Neutral Citation: [2025] UKFTT 895 (TC)

Case Number: TC09596

FIRST-TIER TRIBUNAL
TAX CHAMBER

[Taylor House]

Appeal reference: TC/2022/02053

VAT – supply of flooring by Appellant – fitting carried out by independent fitters – whether supply of fitting services being made by Appellant as a single supply of flooring and fitting or whether there were two separate supplies – the economic realities of the transaction when looked at as a whole – the need to have regard to all the circumstances in which the transaction or combination of transactions takes place – the contractual documentation and the legal relationship of the parties – Secret Hotels 2 Limited v HMRC; All Answers Ltd v HMRC and Tolsma v Inspecteur der Omzetbelasting Leeuwarden considered and applied – legitimate expectation and the jurisdiction to consider public law arguments in the context of an appeal against a best judgment assessment under section 73(1) of the Value Added Tax Act 1994 – Appeal allowed (The Supply Issue)

Heard on: 14 to 16 May 2025
Judgment date: 24 July 2025

Before

JUDGE NATSAI MANYARARA
JOHN AGBOOLA JP

Between

UNITED CARPETS (FRANCHISOR) LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Michael Jones KC, instructed by Mishcon de Reya LLP

For the Respondents: Miss Isabel McArdle of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal concerns the VAT treatment of a series of transactions. The Appellant (United Carpets (Franchisor) Limited) appeals against VAT assessments ("**the Assessments**"), raised to best judgment (pursuant to s 73(1) of the Value Added Tax Act 1994 ("**VATA**")), as follows:

VAT period	Date of Issue	Amount
02/18	24 February 2022	£31,975
05/18	30 May 2022	£28,836
08/18	31 August 2022	£25,555
11/18	13 October 2022	£37,356
02/19	13 October 2022	£37,097
05/19	13 October 2022	£38,941
08/19	13 October 2022	£36,266
11/19	13 October 2022	£41,794
02/20	13 October 2022	£35,762
05/20	13 October 2022	£11,015
08/20	13 October 2022	£31,050
11/20	13 October 2022	£29,435
02/21	13 October 2022	£30,508
05/21	13 October 2022	£21,348
08/21	13 October 2022	£29,488
11/21	13 October 2022	£30,397
	Total	**£496,823**

2. The Appellant is a retailer of flooring (including carpets, underlay, vinyl and wood flooring), as well as beds. A customer who purchases flooring from the Appellant is given the option to have an independent, self-employed, fitter to carry out the fitting of the flooring that the customer has purchased. If the customer so chooses, the fitter will attend the customer's home to fit the flooring, as directed by the customer. The fitter is then paid by the customer for that work, with the money being received and retained, in full, by the fitter.

3. HMRC determined that the Appellant had incorrectly treated the supply of carpet fitting and contend that the Appellant supplied fitting services via subcontractors who have assessed the Appellant for output tax on the fitting fees. HMRC further contend that the Appellant makes those supplies as part of a single supply, comprising both the flooring and the fitting services. The Assessments were raised to recover under-declared output tax.

4. The Appellant's position is that the self-employed fitters are completely independent, and that the fitting services do not form a single supply. The Appellant further contends that HMRC had stated that they had decided to take no further action to disturb the status quo as regards the VAT treatment adopted by the Appellant, but that they would review the sector more broadly and, if appropriate, issue clarificatory guidance in the future. HMRC disagree. HMRC's position is that there had merely been a pause in the enquiry.

ISSUES

5. The issues in the appeal are:

(1) Whether, for VAT purposes, the supplies of fitting services made to customers following the referral to the fitter by the Appellant were supplies made (i) by the self-employed carpet fitters who performed the services, or (ii) by the Appellant as a single supply of flooring and fitting ("**the Supply Issue**"); and

(2) Whether the Assessments, or alternatively some of them, should be quashed on the basis that they were made by HMRC in breach of a legitimate expectation on the part of the Appellant that HMRC would take no such retrospective action ("**the Legitimate Expectation Issue**"). This issue gives rise to a question as to the scope of the jurisdiction of the Tribunal, and the application of the doctrine of legitimate expectation.

BURDEN AND STANDARD OF PROOF

6. The burden of proof is on the Appellant to establish the correct amount of VAT that should be assessed. This is evident from the case *C & E Coms v Pegasus Birds Ltd* [2004] STC 1509; [2004] EWCA Civ 1015 ('*Pegasus Birds (2)*'), where Carnwath LJ said this:

> "[14] Generally, the burden lies on the taxpayer to establish the correct amount of tax due:
>
> 'The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right."

7. This was also explained by Mustill LJ in *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635, at 642, as follows:

> "The starting point is an ordinary appeal before the [Tribunal]. Here, however unacceptable the idea may be to the ordinary member of the public, it has been clear law binding on this court for sixty years that an inspector of taxes has only to raise an assessment to impose on the taxpayer the burden of proving that it is wrong: *Haythornwaite & Sons Ltd v Kelly (Inspector of Taxes)* (1927) 11 TC 657"

8. The standard of proof is the ordinary civil standard; that of a balance of probabilities.

AUTHORITIES AND DOCUMENTS

9. The authorities, to which we were referred by the parties included:

(1) *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case 16/93) [1994] STC 509 ('*Tolsma*');

(2) *C & E Comrs v Redrow Group plc* [1999] 1 WLR 408; [1999] STC 161 ('*Redrow*');

(3) *A1 Lofts Ltd v HMRC* [2010] UKFTT 581 (TC) ('*A1 Lofts*');

(4) *R & C Comrs v Loyalty Management UK Ltd* and *Baxi Group Ltd v R & C Comrs* (Joined Cases C-53/09 and C-55/09) [2010] STC 2651 ('*Loyalty Management (CJEU)*');

(5) *Lower Mill Estate v HMRC* [2011] STC 636 ('*Lower Mill Estate*');

(6) *HMRC v Aimia Coalition Loyalty UK Ltd (formerly known as Loyalty Management UK Ltd)* [2013] UKSC 15, [2013] STC 784 ('*Aimia*');

(7) *WHA Ltd v R & C Comrs* [2013] UKSC 24; [2013] 2 All ER 907; [2013] STC 943 ('*WHA Ltd*');

(8) *Secret Hotels 2 Limited v HMRC* [2014] UKSC 16, [2014] 2 All ER 685 ('*Secret Hotels*');

(9) *Adecco (UK) Ltd & Ors v HMRC* [2018] EWCA Civ 1794 ('*Adecco*');

(10) *R & C Comrs v Newey* [2013] STC 2432 ('*Newey (CJEU)*')

(11) *HMRC v Newey (t/a Ocean Finance)* [2018] EWCA Civ 791, [2018] STC 1054 ('*Newey*');

(12) *HMRC v Airtours Holidays Transport Ltd* [2016] UKSC 21, [2016] 4 WLR 87; [2016] STC 1509 ('*Airtours*');

(13) *National Car Parks Ltd v HMRC* [2019] EWCA Civ 854, [2019] 3 All ER 590 ('*National Car Parks*');

(14) *All Answers Ltd v HMRC* [2020] UKUT 236 (TCC) ('*All Answers*');

(15) *Trustees of the BT Pension Scheme v HMRC* [2016] STC 66 ('*BT Pension Scheme'*);

(16) *Metropolitan International Schools v HMRC* [2019] EWCA Civ 156 ('*MIS*');

(17) *KSM Henryk Zeman SP Z.o.o. v HMRC* [2021] STC 1706 ('*KSM*');

(18) *Hoey v HMRC* [2022] EWCA Civ 656 ('*Hoey*');

(19) *Caerdav Ltd v HMRC* [2023] UKUT 179 (TCC) ('*Cardev*');

(20) *Queenscourt v HMRC* [2024] UKFTT 460 (TC) ('*Queenscourt*');

(21) *Treasures of Brazil Ltd v HMR*C [2024] UKFTT 929 (TC) ('*Treasures of Brazil*'); and

(22) *Veolia ES Landfill Ltd & Anor v HMRC* [2016] EWHC 1880 (Admin) ('*Veolia*').

10. The documents to which we were referred included: (i) the Hearing Bundle consisting of 1354 pages; (ii) the Authorities Bundle consisting of 1284 pages; (iii) the Appellant's Skeleton Argument dated 25 April 2025; and (iv) HMRC's Skeleton Argument dated 7 May 2025.

BACKGROUND FACTS

11. The Appellant registered for VAT, with effect from 1 July 2012.

12. The Appellant is a franchise business and the majority of its stores are franchise stores. The Appellant's main income stream is franchise commission and the Appellant takes a commission on all items sold. Franchise commission, until recently, was calculated at 9.5 % of net order value (net of discount). This has risen to 10.5%. In respect of the Appellant's turnover, of the turnover from carpets, other flooring and beds, 10% relates to beds, with the remaining 90% split between carpets and other flooring. The Appellant estimates that carpets account for 83.3% of all flooring sales, and that 75% of carpets were sold with fitting.

13. Each store has a pool of fitters who take on fitting work referred to them by the Appellant. Some fitters have been part of the pool for many years, while others come and go. In terms of allocating fitters to particular jobs, it is either the store manager, the warehouse person or another member of staff who is in the warehouse who writes up the fitting sheets and matches customers to fitters, determining which fitter is allocated to which customer in the fitting diary. The store is aware of how many fitters are available each day and, broadly, knows the fitting capacity of each fitter/team of fitters for each day. The Appellant's staff book orders to that level for any given day. Sometimes a customer requests to be referred to a specific fitter. If that fitter remains in the pool of fitters for that store, then the Appellant will accommodate the request. The turnover of fitters in each pool varies from store to store.

14. The Appellant estimates that approximately 75% of customers purchasing carpets ask to be introduced to a fitter. There is no franchise commission charged by the Appellant in respect

of the price paid by the retail customer for fitting services. That price is charged and retained by the fitter concerned. If the total sales invoice value after discount is a value of £500, that franchise would pay 10.5% franchise commission, i.e., £52.50.

15. The Appellant also sold carpets online, although such sales made up a tiny fraction of turnover (approximately 1%, with that number declining over time). As of 2 September 2024, the Appellant no longer sells carpets online.

The Retail Offering

16. The Appellant runs a promotion for customers; referred to as a "free fitting" offer, but which is structured as a discount to the price of the flooring purchased by the customer. The promotion only applies to retail customers. Business-to- business sales are dealt with differently. To qualify for the promotion, customers buying a carpet must purchase an equivalent amount of underlay (with a minimum of $20m^2$). If they do, then the Appellant discounts the price of the goods by an amount equal to what is estimated to be the cost of fitting the carpet; the estimate being based on prices that have been stated to the Appellant in advance by the fitters. The figure is an estimate because it is based only on the amount of carpet purchased, multiplied by the rate per m^2 charged by the fitter.

17. The free fitting offer does not take account of any additional fitting charges occasioned by, for example, the need to fit the carpet to stairs or a landing - each of which is a more complex fitting operation - or moving furniture. The sales process is the same regardless of whether the customer purchases carpet or other types of flooring, such as laminate, vinyl or SPC flooring. The arrangements work in the same way whether or not the free fitting promotion applies; the difference being that in the latter case, the purchase price of the goods is discounted by the Appellant by reference to the estimated "basic" fitting charge.

18. By offering "free fitting", the Appellant reduced the amount of franchise commission earned.

The Fitters

19. The fitters are self-employed and they use their own tools, and drive their own vehicles. They also have their own public liability insurance and are not covered by any of the Appellant's insurance policies. They are not paid by the Appellant and are not on the Appellant's payroll. Since they are self-employed, the fitters have no ongoing obligations to the Appellant (or vice versa) and can take on referrals as they please. The Appellant does not hold any formal records for the fitters, and is not aware of how much the fitters earn by way of the referrals. The only record that the Appellant holds is the work diary, which notes which jobs were fitted for which customers (and when).

20. The rates charged by the fitters are determined by the fitters themselves - with the influence of market forces - albeit that if the rate proposed by the fitter were materially in excess of the average for the area, then the store manager will inform them of that. The average fitting charge, and minimum charge, sought by fitters varies by region according to the information held by the Appellant. Once again, this is determined by the fitters themselves and is not the product of any agreement with the Appellant. Regardless of the type of flooring that the customer purchases, or whether the customer qualified for the 'free fitting' offer, the customer pays the fitter for the fitting on the day of installation. If the customer does not pay the fitter on the day, that is something the fitter would need to resolve with the customer.

The Fitting Service

21. A customer walking into one of the Appellant's stores is greeted by a salesperson whose role is to ascertain the customer's requirements, and then guide them towards suitable products.

Once a customer has settled on a product, the salesperson verbally provides the customer with a quotation based on, either, sizes that the customer has provided, or rough estimate sizes that the salesperson believes would accommodate the customer's requirements. There are A4-sized "**Notices**" displayed throughout the store advising customers that the Appellant does not provide a fitting service. The signage was introduced in 2020, in conjunction with the revisions to the Appellant's "**Invoice**" and "**Terms and Conditions**". If the customer has indicated that they require a fitting service, the salesperson explains that the Appellant does not provide such a service, but can recommend a fitter to them should they wish. Where the customer requests referral to a fitter, the Appellant does so on the basis of its Terms and Conditions. We will return to the 'Notices', 'Invoices' and 'Terms and Conditions' later.

22. In terms of the process at the point of sale, when the customer gets to the till, the salesperson writes out an Invoice, which includes an estimate for the cost of fitting in the boxes on the Invoice marked "**Fitters Notes**" (towards the bottom of the page). The customer does not pay for the fitting at the till, but they are advised by the salesperson that they are to pay the fitter directly for his services. The provisional fitting quotation is noted on the customer's Invoice, but is not included in the sale price and, in line with the Appellant's Terms and Conditions, is provided as an estimate; and in many cases is based solely on the customer's description of the job. Of the customers purchasing other types of flooring, the Appellant estimates that approximately 45% of those customers ask the Appellant to introduce a fitter. Alternatively, the customer can arrange the fitting themselves as not all customers request the referral of a fitter.

The Installation Process

23. The installation date is chosen by the customer - according to fitter availability - at the point of sale, unless the customer is not ready to have the installation carried out immediately, or the delivery date of the product which they are purchasing is uncertain. On the morning of the installation, the fitter goes to the store to pick up work from the store. The fitter collects the carpet from the store and delivers it to the customer as part of his service to the customer. The fitters have a list of the customers and they will call the customer, in advance, to advise what time they are likely to arrive at the customer's home. The fitters will also decide how, and in what order, they will do all their jobs.

24. When attending the customer's home, if the fitter finds that the customer's description of the job is inaccurate, they advise the customer of any additional charges before undertaking the installation. Any differences that require the fitter to carry out differing, or additional, services to that originally described by the customer at the time of their store visit will be chargeable by the fitter to the customer at a rate agreed between them on the day. The Appellant is not privy to that discussion and does not know what the final fitting charge is. The responsibility of paying the fitter is that of the customer, who is obliged to pay the basic fitting charge to the fitter, together with any variations.

25. If the fitter does not show up for the job, then the Appellant sends a different fitter. This would, in most circumstances, be on the same day. However, there may be instances where an installation would need to be delayed. In the vast majority of instances where delay occurs, this delay would be short and the installation would usually be carried out the following day. The customer still pays the fitter on the fitting day (plus any surcharges) as agreed between the customer and the fitter.

26. If there is an issue about the fitting, then the customer will, in most instances, have the fitter's contact number and can contact him. If the customer does not have a contact number, then the customer will sometimes call the store and the store manager will then either pass on the fitter's contact details, ask the fitter to contact the customer, or in some instances arrange

for that fitter to return and complete rectification work. This work is carried out at the fitter's own cost. Complaints made by customers to the Appellant about fitters would normally be dealt with by sending the specific fitter who carried out the installation back to the customer to carry out any requisite remedial work. Repeated complaints about the same fitter would result in the Appellant ceasing to refer work to that individual fitter.

27. In the unusual case that a customer contacts the store to complain about an installation and specifically requests that the original fitter does not return, the store manager decides to send another fitter to rectify that work. That might, on occasion, be at the expense of the Appellant, but it might instead be agreed between fitters whereby the fitter in question pays another to rectify the work of the former. In the latter case, the Appellant would not be privy to any payment agreed between the two fitters. Where the Appellant does deal with issues in relation to fitting, then this is done to protect the reputation of its business.

HMRC's enquiries

28. In January 2020, the Appellant became aware that HMRC were looking at one of its franchisees in Mansfield, which trades under the name "Thompsons Carpets".

29. On 30 June 2020, HMRC issued assessments to Thompsons Carpets in relation to VAT on fitting charges, as a result of their check. Thompsons challenged this assessment.

30. On 7 August 2020, the Appellant's VAT adviser (Mr Sweeting) wrote to Officer Salam (of HMRC) in relation to the VAT compliance checks that HMRC had been carrying out in respect of Thompsons Carpets. Mr Sweeting proposed that, in order to avoid differing reactions from the various franchisees employing numerous advisors, attempts should be made to clarify, and arrive at, a position which can be explained to the franchisees through the Appellant (as the franchisor), who would then put into place appropriate systems under the franchise agreements for all franchisees to adopt.

31. The letter also explained that having reviewed the basis of Officer Salam's assessment on Thompsons Carpets, the Appellant had taken steps to implement a new system to clarify what they consider to be two separate supplies (i.e., the sale of floor coverings by the retailer and the supply of fitting services by an independent fitter). That new system would be adopted by all the franchisees (and in the Appellant's store). The letter concluded by proposing that the parties meet in order to establish the correct VAT position as regards the existing approach, and the proposed new one, so as to ensure compliance. There were subsequent telephone discussions between Officer Salam and Mr Sweeting. HMRC's preference was to postpone any discussion about the correct VAT treatment until the statutory review of the assessments issued to Thompsons Carpets had been completed.

