assistant, it is unlikely that any record would be made at all. Similarly, many purchases of complementary products would not be linked on a high street record. For example, if someone buys eyedrops, they would simply be handed over and not linked to a record at all. In answer to a question from the Tribunal ("If I were one of your customers, could you find out, and could you find out easily, all of your dealings with me?"), Mr Dumaine simply answered "Yes". There were some misunderstandings between VDL and HMRC around record keeping during HMRC's enquiries, but the records in the bundle (which covered the whole of the relevant period) show records being kept of dealings with customers.

139. In summary, Ms Shaw says that, contrary to what HMRC submit, there are multiple examples of clinical advice that have been shown to the Tribunal. On HMRC's second point that this is somehow not medical care, Ms Shaw simply says that the purpose of VDL's services (all this advice given to customers) is to assist in the treatment of defective eyesight and therefore it cannot not have as its purpose the diagnosis, treatment and, insofar as possible, cure of disease or health disorders.

140. **Direct supervision.** Again, Ms Shaw says that it is important to clear up a misunderstanding here. Initially, Bristows told HMRC that the only relevant optician for the purposes of Note (2) was Mr O'Brien. Subsequently, VDL became aware that Note (2) was contrary to EU law and, once it was aware of this, it made clear that it considered Note (2) to be contrary to EU law and that it also allowed other supervision of customer assistants by Mr Dumaine and Mr Roth to count. It is not in dispute that Mr Dumaine and Mr Roth are appropriately qualified to provide care.

141. As far as their supervision of assistants is concerned, the opticians might speak directly to customers with difficult or unusual questions; an email in the bundle refers to such a phone conversation. They also make sure that the website contains accurate clinical advice. The three of them formed what was called an "Optical Council" where they consulted with each other when there was a particularly complicated issue to deal with from customer assistants and on optical matters more generally.

142. The three opticians ensured that at least one of them was always supervising at any given time, coordinating their holiday dates so that there was always someone around if a customer assistant had an unusual or difficult question. The opticians were not "line managing" the customer assistants, but only supervising them with regard to optical matters. In his evidence, Mr Hall explained the difference between operational supervision (the day-to-day running of the centre), which he dealt with, and optical supervision, which he was not involved in at all. Many issues encountered by customer assistants would be escalated (and dealt with) through line managers before being raised to an optician, but customer assistants could always communicate directly with one of the opticians about optical matters to help customers.

143. Supervision is broken down into three parts. Firstly, ensuring appropriate training of customer assistants. Secondly, ensuring that the internal intranet and website (which act as a reference manual for the assistants) are reviewed for the correctness of their optical content. Although the internal intranet was only launched in 2017, Mr Hall's evidence is that similar information was available before that through an internal knowledge database. Finally, opticians being readily available to intervene when there are difficult or unusual questions.

144. As far as training is concerned, Mr Dumaine and Mr Greatbanks gave evidence that they were involved in giving talks to assistants and VDL has now hired a special optical product trainer. This training involves learning about optical matters as well as more practical operational topics. Topics covered include the principles of cleaning contact lenses and how to advise customers who have not complied with care regimes or wearing schedules. The opticians have checked all optical training content. New starters then spend several weeks in what VDL calls "Gradbay" where they "put their knowledge into practice and will be supported and tested to ensure that they can provide correct responses to queries from customers" (Mr Hall's evidence). We were shown extensive training materials.

145. Mr Greatbanks explained that the performance of customer assistants is monitored on an ongoing basis, and they are given appropriate coaching and professional development. He said that the performance of the customer assistants is monitored by the opticians, and he

exhibited an example of a customer assistant's optical coaching and action plan for professional development.

146. Mr Greatbanks says that the internal intranet and website give customer assistants better information and resources than their peers on the high street would have.

147. As far as opticians being ready to intervene, Mr Greatbanks explained that customer assistants are encouraged to send him messages directly on his mobile phone and he would almost always respond right away even outside his working hours. Supervising opticians use Skype and Slack on their phones, and if a matter were very urgent, they would receive notifications and be contactable. There are examples of dialogues between the opticians and customer assistants in the hearing bundle. Mr Greatbanks and Mr Dumaine both say that an optical assistant with an enquiry that he or she felt unable to deal with would always be able to contact a supervising optician directly and get a swift response. They could escalate the matter internally, but it would still arrive at a supervising optician quickly if that were necessary. Mr Dumaine says that this is better than on the high street, where a supervising optician (even a dispensing optician) would not always be available, and the customer might be told to come back later.

