



Neutral Citation Number: [2015] EWCA Civ 1303

Case No: A3/2014/4104

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX)
The Honourable Mrs Justice Proudman, Judge Bishopp
[2014] UKUT 0446 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2015

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE UNDERHILL
and
LORD JUSTICE DAVID RICHARDS

Between :

ISLE OF WIGHT COUNCIL & ORS
- and -
THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS

Appellant

Respondent

Julian Ghosh QC, Jonathan Bremner and Katherine Apps (instructed by **Rowel Genn**
Solicitors) for the **Appellant**
Alison Foster QC, Ben Rayment, Brendan McGurk (instructed by **HMRC**) for the
Respondent

Hearing dates : 3rd December 2015

Approved Judgment

The Chancellor (Sir Terence Etherton):

1. These proceedings raise the issue of principle whether a local authority which charges members of the public for off-street car parking (“OSCP”) is a non-taxable person for Value Added Tax (“VAT”) purposes. This turns on whether treating the authority as a non-taxable person “would lead to significant distortions of competition” within the meaning of Article 4.5(2) of the Sixth Council Directive of 17 May 1977 (77/388/EEC).
2. The appeal is by four local authorities from a decision of the Upper Tribunal (Tax and Chancery Chamber) (Mrs Justice Proudman and Judge Colin Bishopp) (“the UT”) released on 15 October 2014 dismissing the appellants’ appeals from the decision of the First-Tier Tribunal (Sir Stephen Oliver QC, Nicholas Paines QC and Philip Gillette FCA) (“the FTT”) released on 12 October 2012. By its decision the FTT had itself dismissed the appeals of the appellants from the rejection by HMRC of their claims under section 80 of the Value Added Tax Act 1994 (“VATA 1994”) for repayment of VAT which had been paid between 1997 and 2001.
3. The proceedings are in the nature of test cases. Many other local authorities have sought the repayment of VAT, and their requests cover the entire period since January 1978, which is the date by which the United Kingdom was required to comply with the Sixth Directive.

The VAT legislation

4. Article 4.5 of the Sixth Directive has been replaced in substantially similar form by Article 13 of the Principal VAT Directive (2006/112/EC). The Sixth Directive was, however, in force during the relevant period 1978 to 2001 and so, like the FTT and the UT, I shall refer only to its terms. The provisions of Article 4.5 are as follows (adding numbering to the subparagraphs):

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

(2) However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.

(3) In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible.”

The legal framework surrounding local authorities' provision of OSCP

5. There is extensive legislation on traffic management. In England and Wales local traffic authorities are, in London, Transport for London and the Borough Councils, and, outside London, the County or Metropolitan District Councils. District Councils, other than Metropolitan District Councils, are not local traffic authorities but they are empowered to regulate on-street and provide off-street car parking by the Road Traffic Regulation Act 1984 ("the RTRA").
6. Section 32 of the RTRA provides as follows, so far as relevant:

“(1) Where for the purpose of relieving or preventing congestion of traffic it appears to a local authority to be necessary to provide within their area suitable parking places for vehicles, the local authority, subject to Parts I to III of Schedule 9 to this Act—

(a) may provide off-street parking places (whether above or below ground and whether or not consisting of or including buildings) together with means of entrance to and egress from them, ...”
7. Section 35 provides for the local authority to impose charges for OSCP, and section 35C provides for the variation of such charges.
8. Section 122 provides as follows:

“(1) It shall be the duty of every local authority upon whom functions are conferred by or under this Act, so to exercise the functions conferred on them by this Act as (so far as practicable having regard to the matters specified in subsection (2) below) to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off the highway or, in Scotland, the road.

(2) The matters referred to in subsection (1) above as being specified in this subsection are—

(a) the desirability of securing and maintaining reasonable access to premises;

(b) the effect on the amenities of any locality affected and (without prejudice to the generality of this paragraph) the importance of regulating and restricting the use of roads by heavy commercial vehicles, so as to preserve or improve the amenities of the areas through which the roads run;

(bb) the strategy prepared under section 80 of the Environment Act 1995 (national air quality strategy);

(c) the importance of facilitating the passage of public service vehicles and of securing the safety and convenience of persons using or desiring to use such vehicles; and

(d) any other matters appearing to the local authority to be relevant.”