32. On 28 September 2020, Mr Sweeting wrote to Officer Salam stressing the Appellant's concern about the delay that such a course would involve, and the need for commercial certainty for both the Appellant and its franchisees, as regards the VAT treatment. The letter also repeated the request for a meeting with HMRC. Due to restrictions in place as a result of the COVID-pandemic, a meeting was held via Teams. The purpose of the meeting was for HMRC to establish how the business operates, the business activities, how VAT is treated on activities/costs incurred, and to identify what interaction there is between all entities in the wider corporate group. Officer Hothi (of HMRC) then asked for information regarding the franchise arrangements.

33. Between 23 and 24 November 2020, the information was provided to Officer Hothi by Mr Sweeting, together with copies of the Appellant's pro forma Invoices, in-store Notices, staff training confirmation, and Terms and Conditions in relation to the sale of flooring, and the fitter introduction.

34. On 27 November 2020, the formal meeting between the Appellant and HMRC took place. Present were Mr Bowness (a director of the Appellant since retired), Mr Sweeting, Officer Hothi and Officer Jones, with notes being taken by HMRC. During the meeting, sales processes and fitter referral for retail customers were explained.

35. Following further exchanges of correspondence, on 24 May 2021, Officer Hothi wrote to Thompsons Carpets to inform them that they had decided to withdraw the VAT assessment that had been raised (in the sum of just under £375,000).

36. On 9 June 2021, a telephone call took place between Mr Sweeting, Officer Hothi and Officer Hussain in order to discuss HMRC's ongoing compliance check of the Appellant's VAT position. The note of the call records that Officer Hothi had said that he would be looking into aspects other than the fitting, but that the whole matter was under consideration and that they were actively working on the situation, which affected the whole sector and not just the Appellant. Mr Sweeting pressed the commercial importance of a timely resolution, and the need for certainty for the Appellant, who was using the contractual documentation on a daily basis. Officer Hothi is recorded as acknowledging the Appellant's concerns and saying that HMRC needed more time to consider the position and would advise as soon as they had an answer.

37. On 17 June 2021, Officer Hothi wrote to Mr Sweeting with further questions about the Appellant's VAT affairs.

38. On 6 July 2021, Officer Hothi wrote to Mr Sweeting by a letter headed "United Carpets (Franchisor) Ltd (UC) – New contractual arrangements", stating that HMRC had decided to take no further [action] at that time, but that HMRC would be considering how the sector, more broadly, arranges its supplies. Mr Sweeting responded to Officer Hothi on the same day to mention that the word "*action*" appeared to be missing from the sentence "*has decided to take no further at this time*" in Officer Hothi's letter. Mr Sweeting also wanted to clarify whether Officer Hothi was saying that the Appellant's contractual documentation was being accepted at this time as indicating that there are two separate supplies (i.e., in line with the Appellant's VAT treatment) and that any change after HMRC's review would only be from the date that HMRC clarified the position. Despite Officer Hothi's promise of a response to Mr Sweeting's second query, no further response was provided.

39. On 13 July 2021, Mr Sweeting wrote to Officer Hothi to seek confirmation that any change in HMRC's position as to the VAT treatment of the supplies would only have prospective effect from the date that HMRC communicated that change.

40. On 10 November 2021, Officer Hothi emailed Mr Sweeting to say that he would be moving to a new department and that Officer Grain would be taking over the matter and would continue with the review.

41. On 14 December 2021, a Teams meeting was held at which HMRC stated that they were of the view that the supply of the flooring and the fitting was a single supply, and that they were considering raising assessments.

42. On 20 December 2021, Officer Grain wrote to the Appellant to say that:

> "*the case is still under active consideration and currently progressing through the internal governance process before a final decision can be made*".

43. Officer Grain also asked for the Appellant to provide the quantum of the VAT on fitting fees for the period 1 December 2017 to 30 November 2021.

44. On 31 January 2022, Officer Grain explained that the information about quantum was:

"*considered necessary information and ensures that the submission to the board meets the referral criteria.*"

45. He also stated that the current view of HMRC was that the Appellant makes a single supply of fitted carpets, but that that decision needed to be approved by HMRC's governance board. In the meantime, "*to protect HMRC's current position*", it was said to be necessary to raise assessments where time limits were approaching. Officer Grain said that HMRC would not seek to enforce any such assessments until after the board had concluded its deliberations.

46. On 16 February 2022, Mr Sweeting responded to Officer Grain with the information regarding quantum that he had requested.

The Assessments

47. On 23 February 2022, Officer Grain emailed Mr Sweeting, attaching a notice of assessment (dated 24 February) for the period 02/18, in the sum of £31,975.

48. On 30 May 2022, Officer Grain wrote to Mr Sweeting to advise that the decision letter was being finalised and would be issued shortly, and that due to impending time limits, he had raised an assessment on the Appellant for the 05/18 period.

49. On 31 August 2022, Officer Grain raised a further assessment (for the period 08/18) and stated in the accompanying email that he expected to be able to issue the decision letter and assessments for all periods up to and including 11/21 by the end of the following week.

50. On 12 October 2022 (under the cover of a letter dated 13 October), Officer Grain issued the remaining assessments for the period 11/18 to 11/21.

RELEVANT LAW

51. In order to put the parties' respective contentions into context, we start with the relevant statutory provisions. The relevant law, so far as is material to the issues in this appeal, is as follows:

52. The law relating to payment, and recovery, of VAT in the United Kingdom is contained in VATA, which was intended to reflect the provisions of certain EC Directives. The relevant EU legislation is contained in Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes ("**the First Directive**") and Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the member states relating to turnover taxes - Common system of value added tax: uniform basis of assessment ("**the Sixth Directive**"), as amended by Council Directive 95/7/EC of 10 April 1995. The provisions of the Sixth Directive, as amended by the Invoicing Directive, were replaced by EC Council Directive 2006/112/EC, which is known as the Principal VAT Directive ("**the PVD**"). The current EU provisions relating to VAT and the recovery of input tax are contained in the PVD, which is the source of legislation concerning VAT. The PVD was transposed into domestic law by VATA.

The PVD

53. Article 1(2) of the PVD describes the basic system of VAT thus:

> "The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged. On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components. The common system of VAT shall be applied up to and including the retail trade stage."

54. VAT is payable by a taxable person carrying out a taxable supply of goods or services: art. 93 PVD. A "**taxable person**" is defined as any person who carries out, in any place, any economic activity, whatever the purposes. VAT is charged on "**supplies**" of goods and services for "**consideration**": art. 2(1). VAT becomes chargeable when a supply takes place: art. 63. Articles 14(1) and 24 of the PVD, reflected in s 5, Schedule 4, VATA, define the concepts of "**supply of goods**" and "**supply of services**" respectively, in the following terms;

> "'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner."
>
> "'Supply of services' shall mean any transaction which does not constitute a supply of goods."

55. Article 73 of the PVD, reflected in s 19 VATA, defines, so far as relevant, the "**taxable amount**" as:

> "in respect of the supply of goods or services … everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, …"

56. Article 167 of the PVD provides that:

> "A right of deduction shall arise at the time the deductible tax becomes chargeable."

57. Article 168, reflected in ss 24(1), 24(2), 26(1) and 26(2) VATA, allows a taxable person the right,

> "[i]n so far as the goods and services are used for the purposes of the taxed transactions of a taxable person", to deduct VAT due or paid "in respect of supplies to him of goods or services carried out or to be carried out by another taxable person."

58. Every taxable person who carries out supplies of goods or services in respect of which VAT is deductible must be identified by an individual number: art. 214 PVD.

VATA

59. The provisions of VATA must be interpreted, as far as possible, so as to comply with the PVD.

60. Section 4 provides that:

> "(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply."

61. Section 5(2) provides, *inter alia*, that:

> "(a)"supply" in this Act includes all forms of supply, but not anything done otherwise than for consideration;
>
> (b) anything which is not a supply of goods but is done for a consideration…is a supply of services."

62. Section 24(1) defines "input tax" as, *inter alia*:

> "VAT on the supply to [a taxable person] of any goods or services" which are "used or to be used" for a business "carried on by him."

63. Section 25(2) entitles a taxable person to "deduct" "so much of his input tax as is allowable under" s 26 "from any output tax that is due from him".

64. Section 26(1) and (2) provide that the amount of allowable input tax is that which is "attributable to" … "supplies … made or to be made by the taxable person in the course or furtherance of his business" - [including] taxable supplies.

65. The Assessments were raised under s 73(1), which provides that:

> "**73 Failure to make returns etc.**
>
> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

66. The "**right of appeal**" to the First-tier Tribunal ("**FtT**") against an assessment is governed by s 83, which includes a list of matters in respect of which a right of appeal is available. The scope of the appeal right, as well as the jurisdiction of the FtT, differs between the various matters listed therein. An appeal against an assessment under s 73, or the amount of such an assessment, is brought under s 83(1)(p).

67. VATA and the Value Added Tax Regulations 1995 SI 1995/2518 ("**the VAT Regulations**") are EU-derived domestic legislation, as defined by s 1B(7) of the European Union (Withdrawal) Act 2018 ("**the Withdrawal Act**"). Section 2 of the Withdrawal Act provides that EU-derived domestic legislation, as it had effect in domestic law immediately before IP-completion day (i.e., 31 December 2020), continues to have effect in domestic law on and after that day.

EVIDENCE AND SUBMISSIONS

68. The documents for the hearing, set out at para. 10 above, comprised of pleadings, documents and correspondence relating to HMRC's enquiry and appeal correspondence. The bundle also contained the statements of the witnesses. The witnesses who gave evidence at the hearing were Mr Paul Newton (on behalf of the Appellant) and Officer Grain (of HMRC). We considered the evidence given by the witnesses to be of assistance to us in understanding the background and details regarding the supplies in this appeal. We also heard lengthy submissions from Mr Jones and Miss McArdle (as set out in their respective skeleton arguments), which we shall not repeat here. We have considered any key points of disagreement in determining the facts later.

69. At the conclusion of the hearing, we reserved our decision, which we now give with reasons.

FINDINGS OF FACT

70. There is no dispute as to the Background Facts at [11] to [27] above, save that the parties differ in view as to the conclusions we should reach as a result. We shall not repeat the background here and adopt the 'Background Facts' as the 'Findings of Fact'.

DISCUSSION

71. The Appellant appeals against Assessments (to VAT), which were raised to recover under-declared output tax. The Appellant had accounted for VAT on the premise that it makes supplies of goods, comprising flooring and beds, and that the supplies of fitting services (which are provided by the fitters and are paid for directly by the customers) are supplies made by the fitter concerned to the customer concerned.

72. On the 'Supply Issue', Mr Jones submits that the economic and commercial reality is that:

(1) the fitters who undertake the fitting work for the customers are independent and self-employed. They do not work for the Appellant and the Appellant has no obligation to pay them for their work.

(2) the fitting work is done by the fitters on their own account, and the fitters are liable for its quality.

(3) Customers pay the fitters on completion of the job, with that payment covering any additional surcharge or further charge for work done on site by the fitter, over and above the estimated fitting charge.

(4) the Appellant takes no economic benefit and is not privy to any arrangements entered into between the customer and the fitter.

73. HMRC determined that the Appellant had incorrectly treated the supply of carpet fitting as being made directly to customers by self-employed fitters. In this respect, Miss McArdle submits that where a supply of carpet fitting was made, the fitters - effectively and as a matter of economic and commercial reality - acted as 'subcontractors' for the Appellant. She adds that HMRC further understood the Appellant's case to be that a relationship of 'principal' and 'agent' was being argued, in respect of the Appellant's relationship with the carpet fitters.

74. On the 'Legitimate Expectation Issue', Mr Jones submits that it was unfair for HMRC to assess in respect of periods falling prior to 6 July 2021, effectively reneging on what Officer Hothi said in his letter of that date; and that it was unfair for HMRC to assess in respect of periods falling between 6 July 2021 (being the date of Officer Hothi's letter) and 14 December 2021 (being the date of HMRC informing Mr Sweeting that they might assess in respect of past periods) in circumstances where:

(1) Based on the 6 July 2021 letter, the Appellant was taking HMRC's position to be that any change following HMRC's review would only take effect from the date they clarified their position;

(2) HMRC knew that because Mr Sweeting told them in his email of 6 July 2021 and his letter of 13 July 2021, yet HMRC failed to correct that understanding despite having opportunities to do so; and

(3) In reliance on its understanding of HMRC's position, the Appellant continued to account for VAT based on that understanding.

75. Miss McArdle however submits that at no time did HMRC state that:

(1) the Appellant was correct to treat the supplies of fitting services as having been made by third-party contractors;

(2) they were satisfied that the Appellant had not under declared output tax in the VAT periods in question;

(3) they had decided not to raise assessments for the periods in question;

(4) the Appellant should continue to declare VAT on the basis that it was not supplying fitting services.

76. In further amplification of these submissions, she states that the burden remained on the Appellants to apply the correct VAT treatment, and that HMRC were considering the position more widely. She further states that at no time was the Appellant promised, let alone unambiguously, that output tax would not be assessed.

77. We proceed by considering the Supply Issue first. The point at issue is the direction of the supply of the fitting service. The question posed is whether the Appellant made a supply of

fitting so as to become subject to an obligation to account for VAT. This is not an analysis of what the customer thinks, but what is actually happening from a VAT perspective. It is helpful to set out the relevant principles of VAT, as established by the authorities, before applying the principles to the facts.

THE SUPPLY ISSUE

78. The right to deduct VAT has been described as a fundamental principle underlying the common system of VAT which, in principle, may not be limited. The consequence of the deduction of input VAT is that the tax is charged at each stage in the production and distribution process only on the added value and is, ultimately, borne only by the final consumer.

A supply

79. The concept of a "**supply**" is fundamental to the VAT system. In *Adecco*, Newey LJ (with whom both other members of the court agreed) set out the following propositions in relation to the scope of art. 2(1)(c) of the PVD, and the concept of a 'supply':

> "38. The following propositions can, I think, be derived from the case law:
>
> i) The concept of a "supply" is "an autonomous concept of the EU wide VAT system" (the *Airtours* case 2, at paragraph 20, per Lord Neuberger);
>
> ii) A supply of goods or services "for consideration", within the meaning of article 2(1) of the Principal VAT Directive, "presupposes the existence of a direct link between the goods or services provided and the consideration received" (Joined Cases C-53/09 and C-55/09 *Revenue and Customs Commissioners v Loyalty Management UK Ltd* and *Baxi Group Ltd v Revenue and Customs Commissioners* [2010] STC 2651, at paragraph 51 of the judgment of the Court of Justice of the European Union ("CJEU"); see also Case 102/86 *Apple and Pear Development Council v Customs and Excise Commissioners* [1988] STC 221, at paragraph 12 of the judgment);
>
> iii) A supply of services "is effected 'for consideration', within the meaning of art 2(1) of [the Principal VAT Directive], and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient" (Case C-653/11 *Revenue and Customs Commissioners v Newey* [2013] STC 2432, at paragraph 40 of the CJEU's judgment; see also Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] STC 509, at paragraph 14 of the judgment);"

80. When the Court of Justice of the European Union ("**CJEU**") speaks of "**reciprocal performance**", it is looking at the matter from the perspective of the supplier of the services and it requires that under the legal arrangement, the supplier receives remuneration for the service which it has performed. It is not necessary that the recipient of the service is legally responsible to the supplier for payment of the remuneration. It suffices that the arrangement is for a third-party to provide the consideration. Were it otherwise, taxpayers could structure their transactions so as to escape liability to pay VAT, so long as they could meet the "**economic reality**" test.

81. In *Newey (CJEU)*, at [41], the court explained that:

> "the supply of services is therefore objective in nature and applies without regard to the purpose or results of the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person."

82. The case law from the European Court of Justice ("**ECJ**") makes clear that, whilst the starting point is that every supply should normally be regarded as distinct and independent, there are circumstances where the supply of more than one item in a single transaction may be treated as a 'single supply' which takes its VAT treatment from whichever part of the supply

predominates. That case law has identified two particular situations where a supply which contains one or more elements as part of a single transaction may be treated as a single supply.

83. The first type of situation was explained by the ECJ in *Card Protection Plan Ltd* v *C & E Comrs* Case C-349/96 [1999] STC 270 ('*CPP*'). The background to that case was that CPP provided its customers with protection against financial loss and inconvenience as a result of the loss or theft of credit cards and other items, such as car keys and passports. In effect, the supply included both insurance and other more administrative services. The ECJ decided, at [30], that:

> "There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied."

84. The ECJ in *CPP* explains that, where "one or more elements" constitute the principal service, whilst "one or more elements" form an ancillary service, there will be a single supply. The ECJ cautioned, at [27], that:

> "having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases."

85. This can be referred to as "the *CPP* situation".

86. The second type of situation where there may be a single supply was considered by the ECJ in *Levob Verzekeringen BV* v *Staatssecretaris van Financien* Case C-41/04) [2006] STC 766 ('*Levob*'). In that case, Levob entered into a contract to acquire a standard software package which would then be customised in various ways. The ECJ concluded that, in addition to the situation described in *CPP*, there is a single supply:

> "where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single indivisible economic supply, which it would be artificial to split."

87. In *HMRC* v *The Honourable Society of Middle Temple* [2013] UKUT 250 (TCC) ('*Middle Temple*'), the Upper Tribunal ("**UT**") reviewed both *CCP* and *Levob*, as well as a number of subsequent decisions of the ECJ and set out, at [60], a number of key principles to be applied in determining whether a particular transaction should be regarded as single composite supply or as several independent supplies:

> (1) All of the circumstances and the essential features or elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.
>
> (2) The fact that different elements of the supply can be supplied separately by a third-party is irrelevant.
>
> (3) The ability of the customer to choose whether or not to be supplied with an element is an important factor, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.
>
> (4) Separate invoicing and pricing, if it reflects the interests of the parties, supports the view that the elements are independent supplies, without being decisive. The flip side of this (as explained in *CPP* at [31]) is that, if there is a supply of several elements for a single price, the single price may suggest that there is a single supply. However, again, this is not decisive.