DISCUSSION

148. We remind ourselves, as we start to review the arguments and evidence we have heard, that this is not a decision about the regulatory arrangements put in place by the Vision Direct group. Much was made by HMRC of the way VDBV and VDL have split their functions between them to avoid the need for VDBV to comply with section 27 OA89 and a private prosecution brought many years ago by the GOC against what might loosely be described as a predecessor company for breach of section 27. HMRC have suggested (although this does not appear to be a suggestion endorsed by the GOC) that the Vision Direct group may not have entirely succeeded in its plan and that there may be elements of unlawfulness around its operations. They also criticised the way in which VDL has avoided registering with the GOC and the need to comply with the regulatory requirements which would apply to it if it did. The same criticism is made of Mr Roth and Mr Dumaine, who did not register as overseas qualified opticians. Criticisms have also been made in particular instances of the way in which VDL did not comply with certain regulatory guidelines, although accepting that those guidelines are not applicable to it. None of this is our concern. We are concerned only with the question whether VDL supplied appropriately supervised medical care.

149. In addition to the regulatory position, other matters we consider to have no bearing on our analysis include, the Vision Direct group's choice of law in the T&Cs and their attempts to limit their liability and the ability of users to rely on website material and the group's (and individual optician's) insurance position.

150. A final preliminary point relates to the evidence of what happened over the period we are concerned with. We have noted Mr McGurk's point that a lot of material before us relates to the later part of the period in question and that some of VDL's business practices appear to have improved (e.g. the recruitment of Ms Goodfellow). We do not, of course, have direct evidence from Mr O'Brien of what happened in the period before he left. We do, however, have witness evidence from Mr Dumaine and Mr Hall to the effect that, while business practices have evolved, the way the relevant functions operate has remained relatively constant. Mr Greatbanks' evidence, based on discussions with Mr O'Brien when he took over and his observations in the handover period, are to the same effect. We take Mr McGurk's point that much of Mr Greatbanks' evidence on this point is hearsay and he gave the appearance on occasion of someone who had come with a story to tell, but what he said is consistent with the evidence of the other witnesses, and it was not suggested that any of them

were not telling the truth. We find as a fact that the business practices described in this decision notice obtained throughout the period we are concerned with.

151. We have noted the two decisions, *Leightons* and *Prescription Eyewear*, which deal with the physical and remote dispensing of spectacles, but there is no authority dealing with the question whether (when supplied by the same person) the dispensing of prescription contact lenses is a separate supply from the sale of the lenses themselves, whether conducted in person or remotely. Mr Dumaine attempted to describe the functions of a dispensing optician where contact lenses are concerned by reference to his nine characteristics. We do not know whether those nine functions are regularly performed by dispensing opticians, nor do we know whether a person who did not perform all (or substantially all) of those functions might fairly be described as “dispensing” contact lenses. In our judgment, this does not matter. We do not need to decide what dispensing opticians generally do in relation to prescription contact lenses or whether Mr Dumaine’s definition of “dispensing” in this context is correct. (We should say that we have no reason to doubt it.) All we need to decide is whether what VDL does amounts to the supply of suitably supervised medical care.

What does VDL supply?

152. To test whether the supplies made by VDL amount to appropriately supervised medical care we first of all need to decide what it is that VDL supplies. In the ordinary course, the starting point for any such analysis would be the relevant contracts in place between the parties involved, here VDL, VDBV are the end purchasers of contact lenses. Our problem here is that the contracts do not provide a particularly full or realistic account of everything the parties are doing. In paragraph [23]-[30] we outlined the relevant provisions of the T&Cs (which governed the relationship between VDBV/VDL and purchasers) and the contract between VDL and VDBV.

153. So far as the T&Cs are concerned, they explain that, when a customer places an order, they offer to purchase contact lenses or other products from VDBV and to enter into a contract with VDL for the “supply of dispensing services in relation to those products”. The T&Cs do not explain what is meant by “dispensing services” or exactly what it is that VDL is going to do for customers. The provision dealing with the amount payable to VDL (18% of the total purchase price) is headed “validation of contact lens specification”, which might suggest that VDL was going to do that, although (as we have seen) VDL only actively validates specifications in a very small number of cases. Nothing else is said about what VDL will do for customers.