9. Any surplus of income over expenditure in respect of OSCP falls into the local authority’s general fund established under section 91 of the Local Government Finance Act 1988 (“the LGFA 1988”). That is the fund from which most of a local authority’s activities are financed.

Background

10. The procedural history is long and complex. It is set out in paragraphs [4] to [11] of the FTT’s decision and paragraphs [1] to [9] of the UT’s decision.

11. It is sufficient for the purposes of this appeal to summarise that history as follows. Following earlier proceedings by the present appellants before the then VAT and Duties Tribunal pursuant to VATA 1994 section 80 for repayment of the VAT included in charges made by them to members of the public for OSCP, on an appeal by HMRC to the Chancery Division of the High Court Rimer J (at [2007] EWHC 219 (Ch), [2008] STC 614) referred the following three questions on Article 4.5 to the European Court of Justice (“the ECJ”):

“1. Is the expression ‘distortions of competition’ to be ascertained on a public body by public body basis such that, in the context of the present case, it should be determined by reference to the area or areas where the particular body in question provides off-street parking or by reference to the totality of the national territory of the Member State?

2. What is meant by the expression ‘would lead to’? In particular, what degree of probability or level of certainty is required for that condition to be satisfied?

3. What is meant by the word ‘significant’? In particular, does ‘significant’ mean an effect on competition that is more than trivial or *de minimis*, a ‘material’ effect or an ‘exceptional’ effect?”

12. The ECJ gave its answers in *Revenue and Customs Commissioners v Isle of Wight Council* (Case C-28/07), [2008] STC 2964, [2009] STC 1096, as follows, so far as relevant:

“1. ... the significant distortions of competition ... must be evaluated by reference to the activity in question, as such, without such evaluation relating to any local market in particular.

2. The expression ‘would lead to’ is, for the purposes of the second paragraph of art 4.5 of the Sixth Directive, to be

interpreted as encompassing not only actual competition, but also potential competition, provided that the possibility of a private operator entering the relevant market is real, and not purely hypothetical.

3. The word ‘significant’ is ... to be understood as meaning that the actual or potential distortions of competition must be more than negligible.”

13. When the matter came back before the Chancery Division, HMRC’s appeal was allowed, the order of the tribunal was set aside and the matter was remitted to the FTT for a re-hearing in the light of the guidance of the ECJ.

Decision of the FTT

14. The hearing before the FTT lasted seven days. Oral evidence was given by nine witnesses, some of whom were witnesses of fact and some of whom gave expert evidence. In its reported version ([2013] SFTD 442, to which all references in this judgment are made), the decision runs to 65 closely printed pages and 268 paragraphs. It contains a meticulous and detailed account of the evidence, including, in particular, evidence relating to the factors relevant to the setting of charges by providers of OSCP. The following is a sufficient account of the FTT’s findings and reasoning for the purposes of this appeal.
15. The FTT rejected (at [31]) the submission of HMRC that there is a presumption of law that differential tax treatment of competing suppliers will distort competition in the OSCP market. The FTT said that it is all a question of fact (a point no longer challenged by HMRC).
16. The FTT said (at [37]) that the question is not how local authorities might respond to a change in the VAT treatment but rather it had to make a comparison between, on the one hand, a world where local authorities are treated as taxable persons in relation to supplies of OSCP for VAT purposes, and, on the other hand, a world where they are not.
17. The FTT accepted as general propositions in relation to OSCP charges that the level of a charge must be related to the cost of provision; that the maximum sum to be recovered must be the total cost of provision of the service being provided; and that the deliberate making of a profit would take the activity into the realm of trading. The FTT also accepted, however, that a local authority could legitimately set charges at a level higher than breakeven with a view to discouraging certain types of motoring behaviour: for example, setting high rates of charge for stays of long duration in town centre car parks in order to discourage commuting by car or to encourage commuters to park in car parks further out, leaving the town centre spaces for shoppers. The FTT also considered (at [52]) that local authorities were not precluded from setting OSCP charges with a view to raising income for other traffic management purposes, at least where they are also local traffic authorities (although it did not come to a concluded view on this point).
18. The FTT quoted (at [58]) the following passages from the publication Highways and Transportation:

“In setting parking charge levels factors that should be taken into account include:

Price elasticity of parking demand;

Competition between areas; and

Incentives for the use of off-street parking

The price of parking can be set to influence parking activity in order to serve policy objectives. The level and structure of prices can influence:

The level of usage, and hence the traffic generated;

The type of user; and

The length of stay

.....