88. As the UT noted, at [57], there must not only be a genuine contractual freedom to choose, but the freedom of choice must reflect the economic reality of the arrangements between the parties. A contractual freedom to choose to purchase items separately in circumstances where such a purchase would be significantly more expensive than buying them together does not reflect the economic reality of the arrangements.

89. As far as the "**typical consumer**" is concerned, the UT earlier noted, at [51], that:

> "…it is necessary to have regard to the economic reason or purpose of the whole transaction from the point of view of the typical customer."

90. The typical consumer is mentioned in [29] of *CPP* not as an arbiter of:

> ".... whether one element of a supply is ancillary to another but rather as an aid to identifying precisely what has been supplied and whether that amounts to a single composite supply or several separate supplies."

91. As was made clear by the UT in *HMRC v The Ice Rink Company Limited* [2019] UKUT 108 (TCC), at [19], this means a typical recipient of the package of supplies whose characterisation is in dispute - i.e., in this case, the flooring (carpet) and fitting.

92. The UT's conclusion in *Middle Temple*, at [57], that "the ability of the customer to choose whether or not to be supplied with a particular element of a transaction is an important factor" as long as it is "a genuine freedom to choose which reflects the economic reality of the arrangements between the parties" followed its review of the decision of the ECJ in *BGZ Leasing sp z oo* v *Dyrektor Izby Scarbowej w Warszawie* (Case C-224/11) [2013] STC 2162 ('*BGZ*'). *BGZ* was a case where a leasing company leased goods to its customers, but required them to insure the goods. The leasing company offered insurance which was taken up by many of the lessees. There was, however, no contractual obligation for them to do so and they could have arranged insurance with a third party.

93. The ECJ concluded, at [39] to [42], that the insurance and the leasing were not so closely linked that they form a single transaction, and also that the insurance was not ancillary to the leasing as the insurance was an end in itself and not only the means to enjoy the lease under the best conditions. In particular, the ECJ noted, at [43], that the lessee had the option of insuring the goods with a third-party, which meant that:

> "the requirement for insurance cover cannot, in itself, mean that a supply of insurance by the lessor....is indivisible or ancillary to the supply of the leasing services."

94. The ECJ had already determined that the insurance was not ancillary to the leasing. The ability to choose whether to obtain the insurance from the lessor, or from a third-party, was relevant only in the sense that this did not mean that the requirement in the leasing contract that the goods had to be insured meant that the insurance was nonetheless indivisible from, or ancillary to, the leasing.

95. The case of *Lower Mill Estate* (Warren J and Judge Wallace) involved a freeholder of land ('LME') with the benefit of planning permission for up to 575 residential homes, subject to a condition that they could not be occupied as principal places of residence. For VAT purposes, they were therefore regarded as second, or holiday, homes. The development of the land took place by LME granting agreements for lease of particular plots to third-party customers. Leases for 999 years were then granted by LME pursuant to those agreements, and VAT was charged on those leases. During the period covered by the assessment, those customers also signed build agreements with CBL to construct a holiday or second home on each such plot. The build agreements provided for stage payments to be made to CBL as various stages of the building works were completed. LME was assessed to VAT on those transactions.

96. HMRC contended that the leases and build agreements should be treated as effecting single supplies of completed holiday homes and, therefore, standard-rated. On LME's appeal, the tribunal rejected that contention. However, the tribunal held that the transactions concerned constituted an abuse of rights such that the VAT treatment fell to be redefined in accordance with the principle in *Halifax plc v C & E Comrs* (Case C-255/02) [2006] STC 919, [2006] Ch 387 ('*Halifax*'). In relation to the single supply issue, the tribunal had referred to a number of decisions of the ECJ, including *CPP*.

97. The UT held, at [43], that:

> "43. In our judgment, apart from any abuse or sham, it is not possible to combine supplies by two suppliers under two contracts so as to result in one supply for VAT purposes. The issue was considered extensively in the judgment of Arden LJ in *Telewest*. Given that the Court of Appeal itself declined to refer any question for a preliminary ruling, we do not consider that we could properly refer any question ourselves unless the case law of the Court of Justice since the decision in *Telewest* gives rise to real doubt about the correctness of the decision of the Court of Appeal. In the absence of such doubt, we consider that *Telewest* provides a conclusive answer against HMRC's contentions."

98. And, at [46], the UT said this:

> "46. In our judgment, the correct treatment for VAT purposes, absent abuse, is that there are separate taxable supplies by LME, of leases of building plots, and by CBL, of building services. We reject HMRC's alternative formulations whichever basis is relied on. These are (i) a straightforward single supply of completed holiday homes by LME to customers, (ii) a supply of building services by CBL to LME with a supply by LME of completed holiday homes to the customers, (iii) a joint supply by LME and CBL of holiday homes to customers and (iv) a supply by LME of completed holiday homes to customers by reference to some economic reality different from the apparent contractual arrangements. We consider that the decision in *Telewest* (with which we would not want to disagree even if it were open to us to do so) leads us inevitably to the conclusion which we have reached."

99. As is apparent from the decision, the UT in *Middle Temple* considered the decision of the Court of Appeal in *Telewest Communications plc v C & E Comrs* [2005] EWCA Civ 102, [2005] STC 481 ('*Telewest*'). The *Telewest* decision raised what is commonly known as "the package argument". In *Telewest*, cable television was supplied by one of the regional companies in the Telewest group and, following arrangements implemented with the specific object of achieving supplies which were not ancillary to the provision of cable television services, a subsidiary of Telewest Communications Ltd (the parent company of the group) was formed to provide copies of the Cable Guide magazine. Viewed as a separate supply, the latter provision was zero-rated as a publication. The Court of Appeal rejected the argument that separate supplies could be fused together.

100. There can usually only be a single, composite supply if the same supplier is supplying all elements. In *Lower Mill Estate*, at [43], the UT said this:

> "…apart from any abuse or sham, it is not possible to combine supplies by two suppliers under two contracts so as to result in one supply for VAT purposes."

101. In *Secret Hotels*, at [57], the court however cautioned that one must be careful before stigmatising the contractual documentation as being "artificial", bearing in mind that EU law, like English law, treats parties as free to arrange or structure their relationship so as to maximise its commercial attraction, including the incidence of taxation.

102. For the purposes of this appeal, if there is a single supply (which is of course disputed by the Appellant), it must be on the basis that the supply of the fitting services is ancillary to the supply of the carpets and other flooring.

Of goods or services for consideration

103. The meaning of "**consideration**", for VAT purposes, is clear from *Staatssecretaris Van Financiën v Cooperatiëve Vereniging Cooperatiëve Aardappelenbewaarplaats GA* Case 154/80; [1981] 3 CMLR 337 and *Campsa Estaciones de Servicio SA v Administración del Estado* Case C-285/10; [2011] STC ('*Campsa*').

104. In *Campsa*, the CJEU said this, at [28]:

> "According to settled case law …, the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria."

<u>*Tolsma*</u>

105. By way of example, the case of *Tolsma* concerned a busker who solicited donations from passers-by. The Dutch authorities assessed for output tax on these payments since a supply had been made to the passers-by. The sums he received were held not to be taxable. The ECJ accepted Mr Tolsma's appeal and ruled that the playing of music on the public highway, for which no payment was stipulated, did not constitute a supply of services effected for consideration. At [14], the CJEU explained this as meaning:

> "…the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient."

106. At [16] to [19], CJEU said this:

> "16. If a musician who performs on the public highway receives donations from passers-by, those receipts cannot be regarded as the consideration for a service supplied to them.
>
> 17. First, there is no agreement between the parties, since the passers-by voluntarily make a donation, whose amount they determine as they wish. Second, there is no necessary link between the musical service and the payments to which it gives rise. The passers-by do not request music to be played for them; moreover, they pay sums which depend not on the musical service but on subjective motives which may bring feelings of sympathy into play. Indeed some persons place money, sometimes a considerable sum, in the musician's collecting tin without lingering, whereas others listen to the music for some time without making any donation at all.
>
> 18. In addition, contrary to the arguments of the German and Netherlands governments, the fact that the musician plays in public with a view to collecting money and actually receives certain sums in so doing is of no relevance for the purpose of determining whether the activity in question constitutes a supply of services for consideration within the meaning of the Sixth Directive.
>
> 19. That interpretation is not affected by the fact that a musician such as Mr Tolsma solicits money and can in fact expect to receive money by playing music on the public highway. The payments are entirely voluntary and uncertain and the amount is practically impossible to determine."

107. The ECJ ruled in favour of Mr Tolsma because there was no agreement between the parties, and there was also no necessary link between the musical service and the payments to which it gave rise. Mr Tolsma played whether the passers-by paid him, or not, and he had not entered into a formal agreement with them for the provision of his service. Put another way, the behaviour of the 'supplier' is important. If s/he will continue to make the supplies regardless of whether money is received, then the money received will not amount to consideration.

<u>*National Car Parks*</u>

108. In *National Car Parks* (Patten, Newey and Males LJJ), NCP operated "pay and display" car parks, in which were ticket machines. A board specified the amounts that had to be paid to

park for different lengths of time. A customer wishing to leave their car for a particular period had to insert coins to the value of at least the figure given for that period in order to obtain a ticket which had to be placed in the vehicle's windscreen. Once the requisite coins had been accepted by the machine, the customer would be able to obtain his ticket by pressing a button. Each machine indicated that no change was given, and that 'overpayments' were accepted. A person wishing to park therefore paid a sum in excess of the tariff shown for the period for which he wishes to park because, for instance, the coins he has do not enable him to pay the exact figure and the ticket machine does not give change.

109. In 2014, NCP sought to recover sums which it had accounted to HMRC as VAT in respect of 'overpayments' made in its pay and display car parks between 2009 and 2012. HMRC refused the claim on the ground that the overpayments were to be regarded as consideration for the right to park and were, therefore, taxable. The question raised in the appeal was whether the excess over the tariff is subject to VAT. At [9], the Court of Appeal stated that:

> "9. The authorities also show that "consideration" is a "subjective value" in the sense that "the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria" (the Dutch potato case, at paragraph 13 of the judgment) ..."

110. Therefore, the service and the value given, or to be given, in return for it may be ascertained from the legal relationship between the supplier and the customer (which we will return to consider later in our consideration of the relationships in this appeal).

Redrow

111. The case of *Redrow* involved a house-builder who paid estate agents' fees for services provided to end-purchasers of new houses, in respect of the sale of their old home. This was to smooth the path for end-purchasers in buying a new house from Redrow. Redrow sought to reclaim the input tax on the fees and the repayment was refused. The VAT problem was that while the party that paid could reclaim the input tax, the customers who were the recipients of the supply could not. The factual matrix was that Redrow:

(1) gave instructions to the estate agents in question and monitored the services being provided;

(2) had a contract with the estate agents;

(3) were only legally obliged to pay where the end-purchaser proceeded to buy a new house from them; and

(4) advised the estate agents to protect their positions by way of a separate, additional contract with the end-purchaser on the normal commercial terms.

112. The case reached the House of Lords and led to a decision in favour of the company, which was permitted to retain the input tax on the basis that it was receiving the supply. The decision of the House of Lords in *Redrow* has been treated as authority for two propositions:

(1) Firstly, that a supplier could be treated as making, in the same transaction, both a supply of services to one person and a supply of different services to another person; and

(2) Secondly, that in addressing a claim for input tax by one of those persons, the relevant questions were (i) whether that person had made a payment to the supplier, (ii) whether the payment was consideration for the services supplied to him, and (iii) whether the services were used, or to be used, in the course of a business carried on by that person.

113. Lord Hope of Craighead posed this question, at p 412:

> "Was something being done for him for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration …?"

114. Lord Millett asked, at p 418:

> "Did he obtain anything – anything at all – used or to be used for the purposes of his business in return for that payment?", those questions are to be understood as being concerned with a realistic appreciation of the transactions in question."

115. Lord Millett's paragraph strongly implied that the taxpayer would be able to reclaim the input tax, provided also that it could show that the supplies received allowed it to obtain "anything at all" for "the purposes of its business".

116. However, as Lord Reed explained in *Aimia*, at [66] to [68]:

> "66. …the speeches in *Redrow* should not be interpreted in a manner which would conflict with the principle, stated by the Court of Justice in the present case, that consideration of economic realities is a fundamental criterion for the application of VAT. Previous House of Lords authority had emphasised the importance of recognising the substance and reality of the matter (*Customs and Excise Commissioners v Professional Footballers' Association (Enterprises) Ltd* [1993] 1 WLR 153, 157; [1993] STC 86, 90), and the judgments in *Redrow* cannot have been intended to suggest otherwise. On the contrary, the emphasis placed upon the fact that the estate agents were instructed and paid by Redrow, and had no authority to go beyond Redrow's instructions, and upon the fact that the object of the scheme was to promote Redrow's sales, indicates that the House had the economic reality of the scheme clearly in mind. When, therefore, Lord Hope posed the question, "Was something being done for him for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration …?", and Lord Millett asked, "Did he obtain anything – anything at all – used or to be used for the purposes of his business in return for that payment?", those questions should be understood as being concerned with a realistic appreciation of the transactions in question.
>
> 67. Reflecting the point just made, it is also necessary to bear in mind that consideration paid in respect of the provision of a supply of goods or services to a third party may sometimes constitute third party consideration for that supply, either in whole or in part. The speeches in *Redrow* should not be understood as excluding that possibility. Economic reality being what it is, commercial businesses do not usually pay suppliers unless they themselves are the recipient of the supply for which they are paying (even if it may involve the provision of goods or services to a third party), but that possibility cannot be excluded *a priori*. A business may, for example, meet the cost of a supply of which it cannot realistically be regarded as the recipient in order to discharge an obligation owed to the recipient or to a third party. In such a situation, the correct analysis is likely to be that the payment constitutes third party consideration for the supply.
>
> 68. It is also important to bear in mind that decisions about the application of the VAT system are highly dependent upon the factual situations involved. A small modification of the facts can render the legal solution in one case inapplicable to another. I would therefore hesitate to treat the judgments in *Redrow* as laying down a universal rule which will necessarily determine the identity of the recipient of the supply in all cases. Given the diversity of commercial operations, it may not be possible to give exhaustive guidance on how to approach the problem correctly in all cases."

117. Lord Reed pointed out that the normal expectation is that a commercial business paying a supplier is paying for a right to something, even if that something is a supply to another party.

118. Lord Hope made the same point (concerning Lord Millett's words in *Redrow*), at [110]:

> "I think that Lord Millett went too far [at p 418G] when he said that the question to be asked is whether the taxpayer obtained 'anything - anything at all' used or to be used for the purposes of his business in return for that payment. Payment for the mere discharge of an obligation owed to a third party will not, as he may be taken to have suggested, give rise to the right to claim a deduction. A case where the taxpayer pays for a service which consists of the supply of

goods or services to a third party requires a more careful and sensitive analysis, having regard to the economic realities of the transaction when looked at as a whole."

Aimia

119. The issue in the appeal in *Aimia* was whether Loyalty Management was entitled to deduct, as input tax, the VAT element of the payments which it made to redeemers. Briefly, the case involved the operation of the Nectar card scheme and the entitlement to input tax on reward goods. The scheme works by giving reward points to customers who purchase goods from particular retailers. The points can then be used to obtain further goods or services from certain, specified, third-party suppliers. Aimia paid the suppliers for these goods and services and reclaimed the associated input tax. The input tax claim was refused on the basis that the goods were supplied to the individual customers, and not to Aimia. At [38], the Supreme Court in noted that caselaw of the CJEU indicates that, when determining the relevant supply in which a taxable person engages:

> "…regard must be had to all the circumstances in which the transaction or combination of transactions takes place."

120. At [73], the Supreme Court said this:

> "73. As the Court of Justice has explained many times, VAT is chargeable on each transaction in the production and distribution process only after deduction of the amount of VAT borne directly by the costs of the various price components. The court has consistently stressed that the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities, and that the VAT system consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are subject in principle to VAT (see for example the statement of the Grand Chamber to that effect in *Halifax plc & Others v Customs and Excise Commissioners* (Case C-255/02) [2006] Ch 387 para 78)."

121. Lord Walker explained, at [114] and [115], that in cases where a scheme operates through a construct of contractual relationships, it is necessary to look at the matter as a whole in order to determine its 'economic reality', as follows:

> "114. But in developed economies wholly linear series of transactions are relatively unusual. Increasingly, businesses are organised so as to rely on subcontracting and outsourcing. Consumers are increasingly encouraged to obtain packages of goods and services put together by entrepreneurs. Many marketing schemes (such as that run by LMUK during the period now under consideration) operate through a construct of contractual relationships of some sophistication. It is a construct that is more like a web than a chain.
>
> 115. In cases of that sort it is still necessary, in determining the proper amounts of output tax and input tax, to look separately at different parts of the web of transactions. But in determining the economic reality it is also necessary to look at the matter as a whole. This Court was not shown any authority establishing that a payment by A to B cannot be both consideration for a service supplied to A by B, and (as third-party consideration) an element of the consideration paid for a supply by B to C (in this case, the collector, who is usually, but not always, also the final consumer)."

Airtours

122. A recent case is *Airtours*. The issue in the appeal was whether the appellant, Airtours Holidays Transport Ltd (formerly MyTravel Group plc), was entitled to recover, by way of input tax, VAT charged by PricewaterhouewCoopers ('PwC') in respect of services provided by PwC and paid for by Airtours. Airtours borrowed money from 80 or so different lenders and found itself facing collapse. During discussions with its largest creditors, it decided to engage PwC to prepare a report on the company's proposals to restore its finances and return to

profitability. The contractual documentation appeared to be addressed to the "Engaging Institutions" (i.e., the Banks), with Airtours being a signatory to the contract to ensure that it paid PwC's bills. All parties agreed that Airtours had benefitted from PwC's work.