154. As far as the contract between VDBV and VDL is concerned, VDL agrees to “provide the Services to the Customers” and the “Services” are defined as “a prescription validation service – verifying contact lens specifications using the optician details provided by Customers”. That is a very narrow (and unrealistic) description of what VDL is doing. As we have just noted, VDL validates specifications using optician details provided by customers only in a tiny proportion of cases.

155. Moving on from the contracts to what VDL actually does, it:

- (1) provides a facility under which customers’ enquiries (both in relation to ordering and clinical matters) are answered and it does this through online chat, post, social networks, a customer service line, and email.
- (2) sends out prompts/reminders (e.g., to buy lenses or informing customers of new/superior products of relevance);
- (3) operates the warehouse facility near York. Ms Shaw explained that the warehouses lease is held by another group company, but VDL manages the warehouse

and the despatch of products (although the products in the warehouse belong to VDBV). Ms Shaw explained that VDL is not paid a fee for this by VDBV, and effectively covers the costs of operating the warehouse out of the dispensing fee. We were not shown any contract which addresses this function, but Ms Shaw's summary was not challenged, and we accept it.

The website

156. In addition to the "customer facility", the Vision Direct group operates a website which (as we have seen) contains a significant amount of material which seeks to address every conceivable question someone might have about contact lenses. The information it provides is both theoretical and practical. The website is comprehensive and clear, and it contains material which is clinical in nature. It does, of course, also operate as a "marketplace" for VDBV, advertising its products, reassuring potential customers through the clinical content that Vision Direct is a safe place to buy contact lenses and other eye products and enabling customers to select, order and pay for the products they want.

157. HMRC say that the material on the website cannot amount to the provision of "medical care" as it is general, unspecific information not targeted at a particular contact lens user. We do not agree. As we have already found, the material on the website is comprehensive and seeks to address every conceivable question someone might have about contact lenses. We have also already held that process which starts with the diagnosis of an eye defect, following an eye test, the selection, measuring and fitting of corrective glasses or lenses to correct the defect and the supply of those glasses or lenses is a therapeutic process (designed to treat the eye defect). We consider that providing information, that helps people understand what contact lenses can do to help them and goes on to help them understand how they can best use and look after their lenses and addresses any problems they might have, must be a part of that therapeutic process as it goes to maximising its efficacy. We have not been directed to any authority that suggests that, if generic advice is sufficient to contribute to the therapeutic process, the lack of personalisation means that its provision cannot amount to medical care. In our judgment, advice does not need to be complex, difficult, or personalised to amount to medical care, as long as it contributes to the efficacy of the overall therapeutic process. This conclusion is consistent with the authorities which indicate that "medical care" should not be narrowly construed (see Case C-45/01 *Christoph-Dornier-Stiftung für Klinische Psychologie v. Finanzamt Gießen* ("*Christoph-Dornier*") at [48]) and our conclusion is consistent with the objective of the exemption, which is to reduce the cost of medical care, making it more accessible to individuals (see *Kügler* at [29]).

158. The next question for us is whether the provision of the website is part of the supply made by VDL. As we have already seen, VDBV asserts in the T&Cs that it operates the website and owns the intellectual property rights in its content. We asked the parties for their submissions on the question whether this has any impact on the breadth of supplies made by VDL (and in particular whether we should treat VDL as supplying the information contained on the website). VDL assert that, although VDBV owns the domain name and operates the website, customers enter into a contract with VDL for dispensing services and the website is one of the media through which VDL provides its dispensing services, by producing optical content and uploading it to the website. HMRC's position on this point is that the website belongs to VDBV and VDL has never argued that VDBV was acting as VDL's agent so far as the provision of material on the website is concerned. It follows that VDL cannot rely on the website content when it comes to analysing the service it provides.

159. The contract between VDL and VDBV does not make any provision for the relationship between these two companies in relation to the website. It does not, for example, suggest that VDBV will maintain the website and use it to host material provided by VDL.

The T&Cs assert that VDBV is the owner or licensee of all intellectual property rights in “our Site” and in the material published on it, and, as we noted in paragraph [25], the T&Cs are framed in terms of the site and material on it belonging to VDBV and VDBV being the operator of the website.