Pricing levels can also be set in order to:

Secure sufficient income to cover the cost of operating, maintaining and enforcing car parking facilities;

Raise general income, though this practice is not generally supported in Government Guidance;

Raise income for the improvement of parking and other transport facilities; or

Maximise revenue, as is often the case with privately owned public car parks where there is no local authority control.”

19. The FTT referred to central government guidance formerly contained in Planning Policy Guidance Note 13 (“PPG13”) and subsequently contained in the National Planning Policy Framework. The relevant objectives set out in PPG13 were to integrate planning and transport so as to promote more sustainable transport choices, to promote access to jobs, shopping, leisure facilities and services by public transport and to reduce the need to travel, especially by car. PPG 6, dealing with Town Centres and Retail Development, advised that good quality secure parking was important to maintain the vitality and viability of town centres and to enable retail and leisure uses to flourish.
20. The FTT referred to the requirement under the new National Framework that parking standards for development should take into account the type of development, its accessibility, the availability of public transport and local car ownership levels, and that local planning authorities should seek to improve the quality of parking in town centres so that it is convenient, safe and secure and to set appropriate parking charges that do not undermine the vitality of town centres.

21. The FTT set out extensively its findings of relevant primary fact about the OSCP market and the evidence it had received from the appellants about the local position in Birmingham, the Isle of Wight, South Tyneside and a number of other areas. It also set out the evidence given on behalf of HMRC by employees of National Car Parks Ltd (“NCP”) and Britannia Parking Ltd (“Britannia”) on the commercial OSCP market.
22. The FTT estimated there to be a total of around 11,000 (free and charged-for) local authority car parks, and about 5,000 commercial car parks. It estimated that around 5,500 of the local authority car parks were charged-for, and about 3,000-4,000 of the commercial car parks were charged-for. The evidence from both sides was that local authority car parking tariffs are lower than those of commercial operators. The FTT said that the output VAT generated by local authority OSCP amounted to £150 million per annum, indicating an annual local authority OSCP turnover of some £900 million.
23. It was common ground before the FTT that the burden was on HMRC to establish that non-taxation would cause a distortion of competition.
24. The FTT set out in some detail the extensive arguments advanced by Mr Julian Ghosh QC, for the local authorities. It is not necessary to reproduce them here.
25. The FTT contrasted the objectives and motives of local authorities and commercial operators in the provision of OSCP. It said (at [78]) that, while a commercial undertaking is usually actuated by the motive of maximising its profit and, generally, expanding its business, local authorities provide OSCP as part of the governance of their locality. It quoted (at [179]) the following evidence of Mr Hughes of Birmingham City Council which it accepted:

“LAs do not operate like private companies. They cannot choose (in most instances) what services they will provide, but are required by national government to provide certain services. They are not driven by profit, but by the desire to provide the best possible services they can and to produce particular outcomes for their local areas. They are therefore completely different from commercial entities, which decide which services they will provide and whose decisions are motivated by profit.

Each LA will produce policies tailored to achieve the economic, social and environmental well-being of their area and these will be set out in its Sustainable Community Plan.”
26. The FTT accepted (at [184]) that local authorities’ decisions on provision of car parks, permitted parking periods and charging are influenced by national and local policies, and that reducing commuting by car and discouraging motorists who do commute by car from using town or city centre car parks are among them. The FTT accepted (at [186]) that local authorities do not seek to maximise revenue but are concerned that measures can be funded and implemented.