123. Airtours then reclaimed the input tax on PwC's fees and HMRC challenged this. Airtours argued that:

(1) in spite of strong contradictory evidence in the documentation, it was a party to the contract with PwC;

(2) even if it was not a party to the contract, PwC had nevertheless made a supply to it because the economic reality was that it used the services for the purposes of its own business and, essentially, would not have paid unless it was a recipient of the supply.

124. By a majority, the Court of Appeal dismissed Airtours' appeal ([2015] STC 61). All members of the Court of Appeal agreed that the issue turned on the interpretation of the contract. In agreement with the UT, Moore-Bick and Vos LJJ held that the effect of the contract was that PwC's services thereunder were provided to the Engaging Institutions, and not to Airtours. Dissenting, Gloster LJ concluded, at [46], that "as a matter of construction of the contract, and on analysis of the economic realities of the surrounding commercial arrangements, the appellant had a contractual right to require that the services as described in the [Letter]" were provided. Gloster LJ set out the relevant principles, at [37]:

> "i) Consideration of economic realities is a fundamental criterion for the application of the common system of VAT as regards the identification of the person to whom services are supplied.
>
> ii) Decisions about the application of the VAT system are highly dependent upon the factual situations involved. Thus a small modification of the facts can render the legal solution in one case inapplicable to another.
>
> iii) The case law of the CJEU indicates that, when determining the relevant supply in which a taxable person engages, regard must be had to all the circumstances in which the transaction or combination of transactions takes place. In cases where a scheme operates through a construct of contractual relationships, it is necessary to look at the matter as a whole in order to determine its economic reality. Thus the relevant contracts have to be understood in the wider context of the totality of the arrangements between the various participants.
>
> iv) The terms of any contract between the parties, whilst an important factor to be taken into account in deciding whether a supply of services has been made, are not necessarily determinative of whether as a matter of "economic reality" taxable supplies are being made as between any particular participants in the arrangements. That may be particularly so where certain contractual terms do not wholly reflect the economic and commercial reality of the transactions. However, the contractual position is generally the most useful starting point for the VAT analysis.
>
> v) There may, as a matter of analysis, be two or more distinct supplies within the same transaction. Moreover, a single course of conduct by one party may constitute two or more supplies to different persons...
>
> vi) However, the mere fact that the taxpayer has paid for the service does not necessarily mean that it has been supplied to him. Consideration of economic realities is a fundamental criterion for the application of VAT. Thus substance and reality remain critical. What is required is a realistic appreciation of the transactions in question. Consideration paid in respect of the provision of a supply of goods or services to a third party may sometimes constitute third party consideration for that supply, either in whole or in part. Economic reality being what it is, commercial businesses do not usually pay suppliers unless they themselves are the recipient of the supply for which they are paying (even if it may involve the provision of goods or services to a third party), but that possibility cannot be excluded *a priori*. A business may, for example,

> meet the cost of a supply of which it cannot realistically be regarded as the recipient in order to discharge an obligation owed to the recipient or to a third party. In such a situation, the correct analysis is likely to be that the payment constitutes third party consideration for the supply. A case where the taxpayer pays for a service which consists of the supply of goods or services to a third party requires a more careful and sensitive analysis, having regard to the economic realities of the transaction when looked at as a whole. It may lead to the conclusion that it was solely third party consideration, or it may not."

125. At [41] Gloster LJ expressed the view that the case, like *Redrow*, was a case where two distinct supplies of services were being provided by PwC within the same overall transaction. She noted the caveats articulated by Lord Reed and Lord Hope in *Aimia* and recognized both that every case has to be approached on its own particular facts, and that it may be dangerous to draw analogies between the facts of two different cases which may appear superficially similar. She concluded, however, that although there are obvious differences between the facts of *Redrow*, the principles identified in *Redrow* and confirmed in *Aimia* support the analysis that PwC was making two distinct supplies "in both directions" (*Aimia* at [89] per Lord Hope); that is both to the Banks and to Airtours.

126. When the appeal was before the Supreme Court, Lord Clarke agreed with Gloster LJ in his dissenting judgment (Lord Carnwath agreed). Lord Neuberger found that the contract did not create a supply between PwC and Airtours, and that even though there were some factors in Airtours' favour, they were insufficient to override the contract. In other words, while Airtours was closely involved in the matter, this did not mean that it was contractually entitled to receive the services from PwC. For that reason, and in the absence of anything else that would serve to override the contract (for example, a finding that the contract was an entirely artificial structure), Airtours did not receive the supply and could not claim the input tax. Lord Neuberger commented on *Redrow* and said that Lord Millett's comments "cannot be taken at face value".

WHA Ltd

127. The appeal in *WHA Ltd* concerned the effectiveness of a scheme ("Project C") which was designed to minimise the liability to VAT of a group of companies ("Oriel") involved in providing motor breakdown insurance ("MBI"). The purpose of the scheme with which the appeal was concerned was to redress that competitive disadvantage by enabling the VAT element of the cost of repairs to be recovered by one or other of the members of a group of companies to which an MBI insurer belonged, thereby reducing costs and enabling the insurer to offer lower premiums. These arrangements resulted in the VAT paid by warranty on the repair services and parts supplied by the garage being irrecoverable. This was the problem which Project C was designed to solve. Project C had two strands, each of which was based on the operation of statutory provisions. The aim was that the first strand should be enough to secure the recovery of the VAT paid on the repairs. The second strand was designed to provide a fall-back position should the first not hold.

128. HMRC refused the claims made by WHA and Viscount for the repayment of tax. WHA and Viscount then appealed to the Value Added Tax and Duties Tribunal ("the tribunal"). Before the tribunal, HMRC challenged the effectiveness of Project C on the following bases:

> (1) First, they maintained that there was no supply of services by the garages to WHA; if that contention were accepted, it was fatal to the success of the scheme since both strands of Project C depended upon it being accepted that the repair services were supplied by the garages to WHA.

(2) Secondly, they maintained that if there was indeed a supply of repair services to WHA, its onward supply to Viscount was in any event subject to VAT; if that contention were accepted, it was fatal to the success of the first strand.

(3) Thirdly, they maintained that Viscount was not, in any event, entitled to recover input tax under the UK legislation in question; if that contention were accepted, it was fatal to the success of the second strand.

129. HMRC also advanced further arguments based on the alleged artificiality of the scheme, including a contention based on the EU doctrine of abuse of rights.

130. On appeal to the Supreme Court, the court decided there is no supply of repair services by the garages to WHA. At [26] to [27], Lord Reed said this:

> "26. As this court has recently observed (*Her Majesty's Revenue and Customs v Aimia Coalition Loyalty UK Limited* [2013] UKSC 15, para 68), decisions about the application of the VAT system are highly dependent upon the factual situations involved. A small modification of the facts can render the legal solution in one case inapplicable to another. It is therefore necessary to begin by considering carefully the facts of the present case. As was also noted in the *Aimia* case at para 38, the case-law of the Court of Justice indicates that, when determining the relevant supply in which a taxable person engages, regard must be had to all the circumstances in which the transaction in question takes place. Furthermore, as Lord Walker explained in *Aimia* at paras 114-115, in cases where a scheme operates through a construct of contractual relationships, as in the present case, it is necessary to look at the matter as a whole in order to determine its economic reality. Accordingly, although the transaction of particular importance is that between the garage and WHA, it has to be understood in the wider context of the arrangements between the insured, NIG, Crystal, Viscount, WHA and the garage.
>
> 27. The contractual position is not conclusive of the taxable supplies being made as between the various participants in these arrangements, but it is the most useful starting point. I shall begin with the contract of insurance between the insured and NIG. Two sample policies have been produced in these proceedings. Their terms, so far as material, are to similar effect, and it is sufficient to refer to one of them, described as "Motor Cover". The policy makes it clear that the insurer is undertaking to meet the cost of repairs to the vehicle falling within the scope of the policy: it is not undertaking responsibility for the repairs themselves. The policy states, for example, that "following a mechanical breakdown of your vehicle, this policy will assist with the cost of repair of the parts listed"; and the terms and conditions provide that "NIG will not pay more than the limits shown on the proposal form or, if lower, in this policy document". Although the terms and conditions also provide that NIG "reserves the right to provide replacement parts and to carry out repairs under this policy or to arrange for their provision by other persons", the implication of that clause is that NIG is under no obligation to do so."

131. It does not follow from the requirement for there to be a 'legal relationship' between the supplier and the recipient of a supply of services that the relationship must be contractual, or (if it is) that the terms of the contract are necessarily conclusive.

The legal relationship and the importance of the contractual terms

132. Returning to the legal relationship and the contractual documentation, a supply of services is effected "for consideration" only if there is a "**legal relationship**" between the provider of the service and the recipient - pursuant to which there is reciprocal performance - and the remuneration received by the provider of the service constitutes the value actually given in return for the service supplied to the recipient. Furthermore, where the person who pays the supplier is not entitled under the contractual documentation to receive any services from the supplier, then unless the documentation does not reflect the economic reality, the payer has no right to reclaim, by way of input tax, the VAT in respect of the payment to the supplier. As regards the importance of 'contractual terms' in categorising a transaction as a taxable

transaction, it is necessary to bear in mind the case law according to which consideration of "**economic and commercial realities**" is a fundamental criterion for the application of the common system of VAT.

133. The contractual arrangements will usually provide the starting point and are likely to be conclusive, unless shown to be inconsistent with underlying economic and commercial realities: *WHA Ltd*, at [27] (per Lord Reed JSC). In *Airtours*, at [47], Lord Neuberger PSC said this:

> "47. This approach appears to me to reflect the approach of the Supreme Court in the subsequent case of *WHA Ltd v Revenue and Customs Comrs* [2013] UKSC 24; [2013] STC 943 where at para 27, Lord Reed said that "[t]he contractual position is not conclusive of the taxable supplies being made as between the various participants in these arrangements, but it is the most useful starting point". He then went on in paras 30 to 38 to analyse the series of transactions, and in para 39, he explained that the tribunal had concluded that "the reality is quite different" from that which the contractual documentation suggested. Effectively, Lord Reed agreed with this, and assessed the VAT consequences by reference to the reality. In other words, as I said in *Secret Hotels2 Ltd v Revenue and Customs Comrs* [2014] STC 937, para 35, when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts."

134. Lord Neuberger also said this, at [58]:

> "58. When this court has discussed third party consideration in what is now article 73 of the Principal VAT Directive it has similarly not restricted it to consideration provided alongside, or in performance of, a legal obligation of the recipient - see *WHA Ltd*, para 56 per Lord Reed, in which the garage provided a service to the insured car driver but the insurer alone was responsible for remunerating the garage, and *Loyalty Management UK Ltd*, para 67 per Lord Reed."

135. The same approach was adopted by the *Loyalty Management (CJEU)*, at [39] and [40], where the court stated, citing previous judgments, that:

> "consideration of economic realities is a fundamental criterion for the application of the common system of VAT."

136. The court added that that issue involved consideration of "the nature of the transactions carried out" in the particular case.

137. In *Newey (CJEU)*, one of the questions referred to the CJEU was:

> "In circumstances such as those in the present case, what weight should a national court give to contracts in determining the question of which person made a supply of services for the purposes of VAT? In particular, is the contractual position decisive in determining the VAT supply position?"

138. The answer to that question was given at [42] to [45] of the CJEU's judgment, as follows:

> "42. As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, Joined Cases C-53/09 and C-55/09 *Loyalty Management UK and Baxi Group* [2010] ECR I-9187, paragraphs 39 and 40 and the case-law cited).
>
> 43. Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the

recipient in a 'supply of services' transaction within the meaning of Articles 2(1) and 6(1) of the Sixth Directive have to be identified.

44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.

45. That is the case in particular if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions."

139. Decisions about the application of the VAT system are dependent upon the factual situations involved. Case law has shown that a small modification of the facts can render the legal solution in one case inapplicable to another.

Secret Hotels

140. The case of *Secret Hotels* concerned the liability to VAT of a company which marketed and arranged holiday accommodation through an online website. The outcome turned on the appropriate characterisation of the relationship between the company, the operators of the hotels and the holiday-makers or their travel agents (which is an English law issue), and the impact of certain provisions of the relevant EU Directive on that relationship once it had been characterised (which is an EU law issue). The appeal essentially considered the question of whether the tour operator was acting solely as an 'intermediary', for the purposes of art. 306. The FtT and the Court of Appeal concluded that Med, in fact, marketed and sold the hotel accommodation to customers as a 'principal'.

141. At the end of his judgment in *Secret Hotels*, Sir John Chadwick summarised the main factors as follows:

(1) Med dealt with customers in its own name (a) in respect of the use of its website and (b) in the services of its local handling agents.

(2) Med dealt with customers in its own name (and not as intermediary) in those cases where the hotel operator was unable to provide accommodation, as booked, and the customer rejected the alternative accommodation offered.

(3) Med dealt with matters of complaint and compensation in its own name, and without reference to the hotelier.

(4) Med used the services of other taxable persons (the hoteliers) in the provision of the travel facilities marketed through its website.

(5) In relation to VAT, Med dealt with hoteliers in other Member States in a manner inconsistent with the relationship of principal and agent. In particular, Med did not provide the hoteliers with invoices in respect of its commission (nor even notify the hoteliers of the amount of that commission); thus, making it impossible for the hoteliers to comply with their obligations to account to the tax authorities of that Member State in accordance with the EU Directive.

(6) (6)(a) Med treated deposits and other monies which it received from customers and their agents as its own monies. It did not account to the hoteliers for those monies; (b) It did not enter those monies in a suspense account so as to take advantage of art. 79(c); and so, could not rely on the exclusion from the scope of art. 306.1(b).

142. HMRC also relied on the points that: (7) hoteliers would invoice Med for the net sum in respect of each customer at the end of the relevant holiday, and (8) Med reserved a number of rooms - and sometimes specific rooms - in many hotels, for which it paid the net sum in advance.

143. In the Supreme Court, Lord Neuberger held that the meaning of art. 306 - and how it was to be applied - was a matter of EU law and the decisions of the Court of Justice were binding on national courts, but in so far as the provisions of art. 306 depended upon the precise nature and character of the contractual relationship between parties, the issue was to be determined by reference to the proper law of the contract or contracts. Lord Neuberger held, at [27], that

in most cases an 'intermediary', for these purposes, would be the equivalent of an agent in English law and so proceeded to analyse the arrangements under which the tour operator made rooms available to its clients by considering whether it offered those rooms as principal or as agent for the hoteliers. At [35], he said this:

> "when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts."

144. And, at [42], he noted that the contract between the tour operator and the consumer contained the following provision:

> "the [tour operator] provides information concerning the price and availability of hotels [and]…any reservations you make on this site will be directly with the company whose hotel services you are booking."

145. At [54] to [56], he said this:

> "54. The reformulated issue effectively assumes the correctness of the proposition that, once it is concluded as a matter of English law, that the effect of the contractual documentation and the way in which the parties conducted their relationship was that Med was an agent for the hotelier with whom a customer booked accommodation, as opposed to a principal who booked accommodation with the hotelier and then booked it on to a customer, Med fell within art 306(1)[b], rather than art 306(1)[a]. That is not an assumption which can safely be made in every case, but it seems to me that in the general run of cases, such a proposition will be correct.
>
> …
>
> "56. Thus, in deciding whether art 306(1)[a] or art 306(1)[b] applies, the approach laid down by the CJEU in order to decide whether a person such as Med is an intermediary is very similar to the approach which is applied in English law in order to determine whether Med was an agent, ie the very exercise undertaken in paras [31]–[50] above. One starts with the written contract between Med and the customer, as it is the customer to whom the ultimate supply is made. However, one must also consider the written contract between Med and the hotelier, as there would be a strong case for saying that, even if Med was the hotelier's agent as between it and the customer, Med should none the less be treated as the supplier as principal (in English law) or 'in its own name' (in EU law) if, as between the hotelier and Med, the hotel room was supplied to Med."

146. And, at [57]:

> "57. For the reasons set out in paras [36]–[44] above, I consider that the contractual documentation supports the notion that Med was an intermediary, and, in the light of the discussion in paras [45]–[50] above, it seems to me that 'economic reality' does not assist a contrary view. Further, one aspect of economic reality is that it is the hotelier, not Med, who owns the accommodation and it is the customer, not Med, to whom it is ultimately supplied: that does not, of course, prevent the hotelier supplying the accommodation to Med for supply on to the customer, but it makes it hard to argue that Med's analysis that it is no more than an agent is contrary to economic reality. Further, one must be careful before stigmatising the contractual documentation as being 'artificial', bearing in mind that EU law, like English law, treats parties as free to arrange or structure their relationship so as to maximise its commercial attraction, including the incidence of taxation …"

147. The contract, therefore, contained a provision setting out the position as unambiguously as possible.

Adecco

148. In *Adecco*, the appellant employment bureaux supplied clients with temporary staff. They used three different business models, one of which was 'non-employed temps'. Such persons were on the books of the bureaux, but were not considered to be employed by them. The bureaux might introduce the temps to clients looking for a temporary worker to undertake an assignment. The temps were not obliged to accept any assignment offered and the bureaux were not obliged to find them an assignment. Nevertheless, the bureaux undertook to pay those temps for the work that they did for the bureaux's clients, and was classed as their 'employer' for various regulatory matters, including payment of Pay-As-You-Earn ('PAYE') and National insurance Contributions ('NICs'). The payment received by the bureaux from their clients was periodic and normally calculated as an amount representing the payment the bureaux made to the temp, plus an element of commission. Adecco had these three "business models:

> (1) Employed temps: it employed persons who it assigns to its clients on a temporary basis. There is an employment contract between Adecco and the employee under which the employee agrees to act exclusively for Adecco and Adecco guarantees to find a minimum number of paid assignments for the employee;
>
> (2) Non-employed temps: (who were the subject of the appeal). They were persons who are on the books of Adecco but are not considered to be employed by that company. Adecco may introduce them to clients looking for a temporary worker to undertake an assignment. The temps are not obliged to accept any assignment offered and Adecco is not obliged to find them an assignment. Nevertheless, Adecco undertakes with these persons to pay them for the work they do for Adecco's clients and is classed as their "employer" for various regulatory matters, including the working time regulations and payment of PAYE/NIC. Adecco's payment by its clients will be periodic and normally calculated as an amount representing the payment Adecco must make to and on behalf of the temp, plus a commission element.
>
> (3) Contract workers: these were self-employed workers who Adecco may introduce to a client, and with whom the client will enter into a separate contract, direct with the contract worker, to provide the work required. They are not Adecco's employees in any sense, and Adecco does not undertake to pay them. Adecco's charge to its clients will typically be a one-off fee (albeit normally calculated by reference to the contract worker's rate of pay and the length of the assignment).'