160. Nothing was said to us about the capacity in which optical staff acted when they were involved with the website. Mr Dumaine is employed by VDBV and other senior optical staff are employed jointly by all group companies. Were they acting for VDL or VDBV when reviewing website content? In Mr Dumaine’s case, at least, the only straightforward answer is that he was working for VDBV. The only clear provision is VDBV’s assertion in the T&Cs that the website content belongs to it. On that basis we consider that the material on the website (including the optical/clinical content) “belongs” to VDBV and is made available by it. It must follow from this that, to the extent VDL has supplied this material or reviewed its content, it has done this for VDBV pursuant to a contract or other arrangement between the two companies. It is VDBV which makes the content available to customers and other website users. If we assume (this is the next question we will consider) that the provision of the website (at least as far as customers are concerned) amounts to a supply, there are two supplies here, one (of producing or reviewing website content) between VDL and VDBV and another (making the website material available) between VDBV and customers. VDBV is, as it were, a new actor and has broken the chain of supply.

161. The next questions, if we are wrong in our view that it is VDBV alone rather VDL which provides the website content, are (a) whether the provision of the website content forms part of any supply made by VDL for VAT purposes, and (b) if it does not, can it be considered in the characterisation of the supply which VDL actually makes?

162. Fundamental though it is, there is no particularly clear definition of “supply” in either UK or EU VAT legislation. As far as UK law is concerned, section 5(2)(a) VATA merely provides that “supply” includes all forms of supply, but not anything done otherwise than for consideration.

163. Article 14(1) of the Directive provides that a supply of goods means “the transfer of the right to dispose of tangible property as owner” and Article 24(1) provides that “supply of services” means “any transaction that does not constitute a supply of goods”. However, even if a transaction amounts to a supply of services, it will not (subject to certain deeming provisions) be subject to VAT if the supply of services is not made “for consideration”.

164. The relevance of this point for us is that the whole of the website (including the clinical content) is made available for free to anyone who wants to come along and look at it. In the context of our first question, certainly as far as domestic law is concerned, if there is no consideration there can be no supply, and consideration is something which is directly linked by a legal obligation to something which is provided. We consider it wholly unrealistic to regard the payment customers make for “dispensing services” as having any link at all (let alone a direct legal one) to the website, as they could have accessed it for free in any event, in much the same way as passers-by could listen to the busker’s music in *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) whether they put money in his hat or not. On that basis, the provision of the website cannot be a supply (at least looked at on its own) because it is available to all comers for free; it is not provided for a consideration. In terms of the Directive, the free provision of the website could be part of a supply (albeit not one subject to VAT) if it were the object of a “transaction”. We find it hard to see how going on to or using a website can amount to a transaction where there is no element of bargaining or agreement between the two parties; the website is simply there and can be used by anyone who wants to. If, which we have already concluded we do not think is the case, it is VDL

which provides the clinical content on the website, we would not consider that this material was supplied (as that term is understood for VAT purposes) by VDL, because that provision is not made under a transaction or for a consideration.

165. If the clinical information on the website is not “supplied” by VDL for VAT purposes, then we do not consider that it should be taken into account in characterising anything which is supplied by VDL. Section 31(1) VATA provides (our emphasis) that a “supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9”. The most natural reading of that provision is that one must first identify what is supplied (the goods or services which constitute the supply) and then decide if that supply falls within a description in Schedule 9. On that reading, it is only the goods or services which form part of that supply which should be considered in deciding whether the supply meets one of those descriptions and anything else that is going on around that supply should be disregarded. We were not referred to any authority which would suggest that such penumbral matters should be considered in determining the nature of a supply.

166. Pausing here, in relation to the website our conclusions are that:

- (1) the quality, quantity, and nature of the optical information on the website are such that its provision could amount to “medical care”, but
- (2) the information on the website is not provided by VDL, and
- (3) even if it were provided by VDL, the terms on which it is made available mean that it is not part of any supply made by VDL and must be left out of account when it comes to characterising the supplies VDL does make.

Validating specifications

167. To a very small extent, VDL validates specifications, but only in those cases where a customer has asked for its specification to be validated. In all other cases, customers place their orders directly with VDBV and enter the details of the contact lenses they wish to purchase on its website. Neither VDBV nor the VDL validate those specifications. Even if the “pop ups”, which provide some safeguards against certain specification irregularities, amount to the provision of medical care, these pop ups are contained on VDBV’s website, which (as we have already seen) VDBV (and not VDL) owns, operates and holds all the intellectual property in. Whilst opticians (two of whom are employed by VDL, albeit jointly with other Vision Direct companies) may have had some input into those pop ups, they operate on VDBV’s website and VDL is not involved in that process at all.