27. The FTT said (at [199]) that the importance attached to OSCP as a means of promoting local economic vitality, and the concomitant need to set charges at a level that does not deter usage will at all times have exerted downwards pressure on pricing.
28. It said (at [196]) that local authorities do not act commercially in the sense of seeking to maximise revenue, but they have to run a balanced budget overall and in order to do so they have to set detailed budgets for the different aspects of their operations and, so far as possible, to keep to those budgets both by constraining costs and achieving budgeted revenue.
29. The FTT stated the following conclusions in paragraph [203]. Non-taxation of local authorities would distort competition in the OSCP market in the areas, principally, of pricing and outsourcing. Local authority charges would find a lower level in circumstances of non-taxation than of taxation. This would in turn affect the pattern of provision of OSCP in two respects. First, fewer commercial car parks would open or remain open. Secondly, and in consequence, more local authority car parks would open or remain open in pursuance of the local authorities' duty to seek to ensure adequate OSCP pursuant to section 122 of the 1984 Act. In addition, decisions on forms of 'outsourcing' would tend to be distorted in favour of forms that left the local authority as the provider of OSCP, with the commercial sector providing at most the management.
30. The FTT said that it did not suggest that the lower rates of charge (if there was no taxation) would in every case have corresponded exactly to the amount of VAT not chargeable but it considered that the overall mix of charges would have been lower by approximately that aggregate amount.
31. In support of that general conclusion the FTT relied upon the following matters.
32. It found (at [207]) that there is a combination of upward and downward pressures on local authority OSCP charging. The upward pressures are the desire to discourage certain forms of motoring and parking behaviour through pricing and the consideration that OSCP should make a contribution to the costs of traffic management or at least break even, so that non-motorists do not subsidise motoring. The downwards pressures are the wish of local authorities to contribute to the economic vitality of their areas through charging that does not deter, for example, shoppers and the recognised unpopularity of car parking charges, coupled with the fact that ultimate responsibility for their setting rests with locally elected Councillors. In circumstances of non-taxation, the interplay of the downwards and upwards pressures on charges would have caused charges to find a level lower than their level in circumstances of taxation by a margin approaching the VAT fraction because the force of the downwards pressures would not be weakened by non-taxation, whereas that of the upwards pressures would be.
33. The FTT accepted the evidence given on behalf of NCP that, while local authorities would not generally respond to a decision in their favour by cutting the charges, they would tend not to increase them in line with inflation, producing a reduction in real terms over time.

34. The FTT rejected (at [222]) the appellants' submission that the legislative framework would prevent that happening. It said that local authorities must be permitted, when having regard to the relationship between expenditure and charges, to notice whether the level of revenue from charges is or is not reduced by the need to account for output VAT on the charges.
35. The FTT concluded (at [243]) that there is sufficient cross-price elasticity of demand in the United Kingdom as a whole for local authority car park pricing to affect commercial operators' pricing.
36. The FTT found (at [247]) that the lower levels of charging that would be reached in circumstances of non-taxation would lead to correspondingly lower commercial OSCP charges where the commercial car park faced local authority competition. Having stated that commercial OSCP charges are higher than, but constrained by, nearby local authority OSCP charges, the FTT said (at [249]) that, if local authority charges reached a lower level than they have done in circumstances of taxation, but everything else remained equal, it was reasonable to suppose that the commercial charges would maintain much the same relationship to local authority charges. The consequence would be that commercial charges would tend to be lower to an extent commensurate with the extent to which local authority charges would be lower.
37. The FTT further concluded that non-taxation of OSCP provided by local authorities would distort competition in that it would affect the economics of different models of "outsourcing". It accepted evidence that outsourcing would be structured so as to maximise the benefit to the local authority and that non-taxation would lead to fewer opportunities for commercial providers to take over local authority car parks outright or to enter into fully fledged joint ventures.
38. Finally, the FTT said (at [260]) that the degree of distortion of competition produced by non-taxation would be more than negligible. It found that the distortion of competition would detrimentally affect something like 36% of commercial car parks. It further said that a force depressing pricing overall by a VAT factor of between 7.5% and 15% could not be dismissed as negligible.