149. *Adecco* concerned Category (2) and the temps' relationship was with Adecco only.

150. A question arose as to whether the fees charged by the bureaux to their clients were subject to VAT. The bureaux argued that: (i) they did no more than introduce candidates to clients and provide ancillary (in particular, payment) services; (ii) it was the temps themselves, not the bureaux, who supplied their work to the clients; (iii) on that basis VAT was not payable on the totality of the fees but only on the element attributable to the introduction and ancillary services that they supplied themselves. HMRC denied that any such distinction fell to be made, and took the view that the bureaux were obliged to account for VAT on the totality of the fees received by them. HMRC rejected repayment claims made by the bureaux on that basis. That decision was upheld by the FtT and the UT.

151. The Court of Appeal examined the contracts and found that Adecco was liable, come what may. Furthermore, Adecco paid the temps and was contractually obliged to do so. The court held that both contractually, and as a matter of economic and commercial reality, the

temps' services were supplied to clients via the bureaux. The bureaux did not merely supply their clients with introductory and ancillary services. VAT was, therefore, chargeable on the totality of the fees paid to the bureaux by the clients. Furthermore, there could be no question of the temps having provided their services under contracts with their clients. Whatever the scope of the bureaux's obligations to their clients, the temps' services were provided to clients in pursuance of the contracts between, on the one hand, the bureaux and their clients and, on the other, the bureaux and the temps.

152. Although the contract between the bureaux and a temp referred to the temp undertaking an assignment for a client, and providing services to the client, it also spoke of the client requiring the temp's services through the bureaux and of the temp being supplied through the bureaux. While temps were to be subject to the control of clients, that was something that the temps agreed with the bureaux, not the clients. The bureaux could fairly be described as conferring such control on its clients. The bureaux paid temps on their own behalf, not as agent for the clients. Moreover, the bureaux did not drop out of the picture once they had introduced a temp to a client. They were responsible for paying the temp, and had to do so regardless of whether they received payment from the client. The fact that the bureaux had no control over a temp in advance of his taking up an assignment with the client did not matter.

All Answers

153. The legal principles of VAT were identified by the UT in *All Answers* (Judges Richards and Brannan), which concerned an online business operated by the taxpayer who provided essays to order to customers in return for payment. The appellant operated a largely internet-based business. Customers accessing its website ("Customers") could (in return for payment which is made to the appellant) order academic work, such as essays, dissertations or pieces of coursework, which are then written by third parties ("Writers"). The Writers tended to be teachers, lecturers and PhD students who were not employed by the appellant. The appellant did not disclose the Writers' identities to the Customers, and *vice versa*.

154. The appellant and a Writer of a particular piece of work shared the fee paid by the purchasing Customer between them. The appellant retained around two-thirds of the fee, with the Writer obtaining the remaining one-third. If a Customer paid £240 for a piece of work, the appellant typically retained £160 of that amount and paid £80 to the Writer. HMRC contended that the appellant in that appeal made a single standard-rated supply of the academic work to a Customer and should account to HMRC for VAT on the full price paid by the Customer. The logic of HMRC's case was that when the appellant pays the Writer £80, it is paying the Writer consideration for a separate supply made by the Writer to the Appellant. However, since Writers tended not be registered for VAT, the appellant was not entitled to credit for any input tax incurred in respect of this separate supply. The appellant's case rested on the proposition that it entered into contracts for the provision of academic work as 'agent' for the Writer producing it.

155. The essence of the dispute between the parties revolved around the concept of "reciprocal performance" described in *Tolsma*. The UT considered the guidance given by Newey LJ in *Adecco*. The UT also considered the question of how to determine relevant aspects of the legal relationships between the parties in order to consider whether the £240 given to the appellant was consideration for a taxable supply made by the appellant. The UT noted that the CJEU had determined this question in *Newey (CJEU)*, with reference to one of the questions referred and the answer given by the CJEU at [42] and [44] (supra).

156. One aspect of the UT's examination of the contracts involved ascertaining whether Writers gave the appellant authority to make contracts on their behalf and, if so, whether the appellant exercised that authority by entering into contracts for the provision of academic work

as agent for the Writers. In this respect, the UT referred to Lord Scarman's dicta in *Yeung Kai Yung v Hong Kong and Shanghai Banking Corporation* [1981] AC 787. at 795:

> "...it is not the case that, if a principal is liable, his agent cannot be. The true principle of law is that a person is liable for his engagements (as for his torts) even though he acts for another, unless he can show that by the law of agency he is to be held to have expressly or impliedly negatived his personal liability."

157. At [28], the UT also considered the ways that an agent can conclude a contract on behalf of a principal by referring to *Teheran-Europe Co. Ltd v S.T. Belton (Tractors) Ltd* [1968] 2 WLR 523 (per Donaldson J), as follows:

> "An agent can conclude a contract on behalf of his principal in one of three ways:
>
> (a) By creating privity of contract between the third party and his principal without himself becoming a party to the contract. The principal need not be named but the contract must show clearly that the agent was acting as such. Familiar examples are contracts made by X as agents and signed by X, the signature being claused "as agents only." The consequence of such an arrangement is that the third party can only sue, and be sued by, the principal.
>
> (b) By creating privity of contract between the third party and his principal, whilst also himself becoming a party to the contract. The consequence of this arrangement is that the third party has an option whether to sue the agent or the principal, although this is of little practical value if he does not know of the principal's existence. Equally the third party is liable to be sued either by the agent or by the principal. Where both agent and principal are privy to the contract questions of election can arise (see *Clarkson Booker Ltd. v. Andjel*), but no such question arises in this case.
>
> (c) By creating privity of contract between himself and the third party, but no such privity between the third party and his principal. In other words, in relation to the third party he is a principal, but in relation to his principal he is an agent. The consequence of this arrangement is that the only person who can sue the third party or be sued by him is the agent."

158. The UT then said this, at [30] and [31]:

> "30. Therefore, even if the Appellant did contract to supply academic work as agent for the Writer who produced that work, it remains possible that the Appellant was itself liable to the Customers under that contract. There being no suggestion in this case that there was any particular trade usage or custom, we will seek to discern the extent of the Appellant's liability, if it did contract as agent, from the terms of the particular contracts and surrounding circumstances.
>
> 31. Both the Writer Contract and the Customer Contract suffered from a lack of clarity as to their precise legal effect. Moreover, some of the provisions of those contracts contradicted each other…"

159. The critical question was, therefore, "What are the relevant rights and obligations of the parties according to the contract(s)". At [41], the UT observed that:

> "41. Clause 14 of the Writer Contract dealt with intellectual property issues. Clause 14.1 provided as follows:
>
> 14.1 You agree that the intellectual property rights to the work submitted transfers to All Answers Ltd upon submission."

160. The Writer therefore no longer owned the copyright to the work. The UT further observed that Clauses 1 and 2 of the Customer Contract immediately introduced a degree of confusion as to its overall effect. The terms of the contact were not clear and the appellant had contractual liability for the quality of the work provided.

161. At [48] and [51], the UT said this:

"48. These two clauses therefore indicate that the Appellant is accepting a personal obligation to use reasonable care and skill in delivery of the work. That is emphasised by the fact that the Appellant is to be judged by the standard of a "competent research agency". The clause does not suggest, for example, that the Writer has the sole obligation to deliver the work, or that the Writer's conduct is to be assessed by reference to the standard of a competent academic. It does not even suggest that there is to be any claim against a Writer for a failure to deliver work to an acceptable standard. The only liability mentioned in Clause 4.2, and the only liability limited in Clause 4.3, is that of the Appellant.

…

51. The conclusion that the Appellant, and not the Writer, was to be liable to the Customer for late delivery of the work is reinforced by other provisions of Clause 6. Clause 4.8 required a Customer who had not received work by the due date to contact the Appellant the next working day and clause 4.9 operated to limit the liability of the Appellant (with no reference to a liability of the Expert) if the Customer waited longer than this. Moreover, Clause 1.6 of the Customer Contract precluded the Customer from contacting the Writer and so a Customer's only port of call if the work was delivered late was the Appellant."

162. And, at [62]:

"*Conclusion on the effect of the contracts*

62. Our conclusions on the effect of the Writer Contract and the Customer Contract are as follows:

(1) By the Writer Contract, a Writer gave the Appellant authority to enter into contracts as agent on behalf of the Writer.

(2) However, in the Customer Contract, the "core" obligations, to deliver the academic work, to the requisite standard and by the applicable deadline, were obligations that were binding on the Appellant only.

(3) The "no plagiarism guarantee" was an exception. By Clause 7 of the Customer Contract, the Appellant agreed, as agent for the Writer, that if plagiarism was detected in the work provided, the Writer would pay the Customer £5,000. That obligation was binding on the Writer and not on the Appellant.

(4) Pursuant to the Writer Contract, a Writer transferred the entire copyright in the relevant academic work to the Appellant. Having divested itself of that copyright, a Writer would be incapable of providing any licence to use that work to a Student, or indeed to anyone else.

(5) Pursuant to the Customer Contract, the Appellant provided the Customer with only a limited right to use the work. That was different from the interest the Appellant obtained under the Writer Contract, namely the whole copyright in the work."

163. At [24], the UT in *All Answers* applied the three-stage guidance, as follows:

"24. In the light of that guidance, we will adopt the following approach:

(1) First, we will ascertain the meaning and effect of relevant contractual terms so as to determine whether those terms impose an obligation on the Appellant or the Writer (or both) to provide the academic work to the Customer in return for the payment that the Customer makes to the Appellant.

(2) Second, we will consider whether the contractual terms reflect commercial and economic reality.

(3) In the light of our answers to questions (1) and (2), we will determine whether the Appellant made a supply of the academic work so as to become subject to an obligation to account for VAT."

164. The starting point was the contracts.

Application of the caselaw to the facts

165. Turning to the circumstances of this appeal, HMRC's position is that there is a single supply of flooring and fitting services made by the Appellant to the customer. On the contrary, the Appellant's position is that the supply of fitting was made by the fitter to the customer, separately from the sale of the flooring.

166. In determining this appeal, we adopt the three-stage approach adopted by the UT in *All Answers* by:

(1) Firstly, ascertaining the meaning and effect of the relevant contractual terms so as to determine whether those terms impose an obligation on the Appellant to provide the fitting service to the customer in return for the payment that the customer makes to the fitter;

(2) Secondly, considering whether the contractual terms reflect the economic and commercial reality; and

(3) Thirdly, in light of the answers to (1) and (2), determining whether the Appellant made a supply of the fitting so as to become subject to an obligation to account for VAT on the price for the fitting.

167. In summary, having considered the contractual documentation, we are satisfied that there were three distinct agreements in play in this appeal. The first agreement was between the Appellant and the customer, which was entered into at the point of sale (of flooring) on the shop floor when the goods were sold. The second agreement was between the Appellant and the fitter, which dealt with the cost of fitting according to market rate(s). The third and final agreement was between the customer and the fitter, which dealt with payment for fitting services (which was direct to the fitter from the customer). We will explore each of these in greater detail later. We are further satisfied that there were two separate supplies, the first of which comprised of the supply of goods (i.e., carpets and other flooring) by the Appellant to the customer, and the second of which comprised the supply of services (fitting) by the fitter to the customer. We give our reasons for so finding below.

Stage 1 - The Meaning and Effect of the Relevant Contractual Terms

168. The Appellant's Terms and Conditions were as follows:

Contractual Terms and Conditions pre-August 2020

169. The Appellant's "**Terms and Conditions of Sale**" were set out on the reverse of the sales 'Invoice', which was presented to the customer at the point of sale.

The first agreement: between the Appellant and the customer

170. The first of the agreements is that between the Appellant and the customer. In summary, the terms were as follows:

(1) The contract is one for the sale of goods, the goods in question being as described in the Invoice ('**Clause 1**').

(2) Title to the goods remains with the Appellant until payment in full of the price ('**Clause 2**').

(3) The goods are sold by the Appellant on the terms contained in the Sale of Goods Act 1979, except as expressly varied by the Invoice and/or the terms. No change may be made to the contract unless agreed in writing by the Appellant ('**Clause 3**').

(4) The price of the goods provided by the Appellant is as set out in the Invoice ('**Clause 7**').

(5) Under the heading 'Fitting Services', '**Clause 8**' provided that:

> "…The Company retains full responsibility for its products and services, the Installer is responsible for the standard and quality of the work and any liability arising from the installation. The fitting charge is payable direct to the Installer on completion of the work to ensure satisfactory fitting. Rooms should be clear of furniture and of old carpets. By signing this agreement you confirm your acceptance of this arrangement and will make payment direct to the Installer as shown overleaf."

(6) Full payment for goods and services detailed on the Invoice is due upon delivery or collection of the goods, as applicable ('**Clause 9**'):

> "As detailed on the invoice, payment for carpet fitting is payable directly to the Installer and is subject to a separate contractual agreement."

(7) '**Clause 10**' of the Terms and Conditions of Sale addressed issues of liability in respect of defects in the product.

(8) '**Clause 11**' addressed carpet cleaning.

171. On the reverse of the Invoice, beneath the Appellant's Terms and Conditions of Sale, were printed the 'Independent Installer Terms and Conditions of Sale', which set out terms of the (separate) agreement between the customer and the fitter. They provided that:

> "**1. Interpretation**
>
> In these conditions and the Invoice overleaf Customer means the person or persons receiving the carpet fitting and delivery services. The Goods means the goods supplied by the Company. Contract means the contract for the fitting services to the Customer by the Installer. The Company means [the Appellant]. The Installer means the self-employed carpet fitter. The headings are for convenience only and do not affect interpretation.
>
> **2. Legal Title**
>
> The legal title to the Goods shall remain in the property of the Company until any monies whatsoever which are owing to the Company by the Customer have been paid. The Company reserves the right for its agents, servants, employees to enter the premises of the Customer and repossess the Goods, in the event of non-payment of the outstanding balance. Legal title to the Goods does not at any stage rest with the Installer.
>
> **3. Basis of the Sale**
>
> The carpet fitting and delivery services provided by the Installer are supplied under a separate contract from the supply of goods to the Customer by the Company. The Company is not responsible for the delivery or fitting of the Goods to the Customer.
>
> **4. Terms of Payment**
>
> Full payment for the fitting services is due upon fitting payable by cash or cheque directly to the Installer. As detailed on the invoice, payment for the carpet fitting is made directly to the Installer under a separate contractual agreement between the Customer and the Installer…"

172. We are satisfied that these terms made clear that the contract between the Appellant and the customer was, and is, for the sale of goods (i.e., the floor covering) ('Clause 1'); such goods being those which were described in the Invoice, and that the provision of any fitting services was the subject of a separate contract between the customer and the fitter. We are further satisfied that the Terms and Conditions made clear that the Appellant did not provide a fitting service, but that there was a referral to a fitter on the basis of contractual terms. We find that use of the word 'agents' in 'Clause 8' of the Terms and Conditions has clouded the economic reality and has been given greater importance by HMRC that is evident from the economic and commercial reality.

The second agreement: between the Appellant and the fitter

173. In terms of the arrangement between fitters in the 'pool' for a given store and the Appellant, there was no written agreement and the arrangement was informal. The essence of the arrangement was that the Appellant connected a fitter to a customer who needed fitting services. The fitters had pre-agreed to provide 'basic' fitting services at a particular rate, per m^2, and the Appellant knew what that "going rate" was. If the actual job was different from that described by the customer in the store, whether additional sums were sought by the fitter and what they were was a matter between the fitter and the customer.

174. We are satisfied that the Appellant's role in relation to fitting was limited to an 'introductory role', which can be summed up as one where the Appellant essentially told its customers "we do not provide fitting services but we can introduce you to someone who can". The obligation to fit the flooring then lay with the fitter, and not the Appellant. The Appellant's Terms and Conditions and the Independent Installer Terms and Conditions make this explicitly clear. More importantly, and in direct contradiction to HMRC's conclusion in respect of a contractor and subcontractor relationship, the Appellant was not liable to pay the fitter for his work. The payment obligation lay with the customer. Of material relevance, the only reference to fitting costs in the Invoice presented to the customer in the store was to an "estimate", which was not included in the total sum paid to the Appellant by the customer at the point of sale.

The third agreement: between the customer and the fitter

175. There was also a distinct set of terms which set out terms of the agreement between the customer and the fitter, which made clear that the fitting services were to be provided by the fitter (and not the Appellant); namely, the "**Independent Installer Terms and Conditions of Sale**", which can be summarised as follows:

(1) '**Clause 1**' described the contract as being for the fitting services to the customer by the fitter;

(2) '**Clause 3**' made clear that: (i) the fitting and delivery services provided by the fitter were supplied under a separate contract from the supply of goods to the customer by the Appellant; and (ii) the Appellant was not responsible for the delivery or fitting of the goods.

176. '**Clause 4**' provided that payment for the fitting was to be made directly to the fitter under a separate contractual agreement between the customer and the fitter.

Contractual Terms and Conditions post-August 2020

177. The Appellant changed its 'Terms and Conditions', with effect from August 2020. The form of the Appellant's Invoices was also changed. The aim of revising these Terms and Conditions was to make the position even clearer to customers that the Appellant does not provide a fitting service. Signage was also introduced in 2020, which is displayed in prominent positions in the Appellant's stores, and makes clear to customers that the Appellant does not provide a fitting a service.