Answering clinical queries

168. VDL does provide responses to customer queries including clinical queries. The website is clearly relevant here, since (whichever Vision Direct entity it belongs to) it forms part of the resource used by VDL’s customer assistants to answer the customer queries put to it. It was accepted by HMRC that, if a VDL customer assistant pointed a customer at a particular page on the website as answering their question, that would constitute clinical advice. The same would no doubt apply if they had identified a useful resource on a competitor’s website and pointed a customer at that.

169. As far as answering clinical queries is concerned, clearly that service looked at in isolation would fall within the definition of medical care. We have reviewed extensively the range of questions put to customer assistants and their replies, both in the witness evidence and the written materials submitted. We are sure that the questions put to VDL’s customer assistants include questions which prompt them to give clinical/medical advice. There may be scope for discussion about whether some questions that VDL regards as clinical are truly clinical and about how well some of them were answered, but this does not detract from the

fact that VDL's customer assistants are asked questions which are undoubtedly clinical. To help them deal with these questions, they have resources in the form of the website and intranet, and they can escalate difficult questions to (unqualified but more senior) supervisors or directly (or via their supervisors) to an optician.

170. Leaving aside its "pick and pack" function for a moment and given our conclusions on the website, the main service that VDL offers to individuals who purchase products from VDBV is this ability to access the customer help facility. In addition, customers may be sent automatic reminders to purchase new lenses and be informed by email of new, superior products. A very small number of customers may ask VDL to try to verify their specification with their optometrist.

171. In terms of customers who make use of the help facility, we know from Mr Hall's (unchallenged) evidence that approximately 8% of customers get in contact with VDL with one form of question or another. Of those contacts, he said that approximately 30% were looking for pre or post sale advice (for example, an issue with a faulty lens). In cross-examination he agreed that about a third of that 30% would be making orders on the phone or checking that certain products were the same as they were before and therefore not all that 30% (perhaps only two-thirds, so 20%) would be true clinical questions. In other words, somewhere between 1.6% and 2.4% of customers contact VDL to raise a question which might be considered to involve giving clinical advice.

172. So, some clinical advice will be given on the helpline, but three times as many customers use the help facility to raise non-clinical issues as clinical ones and 92% of customers do not use the facility at all. Very few customers will ask their prescriptions to be verified, and it will not be possible to do this for many of those who do. There may be some remote reminders of relatively routine matters (such as the need to buy new lenses). Looked at realistically and accepting Ms Shaw's point that it is open to every customer to raise a clinical question if they want to, we do not consider that the service we have described can fairly be described as the provision of "medical care"; it is the provision of a customer support facility covering a range of issues, which can include issues of a clinical nature, and a reminder/prompt function.

Operating the distribution facility

173. We turn now to consider whether the distribution function VDL performs forms part of its supply to customers. In the T&Cs VDL agrees with customers to provide "dispensing services". That term is not defined in the T&Cs. In the Oxford English Dictionary "dispense" has a general meaning ("To mete out, deal out, distribute; to bestow in portions or from a general stock.") and a medical meaning ("To make up (medicine) according to a prescribed formula; to put up (a prescription)"). Unlike with spectacles, there is no element of creating or making up involved here. The physical dispensing of contact lenses involves choosing the correct lenses and dispatching them. We consider that "dispensing" is a word which in this context can perfectly naturally apply to the activity of picking, packing and dispatching contact lenses.

174. The VDBV/VDL contract we were shown does not address this fulfilment function; it does not tell us for whom or at whose cost VDL is doing this. The contract does not require VDL to do this, although clearly it does. Ms Shaw told us that VDL is not paid to perform this function by VDBV but funds it out of the "dispensing" fee charged to customers.

175. Given that the ordinary dictionary meaning of "dispense" includes distribution and looking at the T&Cs in this context (that the dispensing fee pays for VDL's selection, packing and delivery function), we have concluded that the "dispensing services" VDL

provides for customers includes the selection and dispatch of the products the customer has ordered.