The UT's decision

39. The appellants appealed with the permission of the UT.
40. The appellants contended that the FTT had made a significant error of law, in that it misunderstood the legal framework governing the setting of local authority OSCP charges, and that error had a material bearing on its determination of fact.
41. The argument of the appellants before the UT was that the FTT wrongly concluded that local authorities are not precluded from setting OSCP charges with a view to raising income for other traffic management purposes, at least where they are also local traffic authorities. The appellants contended that such a conclusion was inconsistent with what was said by McCullough J in *R v Camden LBC ex p Cran* [1995] RTR 346, as it was explained by the Divisional Court in *Djanogly v Westminster CC* [2010] EWHC 1825 (Admin), [2011] RTR 9, and in the light of what was said by Lang J in *R (Attfield) v Barnet London Borough Council* [2013] EWHC 2089 (Admin), [2013] PTSR 155. The appellants contended that any increase in the

surplus generated from OSCP charges consequent upon non-taxation would result in an augmentation of the general fund, which the local authority is required to apply in accordance with its wider spending priorities.

42. That was the foundation for the appellants' first ground of appeal that there is no causal connection between increased revenue through non-taxation and lower OSCP charges.
43. The second ground of appeal was that the inference drawn by the FTT that local authority OSCP charges would find a lower level in the absence of taxation was irrational. The appellants contended that that conclusion was not only inconsistent with the proposition that non-taxation could not have any such effect because of legislative constraints but it was also contrary to the clear and consistent evidence before the FTT that non-taxation would not do so because of the manner in which local authorities operated in practice.
44. The UT addressed the appellants' arguments relatively briefly. On the one hand, it accepted that there is no requirement that income and expenditure be balanced on a car park by car park basis. It also said (at [54]), on the other hand, that if, as the appellants submitted, the RTRA is not a fiscal measure, overall, and perhaps taking one year with another, the cost to the local authority of meeting its statutory obligation of providing sufficient OSCP and the revenue from the activity must be broadly equal.
45. The UT said (at [56]) that it did not detect any reason to think that the FTT misunderstood the policy considerations which affect local authority decisions in practice.
46. The UT also accepted (at [57]) an argument, advanced by HMRC's counsel, that if local authority supplied OSCP were not taxed, local authorities would not need to consider raising their charges in the event of an increase in the rate of VAT whereas commercial providers would be compelled to do so. It said that the absence of any compulsion to do so amply supported the FTT's finding that in the absence of taxation the upward pressures on local authority charges would be reduced, and that is a finding of fact.
47. As regards the provision of outsourcing, the UT said (at [58]) that there would be a significant difference of approach if commercial provision was taxed but local authority provision was not. It said that the FTT's finding that local authorities did not disregard the incidence of taxation when deciding whether and how to outsource a car park or its management was a finding of fact and was not based on any misunderstanding of the relevant law.
48. The UT dismissed the appeal. It gave permission to appeal from its decision on the basis that, even though the issue is largely one of fact, the question whether local authorities have to account for VAT on OSCP is of significant public importance and there is a compelling reason for an appellate court to hear the appeal.

The appeal

49. The appellants submit that the UT, like the FTT, reached its conclusion as a result of a fundamental misunderstanding of the legal framework which governs the activities of local authorities in relation to OSCP. In particular, the appellants contend that the UT and the FTT failed properly to take into account two overriding considerations: (1) the OSCP charges are paid into, and expenditure for OSCP is taken from, the local authority's general fund established under section 91 of the LGFA 1988; and (2) the pricing of OSCP is informed by numerous policy considerations related to the policy objectives in section 122 of the RTRA 1984.
50. The appellants contend that, had the UT and the FTT properly understood and taken those matters into account, they would have been bound to conclude that HMRC cannot discharge the burden on them of showing that in the hypothetical national market for OSCP, in which there is no VAT payable on local authority providers of OSCP, the absence of VAT would have a causal connection with a distortion of competition or at any event a significant distortion. That is consistent, Mr Ghosh said, with the undisturbed evidence before the FTT that VAT is not in practice taken into account as a relevant consideration when local authorities fix prices for car parking.
51. In elaboration of those general points Mr Ghosh, for the appellants, forcefully advanced a number of arguments. They can be briefly summarised as follows.
52. In considering whether the non-imposition of VAT on local authority OSCP charges would lead to a significant distortion of competition within Article 4.5(2) the focus is on a hypothetical national activity and market rather than on what actually happens or would happen in the present time in the case of a particular local authority. That is the effect of the ECJ's ruling on the reference for a preliminary ruling.
53. OSCP receipts are paid into, and OSCP expenditure is paid out of, a local authority's general fund established under section 91 of the LGFA 1988. That is a single undifferentiated fund: section 95 LGFA 1988. Unlike on-street car parking receipts (to which section 55 of RTRA 1984 applies), there is no ring-fencing of OSCP receipts which restricts the application of any surplus to other local authority activities. The cost of many other different local authority services are paid out of the general fund, including, for example, children's and social services, education services and environmental services. If VAT were no longer payable on OSCP the amount available in the general fund for all such services would be greater and would be applied to those services in accordance with the local authority's policies, priorities and discretion. The amount saved by non-taxation of VAT on OSCP charges would not be earmarked for OSCP services, which will undoubtedly have a lower priority than many of the other services. The fact, therefore, that the general fund would be greater as a result of the non-imposition of VAT on OSCP charges would have no causal connection to any distortion of competition in the market for OSCP.
54. It is not possible for HMRC to establish that in the hypothetical national market, in which VAT is not payable on local authority OSCP charges, the non-taxation would result in lower local authority OSCP charges and so cause a distortion of competition. Section 32(1) of the RTRA 1984 confers power on the local authority to provide OSCP for the purpose of relieving or preventing congestion of traffic. Section 122 of