The first agreement: between the Appellant and the customer

178. The **'Notices**' displayed in the Appellant's stores read:

"**IMPORTANT NOTICE**

We do not provide fitting services. We can introduce a fitter to you who you may engage. You must pay the fitter direct.

Any fitter we introduce will usually require that all areas to be fitted must be cleared of old flooring and furniture, otherwise surcharges are likely to apply.

If areas are not clear the fitter may refuse to carry out the installation.

Fitters are usually able to take doors off, if necessary, to carry out installation. However, the fitter is unlikely to be able to trim doors.

Please ensure that your fitter is made aware of any underfloor pipes, wires etc prior to fitting.

Please read our Terms and Conditions of Sale and invoice carefully before you sign to agree.

Please also read the Terms and Conditions offered by a fitter introduced by us for his fitting service to you*."*

Due to the "transfer of waste" rules, the fitter is unable to remove any old or new flooring waste from the site."

179. In addition to this, the front of the Appellant's Invoices – which were presented to the customer at the point of sale – stated that:

"*CUSTOMER ORDER: SALE SUBJECT TO TERMS AND CONDITIONS OVERLEAF*".

180. The Invoice goes on to set out details of the goods to be purchased (description, colour, size, quantity, code and price), and states:

"NEXT STEPS

A fitter introduced by us will make direct contract with you to agree their engagement with you and subject to that to make necessary arrangements.

...

FITTING SERVICE

We do not provide fitting services, for that you must yourself engage a fitter.

We can make an introduction, do you wish us to do so? [There is then a "yes"/"no" tick box].

By answering YES you instruct us to pass on your details and a copy of this invoice to a fitter.

...

I AGREE TO THE ABOVE AND TO THE TERMS AND CONDITIONS OVERLEAF

Customer Signature

...

Discount

You are entitled to this discount if you have purchased the equivalent amount of underlay from us."

181. There is then a box headed 'Fitters Notes', which contains boxes for "**Fitting Estimate**"; one for "**Surcharges**" and one for "**Total**".

182. The Appellant's Terms and Conditions of Sale (between the Appellant and the customer) are then set out on the reverse of the Invoice, as follows:

(1) The contract is one for the sale of goods, the goods in question being as described in the invoice ('**Clause 1**').

(2) Title to the goods remains with the Appellant until payment in full of the price ('**Clause 2**').

(3) The goods are sold by the Appellant on the terms contained in the Sale of Goods Act 1979, except as expressly varied by the Invoice and/or the terms. No change may be made to the contract unless agreed in writing by the Appellant ('**Clause 3**').

(4) The price of the goods provided by the Appellant and the delivery charge (if any) is as set out in the Invoice. Full payment is due on delivery or collection, as the case may be ('**Clause 7**'). The clause goes on to state:

> "*Your discount entitlement is set out below*".

(5) Under '**Clause 8**', headed 'Discount Entitlement', it is stated:

> *"We will reduce the price of the goods by way of a discount for you as shown on the invoice."*

183. Under the heading 'Fitting Services', '**Clause 9**' provides that:

> "(a) We do not provide carpet fitting services and this forms no part of any contract between you and us. It is for you to engage a carpet fitter and any fitting service is provided to you wholly and exclusively under/pursuant to such an engagement which is a contract between you and a fitter.
>
> (b) Upon your request we may introduce a fitter to you. Following such introduction, it is between you and such fitter to agree the terms and conditions (including price) for the fitting services. You are always free to engage a fitter of your choice.
>
> (c) To make the introduction of fitter requested you instruct us to communicate your personal details, including a copy of the invoice overleaf, to the fitter(s) to be introduced.
>
> (d) We have agreed with the fitters we introduce the basis for estimating the price of the fitting service and stairs and other surcharges (if any). The fitting estimate shown on the invoice overleaf for the fitting service is made accordingly as are the stairs and other surcharges (if any) shown on the invoice. It remains your responsibility to pay the fitter in accordance with your contract with him.
>
> (e) The fitting estimate and stairs and other surcharges (if any) shown on the invoice are not held out by us or made by us for and on behalf of the fitter and are made in reliance on the information you have provided to us, including in the customer service checklist on the invoice overleaf. Subject always to the foregoing, the fitters we introduce have agreed with us that they will offer the fitting service to you under the terms and conditions set out below under "fitting service terms and conditions". For the avoidance of doubt those terms and conditions are not part of any contract between you and us but may form part of a contract between you and the fitter. We do not hold these terms and conditions out on behalf of the fitter. It is your responsibility to agree terms and conditions with the fitter which you consider to be satisfactory including as to price and payment.
>
> (f) The fitter we introduce is considered by us to be properly qualified to fit your floor covering. However, we give no promise or guarantee with respect to and accept no responsibility for the quality of the fitting service. We accept no responsibility for any damage or loss you might suffer in connection with the fitter's performance of his contract with you. If you are not satisfied with the fitting service your only recourse is to the fitter under your contract with him."

184. '**Clause 10**' of the Terms and Conditions of Sale addresses issues of liability in respect of defects in the product.

185. '**Clause 11**' addresses carpet cleaning.

186. While the Terms and Conditions were seen at the point of sale, there was ample signage in the store.

The second agreement: between the customer and the fitter

187. On the reverse of the Invoice, beneath the Terms and Conditions of Sale, are the distinct "**Fitting Service Terms and Conditions**", which set out terms of the agreement between the customer and the fitter, and make clear that the fitting services are to be provided by the fitter (and not the Appellant). They read as follows:

"Fitter ("We, us") Name: Address:

Tel No: Customer ("you") Name:

Address:

Tel No:

1. You have been introduced to us by [enter details of retailer] so that we may enter into an agreement with you to fit the goods as described in their invoice ("the invoice") (a copy of which is attached) which you have purchased from them ("the goods").

2. We hereby agree with you to fit the goods for the fitting price, and stairs and other surcharges (if any) on the terms and conditions herein.

3. The fitting price is equivalent to the amount shown on the invoice as the estimated fitting price. Any surcharges are as shown on the invoice.

4. Payment is to be made by you or on your behalf upon completion of the fitting service.

5. Our agreement to fit the goods and the fitting price and any stairs and other surcharge (if any) is subject to the following requirements being satisfied:

(a) The information you have provided in the "customer service checklist" part of the invoice is complete and correct.

(b) Unless otherwise agreed, all areas where the fitting is to take place will be clear of any floor covering and furniture, otherwise we may refuse to proceed and/or make an additional charge.

(c) If necessary, in performing the fitting service doors may be removed but will not be trimmed, cut or otherwise worked on by us.

(d) You must advise us of the whereabouts/position/routing of any underfloor piping, wiring, cabling etc and no responsibility is accepted by us for any damage thereto unless the precise location for them has been given to us in writing.

(e) Unless otherwise agreed we will not be required to remove or take away any old or existing floor covering nor any waste remaining after performance of the fitting service.

Fitter's signature: Customer's signature: Date:"

188. The blue copy of the Invoice is the store's copy, the yellow copy is the fitter's copy and the white copy is the customer's copy. Therefore, in terms of the agreement between the customer and the fitter:

(1) '**Clause 2**' provides that the fitter agrees to fit the goods (the flooring) for the fitting price, stairs and other surcharges.

(2) '**Clause 3**' provides that the fitting price is equivalent to the amount shown on the Invoice as the estimated fitting price.

(3) '**Clause 4**' provides that payment is to be made by, or on behalf of, the customer upon completion of the fitting.

(4) '**Clause 5**' provides that the agreement to fit the goods and the fitting price is subject to the customer having accurately described the requirements of the job. This permits the fitter to vary the price in the event that the job is not as described by the customer when purchasing the flooring.

189. It is clear from all of the documentation that the customer had the freedom whether to choose to engage a fitter and there was no obligation to do so at the point of sale of the goods. Once the customer chose a fitter, a separate agreement came into play and the Appellant was not privy to that agreement.

The third agreement: between the Appellant and the fitter

190. In terms of the arrangement between fitters and the Appellant, there was an attempt to introduce a written agreement entitled "**Introduction Agreement with Fitter**". This was devised to describe, and put in writing, the fitter referral service provided by the Appellant and the fitting services that the fitters provide directly to the customers Under the agreement:

(1) '**Clause 1**' provides that the Appellant will sell floor coverings to customers and may introduce the customers to fitters with a view to the fitter entering into a contract with the customer to fit the goods. The Appellant promised to provide the fitter with a copy of the Invoice to the customer identifying the customer and describing the goods.

(2) Under '**Clause 2**', in consideration for such introduction, the fitter agreed to offer the customer the fitting service on the terms and conditions set out in 'Clause 4'; those terms being (subject to some minor differences) the 'Fitting Service Terms and Conditions' for the estimated fitting price and any surcharges stated on the customer Invoice so long as the estimated fitting price accords with the "agreed basis for estimation" set out in '**Clause 5**'. The agreed basis of estimation could be varied by agreement between the Appellant and the fitter from time to time. Also, under 'Clause 2', the fitter is to provide the terms in writing to the customer to sign and retain a copy of that for 12 months.

(3) Pursuant to '**Clause 3**', as soon as reasonably practicable following the Appellant's introduction of the fitter, the latter is to make contact with the customer with a view to agreeing the fitter's contract with the customer for the fitting service and for making practical arrangements for performance of it.

(4) '**Clause 4**' sets out the terms and conditions which form the basis of the contract between the customer and the fitter.

(5) '**Clause 5**' sets out the "Agreed basis of estimation", comprising a number of prices per m^2 according to flooring type, and an indicative stair surcharge, with prices in respect of the removal of existing flooring and moving furniture being as agreed from time to time.

(6) '**Clause 6**' provides that the Appellant has no liability to pay or guarantee payment by the customer of any amount due from the customer to the fitter in respect of the fitter's fitting service, and that it is for the fitter to recover any such amount direct from the customer.

191. The fitters did not, however, want to be tied down, or held to any formal arrangement. This supports the view that the fitters were not paid, contracted or employed by the Appellant. This also supports the view that there was no agency relationship. Miss McArdle however referred Mr Newton to the Facebook job alert for fitters that was included in the documents before us. We are, however, satisfied that the job alert does not support any finding that the fitters were hired/employed by the Appellant. The incontrovertible facts of this appeal are that the fitters were not on the Appellant's payroll and received no payment from the Appellant, so this was not a recruitment process.

Online sales

192. The terms relating to online sales were materially similar to those described above in respect of in store sales before August 2020, save that '**Clause 8**' of the terms between the Appellant and the customer included the following:

> "When purchasing directly in store, the fitting charge will be payable direct to the Installer on completion of the work to ensure satisfactory fitting. When purchasing online, you will be

charged for the fitting costs (with exception of any additional chargeable services as agreed directly with the store) during the checkout process. Rooms should be clear of furniture and of old carpets. By continuing with your purchase you confirm your acceptance of this agreement and, if required, will make payment direct to the Installer as shown on your Invoice."

193. Where payment was taken from the online sale, the Appellant passed that to the fitter in full, without deduction. As with the in-store sales, there was also a separate 'Independent Installer Terms and Conditions of Sale' governing the separate contractual relationship between the fitter and the customer.

194. Miss McArdle cross-examined Mr Newton about the Appellant's website from 2017 (which is no longer current), where it is stated:

"***We*** *do apply a surcharge for carpet fitting on stairs.*"

"***Our*** *charges for fitting are…*"

195. We find that this analysis only considers one snippet of the entire sales process, and is not conclusive evidence of a single supply being made by the Appellant. We further find that there is considerable force in Mr Jones' submission that the carpet fitting services formed no part of any contract between the Appellant and the customer. The Terms and Conditions expressly state that it is for the customer to engage a fitter, and that any fitting service is provided pursuant to such engagement. Despite there being a 'pool' of fitters for any given day, the customer is free to engage a fitter of their choice (if that fitter is known to them). As stated earlier, there is no obligation for a customer to opt for fitting services.

196. Whilst there is a fitting 'estimate' included on the Invoice, we are satisfied that this is in accordance with the market rate. We are satisfied that the fitting estimate shown on the Invoice is made on the basis of an agreement with the fitters, and it remains the customer's responsibility to pay the fitter in accordance with his/her contract with the fitter. The fitter introduced by the Appellant is considered by the Appellant to be properly qualified, but the Appellant gives no promise, or guarantee, with respect to the quality of the fitting service. If the customer is not satisfied with the fitting service, the source of recourse for the customer is the fitter (whose number the customer will have). If, in the rare circumstance, the customer does not have the correct contact details for the fitter, the Appellant can provide that number or make contact with the fitter. There is, clearly, a distinct set of 'Fitting Service Terms and Conditions', which set out terms of the agreement between the customer and the fitter.

197. The Appellant assumes no responsibility for the fitting service as that responsibility lies with the fitter. Furthermore, the Appellant is not liable to pay the fitter for his work as that liability rests with the customer (with payment being made directly to the fitter). Category (3) of the business models in *Adecco* bears the closest parallel to the appeal before us. Furthermore, the problem that arose in *All Answers* was that the Writer was "behind the scenes". That is not the situation in the appeal before us. Having considered the documentation, cumulatively, we are satisfied that the Appellant's role is limited to introducing the fitters to the customer, with the core obligation to fit the flooring being with the fitter (for which the customer makes payment directly to the fitter).

Stage 2 - Economic and Commercial Reality

198. The CJEU has observed that the contractual position normally reflects the commercial and economic reality of the transactions: *Newey (CJEU)*, at [43].

199. Miss McArdle submits that:

(1) where a customer purchases carpet with underlay and fitting, they are seeking to purchase a 'fitted carpet'. She adds that the Appellant provides commercial incentives to

encourage this in the form of the offer of 'free fitting' to customers who purchase underlay and carpet;

(2) the fitting fee is agreed between the Appellant and the customer, without recourse to the fitter, at the time of the order; and

(3) The identity of the fitter is not provided to a customer at the point of sale and the customer has no input in relation to the selection of the fitter.

200. In respect of Miss McArdle's submission that a customer seeks to purchase a 'fitted carpet' when they purchase the goods from the Appellant's store, we have found that the customer has freedom of choice in relation to the fitting service and we are satisfied, on consideration of the contractual arrangements, that it is made clear to the customer by the Appellant (both under the pre- and post-August 2020 arrangements) that the Appellant does not provide fitting and, further, that a significant proportion of customers buy flooring from the Appellant without asking for a fitter to be referred to them.

201. In respect of Miss McArdle's submission that the fitting fee is agreed by the Appellant and the customer without recurse to the fitter, we are satisfied that it is only an 'estimated' fitting fee that is entered on the Invoice. The estimate is based on the 'going rate' that is discussed between the Appellant and the fitters. Indeed, HMRC were unable to provide any evidence of the arrangements that are considered to be in place in the industry as a whole (or any trade practice) and wrongly interpreted the question from the panel as the trade practice known to HMRC to be a requirement for HMRC to disclose the tax affairs of a specific taxpayer in the same industry as the Appellant. The unchallenged evidence given on behalf of the Appellant is that the estimate given in the Invoice is based on rates that the fitters and the Appellant have discussed in advance; thus informing the estimated cost. As already considered, the charge might be different from the estimated cost (depending on the actual job) as agreed between the fitter and the customer. Such an arrangement is entirely consistent with there being a separate supply of fitting by the fitter to the customer.

202. Furthermore, we accept that the fact that the identity of the fitter is not provided to the customer until the fitter makes contact on the day of the fitting is of no probative value to HMRC's case. This is because the service provided by the fitter is not a personal one in the sense that the identity of the fitter is material from the customer's perspective.

203. HMRC's overarching contention appears to be that the fitters are acting as 'subcontractors' for the Appellant. We find that HMRC's view that a subcontractor relationship exists in the circumstances of this appeal is misconceived. This is because the economic/commercial model of a contractor/subcontractor relationship ordinarily arises where the contractor is responsible for some task (e.g., the provision of goods or services to the recipient of those goods or services) and contracts with someone else (i.e., the subcontractor) to undertake all, or part, of that task. We are satisfied that the Appellant did not assume any responsibility for the fitting of flooring in this appeal and did not contract with the fitter to undertake such a task. The fitters were under no obligation to provide their services and were not under a 'cab-rank' rule, so to speak.

204. Furthermore, we are in agreement with Mr Jones that in a contractor/subcontractor relationship, the customer (client) pays the contractor for completion of the task, pursuant to their agreement. The contractor then pays its subcontractors for their work; which is ordinarily a margin on the difference between what it receives from the client and what it has had to pay its subcontractors. There is no evidence before us to support a finding that the customer paid the Appellant for the fitting service and, indeed, such an arrangement is not reflected in the contracts/agreements analysed above. Furthermore, the Invoices show that the total sum paid

by the customer at the point of sale does not include the 'fitting estimate'. There is no evidence before us that the Appellant ever received the fitting payment.

205. As described by Mr Jones in his skeleton argument, the Appellant (the putative contractor in HMRC's analysis) is not entitled to receive (and does not in fact receive) any economic benefit from the price paid for the fitting services. The payment is made by the customer to the fitter, directly, and the fitter retains the entire amount. In many circumstances, the Appellant will not know what the final fitting charge is if surcharges have been applied, or if the job is not as described by the customer. We accept, and agree with, Mr Jones' submission that the outcome of HMRC's case is that the Appellant has to pay a greater amount of VAT in respect of the transaction where the customer opts for the fitter referral than it must pay in respect of the transaction where such a choice is not made by the customer. This is despite the fact that, in economic terms, the Appellant is receiving exactly the same, or less (when the customer qualifies for a discount), in the first transaction. In this respect, around 25% of customers purchase carpets without asking to be introduced to a fitter by the Appellant. In the case of 'other types of flooring', this figure is around 55%.

206. In relation to an agency relationship (which was how HMRC also interpreted the Appellant's case to be), in *Maritime Stores Ltd v HP Marshall & Co Ltd* [1963] 1 Lloyd's Rep 602, at 608, the following summary of the law set out in Bowstead & Reynolds on Agency was approved:

> "The question whether an agent who has made a contract on behalf of his principal is to be deemed to have contracted personally, and, if so the extent of his liability, depends on the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circumstances, including any binding custom."