176. As Mr McGurk observed, choosing the correct goods to dispatch is not a clinical function, however sophisticated VDL's packing system may be. It is no different from any other remote seller of goods (Ocado or Amazon, for example) making sure they fulfil their customers' orders. We mentioned earlier that the only element of a dispensing optician's services McCullough J was concerned by in *Leightons* was the relatively small delivery element of service provided when the patient came in to collect his spectacles. He concluded that this was ancillary to the service of measuring and specifying, so that it too was exempt; [1995] STC 458 at p465. That is not the case here, where the function of picking, packing and delivery of the lenses (not just handing them over to a customer who is physically present) is much more substantial. This activity (and the answering of the 92% of helpline queries which relate to the sale/delivery of lenses rather than clinical matters) is not dissociable from the activity of selling contact lenses so as to amount to a separate supply of medical care, even where that activity is performed by a person other than the seller of the lenses.

177. Even if the services VDL provided to customers did not include this selection, packing and delivery function, we would have concluded (for the reasons in [172]) that VDL's services could not be described in the round as "medical care". The fact that, in our judgment, VDL was performing a selection, packing and delivery function for customers as part of its "dispensing services" makes us even firmer in our conclusion.

178. This is sufficient to dispose of the appeal in HMRC's favour, but we will go on briefly to consider the second issue, which is whether, assuming the services supplied by VDL were services of medical care, they were subject to appropriate supervision within the meaning of Note (2).

Note (2): supervision

179. Mr McGurk stresses the need for oversight seen in the passage from *Allergycare* cited above, and we consider that he is right to do so. An element of oversight or supervisory responsibility is, to our mind, the most natural meaning of "direct supervision", as much if not more than training or helping. That much is clear from the Oxford English Dictionary, which gives as the two primary meanings of the verb to supervise as, "To oversee or direct the execution of (a task, activity etc); to have charge of or responsibility for (a business, institution, department etc.); to preside over; to superintend" and "To oversee the work or conduct of (a person or group of people); to have supervisory responsibility for (an employee or workforce)." That element of authoritative/superior oversight or "checking up" is to be seen in both *Elder Home Care* (in the frequent and regular visits) and in *Land* (by Dr De Silva sitting in the outer room whenever he was not conducting eye tests and observing what was going on).

180. Note (2) requires (so far as relevant) direct supervision by a person who is registered on the register of dispensing opticians kept under OA89. Only Mr O'Brien was so registered in the period in question. Mr Roth and Mr Dumaine are qualified abroad but they were never registered with the GOC. HMRC were originally told that VDL relied only on Mr O'Brien's supervision to meet the requirements of Note (2) but were later told that VDL also relied on supervision by Mr Roth and Mr Dumaine, as VDL considered Note (2) to be a breach of EU law. In her skeleton Ms Shaw submitted that HMRC appear to accept that supervision can be provided by someone registered under OA89 or a person qualified elsewhere in the EU. Mr McGurk made it clear that HMRC do not accept that proposition at all.

181. Ms Shaw relies on the CJEU decision in *Belgisch Syndicaat van Chiropaxie and others v. Ministerraad* (Case C-597/17) in support of this proposition. This was a purely

domestic dispute. Under Belgian law exemption was limited to cases where services were provided by certain regulated provisions, which did not include chiropractors, osteopaths, and plastic surgeons. The CJEU held that, depending on the structure of medical and paramedical provision in a Member State, it may be possible to verify the professional qualifications of an individual (to ensure that the healthcare is of a sufficient quality) without requiring then to be a member of a regulated profession. Fiscal neutrality was relevant here, as similar supplies in competition with each other should not be treated differently for these purposes. As Mr McGurk observed, this case is about equivalence within a Member State and has nothing to say about whether requirements such as Note (2) infringe Treaty rights, which Mr McGurk says it does not as it is open to a foreign qualified optician such as Mr Roth or Mr Dumaine to register with the GOC as an overseas qualified dispensing optician. As Ms Gill explained in evidence, if their qualification was at least equivalent to a UK dispensing optician, they would have been registered. If not, they could have been registered but restricted to doing what their qualification and training indicated they were competent to do. EU law is concerned with unlawful restrictions on free movement, including of professionals, but it has never been suggested (Mr McGurk says) that the GOC's approach to registration is contrary to EU law. This point was not pleaded, and we should reject it for that reason and because it is wrong.