the RTRA 1984 imposes a duty (so far as practicable having regard to the matters in section 122(2)) on those local authorities to which it applies to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off the highway. Numerous policy considerations inform the exercise of the local authority's discretion as to the provision of OSCP pursuant to sections 32 and 122 and the pricing of OSCP charges. Those policy considerations cannot lawfully include setting prices at a level intended to secure general funding for local authority expenditure or to gain market share: comp. *R v Camden LBC ex p. Cran* [1995] RTR 346, *Djanogly v Westminster CC* [2010] EWHC 1825 (Admin), [2011] RTR 9 *R (Attfield) v Barnet London Borough Council* [2013] EWHC 2089 (Admin), [2013] PTSR 1559.

55. It is relevant for local authorities, when setting the OSCP charges, to know the cost of provision of OSCP in order to avoid unlawful trading or revenue raising but otherwise such cost does not inform the policy considerations which determine the provision and pricing of OSCP. The cost of the provision of OSCP might, at most, be a final consideration once all the policy considerations relevant to the section 32 power and the section 122 duty have been taken into account in fixing the pricing levels.
56. In view of the numerous policy considerations which play a determinative role in influencing the local authorities' discretion in fixing the charges for OSCP, and the very limited relevance of the cost of providing OSCP in fixing those charges, even if VAT is treated as a cost of the provision of OSCP by local authorities its non-imposition would have no causal effect on pricing and so on any distortion of competition. Indeed, the evidence before the FTT of what happens in practice was that VAT does not feature in setting the charges for OSCP. Consistently with that analysis, Mr Ghosh said that, contrary to the view expressed by the FTT, VAT is not an upward pressure on price in a causal sense.
57. Although Mr Ghosh's primary focus was on what he submitted were errors of law by the FTT, which he said the UT had wrongly failed to identify, he made some additional specific criticisms of the UT's decision. These included a criticism of the UT's statement in paragraph [54] that:

“ it must follow, if the RTRA is not a fiscal measure, that overall, and perhaps taking one year with another, the cost to the local authority of meeting its statutory obligation of providing sufficient offstreet parking and the revenue generated from the activity must be broadly equal.”
58. Mr Ghosh submitted that this statement was not correct, and was not a conclusion of the FTT, and was not an accurate reflection of any decided case.
59. Mr Ghosh criticised paragraph [57] of the UT's decision (summarised above) on the ground that the UT had failed to bear in mind that the analysis must be conducted in the legal context of a nationwide hypothetical market.
60. Finally, with regard to paragraph [58] of the UT's decision, Mr Ghosh said that the UT was wrong to conclude that, independently of pricing, the FTT found and was entitled to find that Article 4.5(2) was satisfied because non-taxation would distort the provision of outsourcing. He submitted that, even if, which he did not accept, the

FTT did find that non-taxation would distort competition in the area of outsourcing because it would lead to different models of outsourcing which would maximise the benefit to the local authority, the FTT made no finding that the distortion of competition would be significant. That is apparent from the final two sentences of paragraph [259] and from paragraph [265] of the FTT's decision, which were as follows:

“[258] ... We note Mr Ghosh's argument that the alternative arrangement [viz. outsourcing arrangement] would not necessarily be less attractive financially to the commercial operator; we incline to the view that, even if that were so, an alteration, produced by the tax régime, in the identity of the maker of a supply would in itself be a distortion of competition. We do not need to reach a concluded view on this, given our conclusion (below) that the effects of non-taxation upon pricing would in themselves amount to a more than negligible distortion of competition.”