207. It is, therefore, clear that the parties to the contract have to be identified.

208. Overall, we are in agreement with Mr Jones' submission that none of the factors identified and relied on by HMRC undermine the position set out in the contractual arrangements in relation to the appeal before us. We further find force in his submission that HMRC appear to be "asserting obligations and bending the focus", which undue focus on agency "misses the wood for the trees". We are satisfied that the economic and commercial reality in this appeal is that the fitters are independent and it is they who undertake fitting work for the customers. They do not work for the Appellant and the Appellant is not obligated to remunerate them for any fitting services. The absence of adopted written terms between the Appellant and the fitters is not fatal to the overall picture but serves to reinforce the independence of the fitters.

209. We accept, and agree, that the fitting terms are uncomplicated. Essentially, one job is the same as another. The customers pay the fitters directly upon completion of the job. The fitter has no obligation to take on work. The discount available to customers is not tied to the fitting. The core obligation to provide the fitting service lay firmly with the fitters and the obligation to pay for that service lay with the customer. We have further considered the fact that online sales comprise of only 1% of the sales.

210. In respect of the small minority of circumstances where the Appellant assists a customer with problems in the fitting service provided, this is not to be translated into a finding that the Appellant is the one making the supply. This is because the assistance given by the Appellant is explicable by reference to its need to maintain its brand and reputation with customers. The fact that the stakes may be high for the Appellant does not translate into a finding that there is a supply of fitting being made by the Appellant, and does not result in a legal obligation on the Appellant (in relation to fitting). In relation to maintaining its brand and goodwill, in *Secret Hotels*, at [46], Lord Neuberger said this:

> "46. There is nothing in factor (1)(a): until a customer selected a particular hotel on the website, Med had to deal with the customer in its own name, but that does nothing to undermine the point that, once a hotel was selected, Med acted as the hotelier's agent. As to factor 1(b), it is true that Med appointed its own local agents to look after holiday-makers, but that was not inconsistent with its status as an agent of the hotelier, and is easily explicable by reference to Med's need to maintain goodwill in the holidaymaking market…"

211. We are satisfied that the Appellant had no obligation to act as intermediary in the circumstances of the appeal before us, unlike Med in *Secret Hotels*. In the appeal before us, where the referred fitter carries out additional fitting work, or fitting work that is not as described at the point of sale of the goods, HMRC's case appears to be that for VAT purposes, the difference between the estimated fitting price on the Invoice and the price actually paid is consideration for a distinct supply; that supply being made to the fitter by the customer.

212. We are in agreement with Mr Jones' position that it does not follow from the fact that a customer wants their flooring to be fitted that the Appellant is the one who is providing the fitting service. We further find that there is considerable force in Mr Jones' submission that HMRC must establish that supplies of fitting are made by the Appellant. HMRC have not done so. For there to be a single, composite supply of a fitted flooring, it must be established that the flooring and fitting service are supplied by the same person. A supplier of flooring cannot become a supplier of fitting by virtue of the fact that fitting is necessary in order for a customer to enjoy the flooring. We are satisfied that it is artificial to treat that single service as being supplied in parts by different people; one part by the Appellant and the remainder by the fitter, to the extent that the price differs from the fitting estimate shown in the Invoice. It is settled that for VAT purposes, the taxable amount is the consideration "actually received" by the supplier.

Stage 3 – Identifying the Supplier

213. Given our findings on the effect of the contracts and the economic and commercial reality, we are satisfied that the fitters are the party making the supply of fitting services to the customer. We find that there is a 'legal relationship' between the fitter and the customer, which relationship involves the fitter providing fitting services to the customer (for which the fitter is solely liable). In return, the customer is liable to pay the fitter, and does *in fact* pay the fitter directly. The Appellant is not privy to that agreement. Applying the principles in *Tolsma*, the satisfaction of those mutual obligations represents 'reciprocal performance' and the sum received by the fitter represents 'consideration' for a supply of fitting services made to the customer. The consideration for the supply is not actually received by the Appellant and, therefore (applying the principles relevant to VAT) cannot form part of the taxable amount for the Appellant.

214. Accordingly, therefore, we resolve 'the Supply Issue' in favour of the Appellant and hold that the supplier of the fitting services is the independent fitter. Despite our conclusions on the Supply Issue, for completeness, we have determined to resolve the second issue in this appeal, given the detailed arguments presented by the parties.

ISSUE 2: THE LEGITIMATE EXPECTATION ISSUE

215. Over a number of years before their visit to Thompsons Carpets, HMRC had visited a number of the Appellant's own stores to conduct VAT checks and did not advise of any issues with the Appellant's VAT position. It was only following their visit to Thompsons Carpets in 2020 that this changed. Following HMRC's enquiries in relation to Thompsons Carpets, the Appellant's management reiterated to its staff that they should make sure they were operating the fitting referral system as instructed, and not outside of that. HMRC subsequently withdrew the assessment raised for Thompsons Carpets.

216. Mr Jones submits that HMRC had stated that they had decided to take no further action to disturb the status quo as regards the VAT treatment adopted by the Appellant, but that they would review the sector more broadly and, if appropriate, issue clarificatory guidance in the future. Mr Jones further submits that the FtT has jurisdiction to consider a legitimate expectation argument on an appeal brought under s 83(1)(p) VATA against an assessment made under s 73 VATA: *KSM*, at [84]. He also submits that the word 'may' in s 73(1) is permissive, not mandatory. He adds that it follows that an assessment is made not by operation of the statute, but by a discretion exercised by HMRC: *KSM*, at [72]. Miss McArdle disagrees that a legitimate expectation arises, or indeed that the FtT has the jurisdiction to consider such an argument.

217. There is, therefore, a significant divergence between the parties in respect of the jurisdiction (if any) of the FtT on the issue of legitimate expectation, in the circumstances of this appeal.

218. In determining this, we have considered the authorities and the relevant statutory scheme. The FtT is a creature of statute and its jurisdiction is wholly derived from statute. The FtT was created by s 3(1) of the Tribunals, Courts and Enforcement Act 2007 ('the TCEA') for the purposes of exercising the functions conferred on it by virtue of the TCEA. This point was made clear by the House of Lords in *C & E Comrs v J H Corbitt (Numismatists) Ltd* [1981] AC 22 ('*J H Corbitt (Numismatists)*').

219. In *Aspin v Estill* [1987] STC 723 ('*Aspin v Estill*') (at 727), Nicholls LJ said this:

> "The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review."

220. The starting point is that appeal grounds which concern public law arguments should be pursued in judicial review proceedings, rather than before the FtT.

221. In *R & C Comrs v Hok* [2013] STC 225 ('*Hok*'), the UT said this, at [41]:

> "41. There is in our judgment no room for doubt that the First-tier Tribunal does not have any judicial review jurisdiction. That was made abundantly clear by the House of Lords in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1981] AC 22. That case related to the Value Added Tax Tribunals rather than the First-tier Tribunal, but they too were a creature of statute with no inherent jurisdiction, and the relevant principles are identical. Lord Lane (with whom the majority agreed) said, in what remains the classic statement on the point:
>
> > "Assume for the moment that the tribunal has the power to review the commissioners' discretion. It could only properly do so if it were shown the commissioners had acted in a way which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. If it had been intended to give a supervisory jurisdiction of that nature to the tribunal one would have expected clear words to that effect in the [Finance Act 1972]. But there are no such words to be found. Section 40(1) sets out nine specific headings under which an appeal may be brought and seems by inference to negative the existence of any general supervisory jurisdiction."

222. The point was also made by Jacob J in *C & E Comrs v National Westminster Bank plc* [2003] STC 1072, where he adopted what had been said by Moses J in *Marks & Spencer plc v C & E Comrs* [1999] STC 205, at 247c, as follows:

"….in so far as the complaint is not focused upon the consequences of the statute but rather upon the conduct of the commissioners then it is clear that the tribunal had no jurisdiction. Its jurisdiction is limited to decisions of the commissioners and it has no jurisdiction in relation to supervision of their conduct."

223. This principle was applied by Warren J in the UT in *HMRC v Abdul Noor* [2013] UKUT 71 ('*Noor*'), at [28]. At [87], the UT said this:

"In our view, the FTT does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax….In contrast, a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the administrative court; the FTT has no jurisdiction to determine the disputed issue in the context of an appeal under s83."

224. *Noor* concerned an appeal pursuant to s 83(1)(c) VATA (concerning recoverability of input tax). Consistently with *Hok*, the UT concluded that the FtT had no judicial review jurisdiction.

225. The Court of Appeal decision in *MIS* (McCombe David Richards and Newey LJJ) concerned whether s 84(10) VATA enabled MIS to advance a legitimate expectation claim in the context of appeals to the FtT, rather than by way of judicial review. The Court of Appeal considered *Noor*, at [19] to [20], where Newey LJ said this:

"19. Secondly, the School's interpretation of section 84(10) of the VATA would appear to imply that public law arguments could routinely be advanced in appeals to the FTT. That would clearly be the case where HMRC had rejected a legitimate expectation claim in advance of the decision under appeal, but other public law arguments could presumably also be put forward. Where, say, it had been suggested to HMRC that it should take a particular matter into account, and HMRC had announced before making an assessment that it did not consider it appropriate to do so, it could be suggested that the assessment depended on a prior decision that could be impugned on public law grounds.

20. That would be a very surprising result. In *Revenue and Customs Commissioners v Noor* [2013] UKUT 71 (TCC), [2013] STC 998, the UT (Warren J and Judge Bishopp) held, departing from views expressed by Sales J in *Oxfam v Revenue and Customs Commissioners* [2009] EWHC 3078 (Ch), [2010] STC 686, that "the right of appeal given by s 83(1) [of the VATA] is an appeal in respect of a person's right to credit for input tax under the VAT legislation" and that the FTT did "not have jurisdiction to give effect to any legitimate expectation which [the taxpayer] may be able to establish in relation to any credit for input tax" (paragraph 87). The UT observed:

> "a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; the FTT has no jurisdiction to determine the disputed issue in the context of an appeal under s 83 (paragraph 87.)"

226. At [21], the court observed that the consequence of the submissions made on behalf of the taxpayer would be that:

"... legitimate expectation (and, seemingly, other public law) arguments could be raised in the F-tT without any need to satisfy the requirements as to obtaining permission and time limits that govern applications for judicial review... It is highly improbable that Parliament intended this when it enacted what has now become s 84(10)."

227. At [24], the Court of Appeal said this:

"In the context of an appeal against "the VAT chargeable on the supply of any goods or services" (section 83(1)(b) of the VATA) or an assessment (section 83(1)(p)), I find it hard to

see how the decision under appeal could have "depended" on any prior decision in the relevant sense unless the latter decision dictated whether or not there was legal liability. A decision as to whether, for example, it was "oppressive to enforce that liability" (to quote from the judgment of Nicholls LJ in *Aspin v Estill*) would, it seems to me, appropriately be the subject of judicial review proceedings rather than an appeal to the FTT."

228. The appeal in *KSM* (which has also been referred to as '*Henryk Zeman*' or '*Zeman*') related to s 73(1) VATA, which includes a "*may*" provision, not a "*shall*" provision, in a best judgment assessment (such as that which is relevant to this appeal). The appeal was made under s 83(1)(p) VATA, which did not *ex facie* appear to oust the FtT's jurisdiction.

229. In relation to s 83(1)(p) (the provision also engaged in the present appeal), the UT began by looking at the wording of the section:

> "71. In the present case, the relevant statutory language provides that if certain conditions are fulfilled, the Commissioners 'may assess the amount of VAT due … to the best of their judgment' (s 73(1)), and if they do then an appeal shall lie to the tribunal 'with respect to' the assessment or its amount (s 83(1)(p)).
>
> 72. The word 'may' is permissive, not mandatory. It must follow that an assessment is made not by operation of the statute but by a discretion exercised by HMRC. We prefer a construction of s 73(1), and therefore of s 83(1)(p), which recognises and gives effect to that word. We therefore respectfully disagree with the approach adopted in Gore at [30] and [44] (see [65] and [67] above), which treats the word 'may' as descriptive of a separate enforcement function and attributes no weight or meaning to it in the context of s 73(1) looked at on its own terms.
>
> 73. A taxpayer has a right of appeal to the tribunal 'with respect to … an assessment … under section 73(1).' Although made in a different context, and indeed in the context of statutory language which is narrower than that in s 83(1)(p) (see [39] above), we agree with the comments of Sales J in *Oxfam* at [63] as to the ordinary and natural meaning of the phrase 'with respect to'. As a matter of language, it defines the scope of the tribunal's appellate jurisdiction not by reference to any particular legal regime or type of law, but instead by reference to the subject-matter of the subsection."

230. The UT noted that the scope of s 83(1)(p) VATA is wider than that of s 83(1)(c) VATA. Section 73 VATA is a discretionary and to "best judgment" matter. The statutory language upon which *KSM* turned was permissive and not mandatory because, in that case, HMRC had had a discretion. The UT also considered the relevant policy considerations, at [82]:

> "82. In such circumstances, it seems to us there are good policy reasons for not adopting a construction of s 83(1)(p) which strictly limits the appellate jurisdiction of the FTT in the manner identified in the Gore decision at [30] (see [65] above), and which therefore excludes consideration of a legitimate expectation argument. We refer again to the comments of Sales J in Oxfam quoted at [39] above. Were one to adopt such a restrictive approach, there would be an obvious risk of duplication, delay and potential injustice given the potential for disputes to arise as to which forum any particular challenge should be brought it."

231. The UT concluded that legitimate expectation issues could be considered in an appeal under s 83(1)(p), as follows, at [84]:

> "84. Coming back then to where we started our analysis, the critical question in this case (see Beadle at [44]) is whether the relevant statutory scheme expressly or by implication excludes the ability to raise a public law defence of legitimate expectation (again, see *Beadle* at [44]). For all the reasons given above, we do not consider that s 83(1)(p) does exclude that ability. On the contrary, on the facts of this case and given the broad subject-matter of s 83(1)(p), we see strong reasons for thinking that it would be artificial and unworkable to exclude a defence based on the public law principle of legitimate expectation from the tribunal's appellate jurisdiction. We therefore consider that the FTT did have jurisdiction to determine that question in this case."

232. It has, consistently, been argued by HMRC that:

(1) the UT in *KSM* explicitly considered whether a legitimate expectation existed on the assumption it had jurisdiction. That claim failed on the facts ([20]) so the jurisdiction question was necessarily *obiter* and thus not binding on the FtT;

(2) *KSM* was decided *per incuriam* because the *MIS* decision was not considered by the UT;

(3) the decision was also reached without considering *Hok* or *BT Pension Scheme*; both being highly relevant; and

(4) Sales J's approach in *Oxfam v HMRC* [2009] EWHC 3078 (Ch), [2010] STC 686 ('*Oxfam*') was, similarly, not considered.

233. Indeed, the same submissions were made by Miss McArdle in the appeal before us. Miss McArdle submits that applying the appropriate principles of statutory construction, an appeal lies with respect to whether an assessment's statutory pre-conditions have been met, such as being made to HMRC's best judgment: see for instance comments on the Court of Appeal in *Rahman (T/A Khayam Restaurant) v C & E Comrs* [2003] STC 150 ('*Rahman (No 2)*'), at [5] to [6]. She adds that the jurisdiction of the FtT does not extend to the distinct matter of the *decision to assess at all*, for instance, because of the possibility of a contrary legitimate expectation. She further submits that the *KSM* analysis of s 73(1) was erroneous (see for instance [81]), where it was considered that "best judgment" imports a jurisdiction to consider the question of whether to assess. In this respect, she submits that the words "best judgment" permit the FtT to determine questions such as whether the assessment has been correctly calculated, and that the calculation has not been capriciously performed, but not wider public law concepts such as whether the decision to assess at all was contrary to a legitimate expectation.

234. Mr Jones, on the other hand, submits that:

(1) the conclusions on the jurisdictional issue in *KSM* were not *obiter*;

(2) no detail is provided by HMRC as to why *KSM* was decided *per incuriam*; and

(3) *KSM* was correctly decided, as was recognised by the FtT in *Treasures of Brazil*.

235. The question of whether *KSM* was rightly decided has been the subject of some adjudication and consideration in the FtT. In *Drinks and Food UK Ltd v HMRC* [2023] UKFTT 00979 (TC), which dealt with a different statutory scheme (and which is not binding on us being a decision of the FtT), Judge Brown KC concluded, at [143] to [146], that:

> "143. …Finally, and in light of the Court of Appeal decision in *David Beadle v HMRC* [2020] EWCA Civ 562, (*Beadl*e) and subsequent decisions of the Upper Tribunal, it is not clear that the decision [*Henryk Zeman*] is soundly reached.
>
> 144. In *Beadle* the Court of Appeal confirmed that the tax tribunals have no inherent judicial review jurisdiction but concluded that in the context of an enforcement decision (i.e. a decision to assess for tax or penalty) there is a presumption that a taxpayer will be able to challenge the decision on public law grounds save where the scope for challenging alleged unlawful conduct has been circumscribed by the relevant statutory scheme. In the context of enforcement action the question will be whether the statutory scheme in question excludes the ability to raise a public law defence in proceedings which are dependent on the validity of the underlying administrative act (see paragraph 44 in particular).
>
> 145. In the case of *The Executors of David Harrison (Deceased) and others v HMRC* [2021] UKUT 273 (TCC) (*Harrison*) the Upper Tribunal confirmed that in the context of an enforcement decision a challenge on public law grounds was permissible unless the statutory

scheme precluded such a challenge. However, in the context of other (nonenforcement) decisions of HMRC clear words are required within the statutory language to permit the taxpayer to challenge the reasonableness of HMRC's decision on appeal. The UT considered that there was no strong presumption against the FTT having power to consider public law arguments in a non-enforcement appeal; rather it was a question of statutory construction (see paragraphs 34 – 36).