182. Because we did not hear full argument on this point, while we see significant force in what Mr McGurk says, we do not think that it would be right for us to express a concluded view on this point. There was no discussion before us of the consequences for this appeal of finding that Mr Dumaine or Mr Roth were not suitably qualified or not. If, as VDL originally argued, supervision by Mr O'Brien alone was sufficient, adding Mr Roth and Mr Dumaine merely leaves all relevant activities supervised by more than one suitable person. We do not understand VDL to have abandoned that argument. If they are not suitably qualified, there must have been some activities which Mr O'Brien did not supervise but Mr Roth and Mr Dumaine did; for example, when they "covered" for Mr O'Brien when he was on holiday or otherwise unavailable. The implications of this were not explored. There was no discussion, for example, of how we should identify the supplies that had been properly supervised and those which had not been and how this would feed into the determination of this appeal. However, we do not need to come to a view on this point.

183. The reason why we do not consider that the requirements of Note (2) are satisfied is that, even if Mr Roth and Mr Dumaine are to be treated as suitably qualified opticians for this purpose, we are not satisfied that all the necessary elements of supervision are to be found here.

184. We consider that supervision in this context is made up of three elements. Firstly, appropriate training of the non-qualified individuals, so that they can competently carry out the functions delegated to them. Secondly, access to an appropriately qualified person at all relevant times to help unqualified individuals with any questions of difficulty. Finally, there must be an element of proactive (supervisor-initiated) oversight of the unqualified individuals.

185. VDL's submissions focus on the first two conditions (training and the availability of qualified help). We are entirely satisfied that those elements are present, albeit that queries will in many cases be escalated through supervisors before reaching an optician. In her final note on evidence, Ms Shaw submitted that supervision can be broken down into three parts, training, provision of reference manuals and being readily available to intervene. She demonstrated from the witness and documentary evidence to our complete satisfaction that all these elements were present.

186. As far as oversight is concerned, she referred to *Verigen*, where there was no oversight by medical professionals during the process of multiplying the cartilage cells. Doctors were involved before and after Verigen's work, but not while it was going on. The principle she derives from that case is that direct supervision can be supplied by a suitable professional having direct involvement in and oversight of the provision of a process, but individual elements of the process can qualify for exemption even without any medical supervision of that element. The supervision here is like that in *Elder Care*: opticians can be contacted if necessary and they will intervene if necessary. As far as *Allergycare* is concerned Ms Shaw (rightly) points out that the ratio of that decision (not that it is binding on us in any event) was that the taxpayer was supplying franchise rights to franchisees and did not make supplies to the public. The tribunal then went on to discuss supervision. The medically qualified personnel were not involved with the treatment unless contacted by a franchisee. She says that case is different because the panel of qualified personnel had not taken responsibility for the supervision of the testers; the facts of that case are far from the position here. At least one optician was supervising all the time, available to help or take over and speak directly to customers. Opticians were involved in training, both delivering it and checking materials. Customer assistants' performance is monitored with appropriate training and professional development. Then there is the website and intranet as an ongoing resource.

187. To some extent this aspect of supervision was addressed by Mr Greatbanks in his witness statement. He firstly referred to the GOC guidance on supervision and said that VDL largely complies with the GOC's guidance on supervision, except that there is no optician on the premises in a position to oversee the work undertaken and ready to intervene if necessary. This is because it will often be the case that no optician is on the premises where the optical assistants are working. He says this is no different from what happens on the high street and referred to one high street chain where a CLO will visit a branch only once a week. However, he says, he or another optician will always be overseeing the work undertaken and ready to intervene if necessary. Mr Greatbanks does not explain how an optician will always be overseeing (as opposed to ready to intervene in if asked) the work if they are not present. He says that, as far as having systems in place to manage poor clinical performance is concerned, the performance of customer assistants is monitored by opticians and exhibits a customer assistant's development plan. The plan submitted (see [131] above) shows the coach as Denise Goodfellow (who is not a qualified optician). Other examples with coaches who were not opticians were raised with Mr Greatbanks in cross-examination.

188. Mr Dumaine discusses supervision by reference to training materials and his availability to deal with difficult questions. He agreed that queries would be escalated through others before reaching an optician and generally that "it is the sales managers who directly supervise the sales assistants" (the customer assistants). Mr Hall discusses initial training, access to reference materials and availability of help if needed.

189. We agree with Ms Shaw that the GOC's guidance/standards for its members are not relevant when it comes to deciding whether the requirements of Note (2) have been complied with. The question for us is, whether such guidance/standards have been complied with or not, are we satisfied that the qualified opticians working in VDL's business were exercising their authority and "checking up on the unqualified [customer assistants], or, at [their] own initiative making sure that all is going as it should" (*Allergycare* at [7])?