146. The Upper Tribunal has affirmed that position in *Caerdav Ltd v HMRC* [2023] UKUT 179 (TCC)."

236. There was, therefore, a question raised as to whether *KSM* was soundly reached. However, in *Queenscourt*, Judge Vos said this:

"158. It does not however follow from this that the Upper Tribunal in *Zeman* reached the wrong conclusion. It clearly considered the decision of the Court of Appeal in *Beadle* to be binding on it and that this therefore required it to approach the question of statutory construction on the basis that Zeman could rely on legitimate expectation unless the relevant statutory provisions excluded its ability to do so.

159. In this sense, *Beadle* represents a clear development of the law as far as the approach to be taken to the question of statutory interpretation in this area is concerned, based on a line of cases which, it appears, were not considered in *Hok*, *Noor*, *BT Pension Scheme* or *Metropolitan International*.

160. The question as to whether or not the Tribunal in *Zeman* had jurisdiction to consider the legitimate expectation argument could not therefore be based on general statements about the likelihood (or otherwise) of Parliament conferring a jurisdiction on the Tribunal to consider such points but had to be based on an examination as to whether or not s 83(1)(p) VATA excluded (expressly or by implication) any ability of the Tribunal to consider such points."

237. Furthermore, in *Treasures of Brazil Ltd*, at [40] to [44], the FtT held that the conclusions on the jurisdictional issue by the UT in *KSM* were not *obiter*, and that *KSM* was correctly decided. Judge Frost said this, at [41] to [45]:

"41. In *Zeman*, the Upper Tribunal first decided that the taxpayer did not in fact have a legitimate expectation, before considering the question of whether or not the First-tier Tribunal would have had jurisdiction to consider such issues.

42. The fact that the Upper Tribunal decided the question of whether or not the taxpayer had a legitimate expectation at an early stage in its reasoning meant it did not need to consider the jurisdiction question. However, despite not needing to, the UT did in fact go on to consider the jurisdiction point.

43. Therefore, the entire decision of the Upper Tribunal was (i) that the First-tier Tribunal had jurisdiction but (ii) that there was no legitimate expectation. If the Upper Tribunal had decided there was no jurisdiction then the legitimate expectation question would have itself been redundant. The jurisdiction point was therefore a constituent part of the decision made. We do not consider that the fact that the Upper Tribunal could have chosen not to determine the jurisdiction question means that it is open to this Tribunal to treat the jurisdiction question as obiter.

44. We are supported in that view by authorities such as *Jacobs v LCC* [1950] A.C. 361, (at p369 per Lord Symonds):

> "there is in my opinion no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing."

> 45. In any event, even if the Upper Tribunal's analysis in the *Zeman* case were not binding upon us, we consider that it is a correct statement of the law."

238. We agree with the propositions in *Treasures of Brazil*, which though not binding on us, we find to be highly persuasive.

239. The FtT *may* have jurisdiction to consider appeal grounds based on public law arguments - such as legitimate expectation - depending on the statutory provisions under consideration. Thus, the statutory context is key. Whether or not there is jurisdiction in any case turns on the language of the relevant legislation and the nature of HMRC's act or discretion. In *Beadle v HMRC* [2020] EWCA Civ 562 ('*Beadle*'), the Court of Appeal noted, at [38], the general rule (explained in *O'Reilly v Mackman* [1983] 2 AC 237 at [285]) that a person will not generally be allowed to challenge a public law decision other than by means of judicial review (known as "the exclusivity principle"). However, at [45], the Court of Appeal stated that express words in a statutory scheme should not necessarily be looked at in isolation when considering whether public law grounds should be excluded. That might be the implication:

> "when the relevant statutory scheme is construed as a whole and in light of its context and purpose…"

240. The cases of *Caerdav* and *Hoey* provide some support for the proposition that the starting point is that appeal grounds concerning public law arguments should be pursued in judicial review proceedings - rather than in the Tribunal - unless the statutory context indicates otherwise. In *Caerdav*, at [154] and [155], the UT pointed out that (as the UT in *KSM* had found) there is a discretion inherent in s 83(1)(p) VATA, when read together with s 73 VATA as it must be. The UT also cited, with approval, the decision in *Noor*.

241. In *Hoey*, at [132], the Court of Appeal held that:

> "The question of jurisdiction can only be determined by reference to the particular statutory scheme in question that governs the tax tribunal's jurisdiction."

242. The Court of Appeal made clear, at [132], that the FtT cannot confer jurisdiction on itself, and that the parties cannot agree to confer jurisdiction on the FtT.

243. The appeal in *BT Pension Scheme* concerned, *inter alia*, a legitimate expectation argument in the context of an extra-statutory concession relating to time limits. The court said this:

> "129. Our own view is that HMRC's construction of ESC B41 is almost certainly correct and is conclusive of this issue. But the Upper Tribunal did not decide the point on this basis. It held that it had no jurisdiction to decide what amounted to a challenge to the lawfulness of the Revenue's refusal to extend to the Trustees the benefit of the extra- statutory concession because it amounted to a public law challenge which should be brought by way of an application for judicial review in the Administrative Court. In so doing, the Upper Tribunal refused to follow the decision of Sales J in *Oxfam v. HMRC*:
>
> > "401. Our reasons for saying that the Tribunal has no jurisdiction to give effect to the Extra-Statutory Concessions stems from the recent decision of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UK Upper Tribunal 363 (TCC) ("*Hok*") a decision of Warren J and Judge Bishopp. Mr Vajda has relied on the decision of Sales J in *Oxfam v. HMRC* [2009] EWHC 3078 (Ch), [2010] STC 686 ("*Oxfam*"), paragraphs 61 to 79 to demonstrate that the Tribunal does have jurisdiction. However, that decision turned on a construction of 83(1)(c) of the Value Added Tax Act 1994 which Sales J held gave jurisdiction to the VAT Tribunal to deal with legitimate expectation in the context of an appeal as to the amount of input tax. It lends no support at all to the view that the Tribunal has a general jurisdiction to deal with public law matters, whether in the context of direct tax or indirect tax, in particular to require, in the exercise of some sort

of supervisory jurisdiction, HMRC to give effect to a concession. The suggestion that there is a jurisdiction in the context of direct tax is refuted by the decision in *Hok*."

...

141. We have heard no argument about s.83(1) VATA and therefore express no view about the correctness or otherwise of the judge's interpretation of that section. But, in agreement with the Upper Tribunal, we do not consider that the decision in *Oxfam v HMRC* should be treated as authority for any wider proposition and we reject the suggestion that the reasoning of Sales J can or should be applied to the jurisdiction of the FTT and the Upper Tribunal to determine the appeals in this case.

142. The statutory jurisdiction conferred upon the FTT by s.3 TCEA 2007 is in our view to be read as exclusive and the closure notice appeals under Schedule 1A TMA do not extend to what are essentially parallel common law challenges to the fairness of the treatment afforded to the taxpayer. The extra-statutory concession is, by definition, a statement as to how HMRC will operate in the circumstances there specified and its failure to do so denies the legitimate expectation of taxpayers who had been led to expect that they would be treated in accordance with it...

143. We therefore consider that the reasoning of Sales J in *Oxfam v HMRC* has no application to the statutory jurisdiction under s.3 TCEA 2007 in the sense of giving to the FtT and the Upper Tribunal jurisdiction to decide the common law question of whether HMRC has properly operated the extra-statutory concession."

244. However, in *The Executors of David Harrison (Deceased) and others v HMRC* [2021] UKUT 273 (TCC) (*Harrison*), at [36], the UT indicated that it "overstates matters" to say that the FtT does not have the power "to consider public law arguments to the effect that HMRC have exercised discretion wrongly, with that strong presumption being rebutted only with clear words or necessary implication". It is "simply a matter of statutory construction".

245. The relevant statutory language in the appeal before us provides that if certain conditions are fulfilled, the Commissioners "may assess the amount of VAT due … to the best of their judgment" (s 73(1)), and if they do then an appeal shall lie to the tribunal "with respect to" the assessment or its amount (s 83(1)(p)). The right of appeal to the FtT is governed by s 83 VATA. The scope of the appeal right and the jurisdiction of the FtT differs between the various matters listed, as determined by case law. The present appeal is under s 83(p) VATA. The provision states, *inter alia*, that:

"**83 Appeals**

(1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—

…

(p) an assessment— (i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or (ii) under subsections (7), (7A) or (7B) of that section; or the amount of such an assessment; ..."

246. An appeal against "the amount of input VAT which may be credited" (which implies the need to determine a specific figure) is of a different quality to an appeal against "a decision of the Commissioners" (which implies consideration of the decision in question, and therefore the legality of that decision) and of a different quality again to an appeal against "an assessment". We agree that the word 'may' is permissive, not mandatory, and that it must follow that an assessment is made not by operation of the statute, but by a discretion exercised by HMRC. This is not, however, determinative of the issue of whether a legitimate expectation arose in the circumstances of this appeal. We proceed to consider what is required to found such a claim.

247. In order to find a claim of legitimate expectation, a promise or representation relied upon must be "clear, unambiguous and devoid of relevant qualification": *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1989] BTC 561; [1990] 1 WLR 1545 ('*MFK*'), per Bingham LJ, at 1569G. Bingham LJ's classic test has been widely approved and applied. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] AC 453 ('*Bancoult*'), Lord Hoffmann said this, at [60]:

> "It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in *R v Inland Revenue Comrs Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131."

248. In *Veolia*, Nugee J considered the principles applicable to a claim for breach of legitimate expectation. The claims by Veolia and Viridor were that they had been led to believe that the refund claims they had made in respect of landfill tax would be repaid. The expectation was said to have arisen from the terms of a business brief issued by HMRC. As to when a legitimate expectation can be created by HMRC, Nugee J summarised the principles in *Veolia*, at [103], as follows:

> "(1) HMRC may create a legitimate expectation that a person's tax affairs will be treated in a particular way either by the promulgation of general guidance to a body of taxpayers or by a specific statement or ruling given to a taxpayer.
>
> (2) A legitimate expectation will only arise if the guidance or the specific statement is clear, unambiguous and devoid of any relevant qualification.
>
> (3) If a taxpayer approaches HMRC for a ruling, he has an obligation to place all his cards face up on the table, in the sense of giving full details of the transaction on which he seeks the revenue's decision.
>
> (4) Provided there was a clear and unambiguous statement, and provided the taxpayer has placed all his cards face up on the table, he will generally be entitled to rely on an assurance given to him as binding on HMRC. A similar entitlement arises in relation to guidance issued by HMRC."

249. Nugee J considered that a claim for legitimate expectation requires the determination of the following questions:

(1) Was there a clear and unambiguous statement creating an expectation?

(2) Did the taxpayer put all his cards face up on the table? and

(3) Was HMRC's decision objectively justifiable or conspicuously unfair?

250. Once it is established that a legitimate expectation has been created, the circumstances of HMRC's attempt to resile from it fall to be considered. In some cases, HMRC will be allowed to resile from the legitimate expectation they have created, provided they satisfy the court on the material before it that there was an objective justification for doing so, which is proportionate in all the circumstances. The burden of establishing justification is on HMRC: see *Veolia* at [160]. It is then for us to decide whether the decision is so unfair as to amount to an abuse of power (requiring conspicuous or substantial unfairness). Applying *R v IRC ex parte Unilever* [1996] STC 681, in relation to objective justification, Nugee J concluded that this boils down to the question whether the decision to depart from any legitimate expectation which had been engendered in the recipient was so unfair as to amount to an abuse of power,

for example, conduct that is "outrageously or conspicuously unfair": see *R (on the application of Hely-Hutchinson) v R & C Comrs* [2017] EWCA Civ 1075, at [75]).

251. As further explained by Sir Ross Cranston in *Glint Pay Services Ltd, R (On the Application Of) v HMRC* [2023] EWHC 1621 (Admin), at [36] to [38], there is a high threshold to satisfy before legitimate expectation can be made out in the taxation context:

> "36…The hypothetical representee is the "ordinarily sophisticated taxpayer" irrespective of whether he is in receipt of professional advice: *R (on the application of Aozora GMAC Investment Ltd) v Revenue and Customs Commissioner* [2019] EWHC Civ 1643, [27], per Rose LJ (as she was).
>
> 37. In *R (on the application of Hely-Hutchinson) v Revenue and Customs Commissioners* [2017] EWCA Civ 1075 Arden LJ (as she was) helpfully gathered together the legitimate expectation principles relevant in the taxation context: HMRC is a public body invested with the power to collect tax, and taxpayers must expect to pay the right amount of tax; a taxpayer's only legitimate expectation is, prima facie, that they will be taxed according to statute, not concession or a wrong view of the law; in assessing the meaning, weight and effect reasonably to be given to statements of HMRC, the factual context, including the position of HMRC themselves, is all important; a statement formally published by HMRC to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them; there was a distinction between a decision that amounted to "mere unfairness" (conduct 'a bit rich' but understandable), and a "decision so outrageously unfair that it should not be allowed to stand": [37], [40], [42].
>
> 38. As to unfairness, Rose LJ explained in *Aozora* that it "has to reach a very high level; it has to be outrageously or conspicuously unfair." She also said: "47…There is a strong public interest in the imposition of taxation in accordance with the law, and so that no individual taxpayer, or group of taxpayers, is unfairly advantaged at the expense of other taxpayers. There is also a real public interest in the revenue making known the general approach which it will adopt, and the practice which it will normally follow, in specific areas … But there are likely to be few cases where a taxpayer can plausibly claim that a representation made in general material of this nature is so clear and unqualified that the taxpayer is entitled to rely on it and to be taxed otherwise than in accordance with the law."

252. A taxpayer then has the obligation to place all of his cards "face up on the table", in the sense of giving full details of the transactions on which he seeks HMRC's decision. Provided there was a clear and unambiguous statement, and provided that the taxpayer has placed all of his cards face up on the table, he will be entitled to rely on an assurance given to him as binding on HMRC (a similar entitlement arises in relation to guidance issued by HMRC). It is only then if those four conditions are met that the taxpayer has a legitimate expectation.

253. In relation to whether the taxpayer put all of his cards face up on the table, in *MFK*, Bingham LJ said that what is required is that the taxpayer must:

(1) Give full details of the proposed transaction;

(2) Indicate the ruling sought;

(3) Make plain that a fully considered ruling is sought; and

(4) Indicate the use he intends to make of any ruling given.

254. Bingham LJ emphasised the role of notions of fairness in the doctrine of legitimate expectation and said that the doctrine of legitimate expectation is rooted in fairness, but fairness is not a one-way street; it imports the notions of equitableness of fair and open dealing, to which the authority is as much entitled as the citizen.

255. Turning to the circumstances of this appeal, by a letter dated 6 July 2021, Officer Hothi wrote to the Appellant in the following terms:

"*Further to your email and attachments dated 23rd November 2020 regarding the new contractual arrangements implemented by UC in August 2020. After further internal deliberation, and addressing your concerns raised in our telephone conversation on the 9th June 2021, I can confirm:*

• HMRC has reviewed the current business contractual arrangements implemented in August 2020 as per your letter dated 23rd November 2020 and has decided to take no further [sic] at this time. However, this is a finely balanced decision.

• HMRC will be considering how the sector more broadly arranges its supplies, and

• This further review may result in HMRC clarifying its view of common contractual arrangements both in this sector and beyond.

I hope this answers your queries and if you need any further information, please do not hesitate to contact me."

256. It is this that is relied on by the Appellant as having created a legitimate expectation. Mr Jones submits that the hypothetical, ordinarily sophisticated taxpayer would have understood Officer Hothi's letter to the Appellant of 6 July 2021 to be a statement that HMRC had deliberated the matter internally, reviewed the Appellant's contractual arrangements and decided to take no further action (including raising the Assessments) at that time. The reference to it being a "*finely balanced decision*" was said by Mr Jones to imply to the hypothetical taxpayer that this was something of a concluded position on the part of HMRC, and one in the taxpayer's favour; rather than a decision to continue deliberating or to defer taking any action. In other words, he submits that it was a concluded view to take no further action against the Appellant (i.e., to leave the status quo undisturbed). Consequently, it is submitted on behalf of the Appellant that there was a legitimate expectation that the Assessments (or some of them) would not be raised.

257. Mr Jones submits that the hypothetical taxpayer would understand Officer Hothi to be drawing a contrast between (a) the status quo and (b) the position following the issue of such revised guidance to the sector as HMRC might issue following their review. In the circumstances, to the "ordinarily sophisticated taxpayer" that was a clear and unambiguous statement that, whilst there might be guidance issued by HMRC in the future which could change the position, until then the Appellant could continue as it had done without threat of retrospective action by HMRC.

258. Whilst we accept that the Appellant did put all of its cards "face up" on the table by engaging with HMRC to clarify the position following Officer Hothi's letter of 6 July 2021, and whilst we accept the contextual background leading up to that letter, we are satisfied that Officer Hothi unequivocally stated that no further action was being taken "at this time". We are further satisfied that Officer Hothi clearly stated that HMRC would be considering the sector more broadly, and that this may result in HMRC clarifying their view. We are fortified in our view by the fact that the Appellant stated that the letter gave it "no certainty or clarity", (the 13 July 2021 letter from the Appellant to HMRC). This is insufficient to give rise to a legitimate expectation. We find that there was no "clear and unambiguous statement" creating a legitimate expectation in Officer Hothi's letter. The Appellant's claim in respect of whether a legitimate expectation had been created therefore falls at the first hurdle. The Legitimate Expectation Issue is, however, academic, given our findings and conclusions on the Supply Issue.

CONCLUSIONS

259. Having considered all of the evidence, cumulatively, we are satisfied that the appeal succeeds on the Supply Issue but fails on the Legitimate Expectation Issue. Accordingly, therefore, we allow the appeal on the Supply Issue and set aside the Assessments.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

260. 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.

Release date: 24th JULY 2025