190. None of the witnesses explained how the opticians monitored the performance of the customer assistants and line managers so that they could satisfy themselves that their performance was of a suitable standard, such that difficult optical/clinical issues were not being missed and appropriate clinical/optical advice was being given to customers who used the helpline. There is no evidence before the Tribunal which enables us to conclude that any

of the opticians delivered this element of supervision in the relevant period. We accept everything that Ms Shaw submits about part of a process amounting to “medical care” and supervision not needing to be unremitting, but this does not detract from the need for that authoritative, intrusive (if not constant) element of checking, knowing for yourself what is going on. This is not inconsistent with the CJEU decision in *Verigen*. In that case the tissue was delivered to doctors, who would be able to check it before it was used in their patients and so the work of the unqualified personnel would be validated before it was used in the end medical process.

191. For these reasons, our answer to the question we posed ourselves at the end of paragraph [189] is “No”. It follows that the requirements of Note (2) were not satisfied.

Fiscal neutrality

192. The final point we need to address is whether, given our conclusion the VDL’s services are standard rated when supplied to UK customers, the principle of fiscal neutrality is engaged given that dispensing services in relation to repeat purchases of prescription contact lenses supplied on the UK “high street” are exempt.

193. As discussed above, the principle of fiscal neutrality requires that similar supplies of services, which are in competition with each other, are to be treated the same for VAT purposes and, in the context of the medical care exemption, the question whether services are similar is to be evaluated by asking whether the disputed supply is of equivalent quality from the point of view of recipients.

194. There are two reasons why the service supplied by VDL is materially different in quality from the supplies made by “high street” dispensing opticians so that the supplies are not similar. First, the requirements of Note (2) are not satisfied. This means that the supplies VDL makes are not subject to the same level of assurance as dispensing services on the high street. Mr Greatbanks suggested that there were shortcomings in the level of supervision to be seen on the high street, but for these purposes we must assume that the comparator services are properly supervised, and the requirements of Note (2) are satisfied in relation to them.

195. Secondly, there is no element of prescription/specification validation in the service VDL supplies. UK high street dispensing opticians need to comply with section 27 OA89, assuming they are selling lenses as well as providing services. VDL is not selling lenses, so it is not required to comply with section 27 OA89, and it has decided (as it is perfectly free to do) not to validate prescriptions/specifications as a matter of course (attempting to do so only for those few customers who specifically ask for this) as part of its dispensing services in connection with VDBV’s lens sales. We reached our conclusion on the liability of VDL’s services simply by analysing what it does, without taking the of lack of validation into account.

196. Prescription/specification validation puts the supplier in the continuum of the therapeutic process, which starts with the eye test and ends with the customer taking possession of and using their lenses. If a person participates in that chain of activity without checking (or at least ensuring that someone else is checking) that what is happening at their stage of the overall process is consistent with the previous links in the chain, they take themselves outside that continuum of care. Whether their supply amounts to medical care will depend on what else they do, but the fact that they have taken themselves outside that continuum amounts in our opinion to a very material qualitative difference from those who stay within it. We acknowledge that the remote dispensing service in *Prescription Eyewear* was held to amount to “medical care” even though customers entered their prescriptions themselves. In that case, however, there was a very comprehensive system, operated in all

cases and which the opticians were closely involved in, for identifying and correcting errors. There was an extensive assurance process in place. We know, from our study of the website, that the “no need for prescription validation” feature of Vision Direct’s business model is promoted to customers as an advantage.

197. From the point of view of customers VDL’s services lack these two elements of assurance, and so its services are of a very different quality from the point of view of recipients. VDL’s supplies are not similar to the comparator exempt supplies (of contact lens dispensing services on the high street by a business which also sells the lenses) and so the concept of fiscal neutrality is not engaged.

DISPOSITION

198. For the reasons set out above we have concluded that in the relevant period:

- (1) the services supplied by VDL did not constitute “medical care” within item 1(b) of Group 7 of Schedule 9 to VATA; and
- (2) those services were not wholly performed or directly supervised by appropriately qualified individuals as required by Note (2) to Group 7.

199. For these reasons, this appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

**MARK BALDWIN
TRIBUNAL JUDGE**

Release date: 21st NOVEMBER 2023