“[265] We do not in our view need to decide separately whether the additional degree of distortion to which we have found that non-taxation would lead in the areas of ‘outsourcing’ and indirectly in the pattern of provision of off-street car parking would be significant in itself. We have concluded that competition would be significantly distorted in the area of pricing, for the reasons we have just stated, even if the additional distortion in these other areas did not exist. Its existence confirms us in the view that non-taxation would significantly distort competition.”

61. I should add, in this context, that Mr Ghosh made a specific criticism of the statement of the FTT in paragraph [257] of its decision that Mr Paul Gallagher, Britannia's property director, had given evidence that non-taxation would lead to fewer opportunities for commercial providers to take over local authority car parks outright or enter into fully fledged joint ventures of the sort set up in Manchester. Mr Ghosh said Mr Gallagher had given no such evidence. Mr Ghosh also observed that neither Mr Gallagher nor Mrs Joanne Cooper, the chief executive of NCP, who also gave evidence for HMRC, had any knowledge of the policies or decision making processes of local authorities in relation to the fixing of OSCP charges.

Discussion

62. Mr Ghosh advanced his submissions with skill and force but I have no hesitation in dismissing the appeal. I can explain my reasons quite briefly.
63. The principal focus of Mr Ghosh's submissions was inevitably and correctly on the findings of the FTT since the critical issue is whether the FTT made an error of law in the light of its legitimate findings of fact: see, eg, *HMRC v Proctor & Gamble UK* [2009] EWCA Civ 407, [7]-[8].

64. At the heart of the FTT's decision was the conclusion that, in a hypothetical world in which VAT had never been imposed on OSCP charges, those charges would have been lower. That conclusion was based on two principal matters.
65. The first was that, in fixing the level of charges, local authorities are bound to have regard to the need to meet costs. The second was that, if VAT had never been payable on OSCP charges, local authorities would have been able to, and would have wished to, keep charges lower in order to boost the local economy by attracting shoppers with cars while maintaining the same spending priorities and the same allocation of the general fund as between the different activities financed out of the general fund.
66. On the first of those considerations, I do not accept Mr Ghosh's submission that, as a matter of law, the cost to local authorities of providing OSCP can only be taken into account in fixing OSCP charges for the purpose of ensuring that the local authorities do not trade with a view to raising finance for its general activities. I do not accept that, as a matter of law, the cost of providing OSCP can only be taken into account, if at all, as a tail-end, relatively inconsequential, consideration after all other policy matters relevant to the RTRA 1984 section 32 power and section 122 duty have been factored into the pricing. That is contrary to the position taken by Mr Ghosh himself at the hearing before the FTT. As appears from paragraph [57] of the FTT's decision, it was he who cited the following paragraph 12-34 of Cross on Local Government dealing with local authority charges generally:
- “the level of a charge must be related to the cost of provision. The maximum sum to be recovered must be the total cost of provision of the service being provided, although it may be possible to have differential rates within the overall scheme. The deliberate making of a profit would take the activity into the realm of trading.”
67. The FTT said that *R v Manchester City Council, ex p King* (1991) 89 LGR 696 had been cited as authority for that proposition; and they accepted it as a general proposition, subject to the proviso that higher charges than breakeven can be set for policy reasons such as setting high rates of charge for stays of long duration in town centre car parks in order to discourage commuting by car or to encourage commuters to park in car parks further out.
68. That was entirely consistent with the evidence of Mr Christopher Haynes, the then recently retired former Head of Transportation Strategy at Birmingham City Council, cited at paragraph [59] of the FTT's decision, that a case had to be made for operating any car park at less than breakeven, and his evidence, cited at paragraph [193], that departments within a local authority would be expected to keep to their budgets. It is consistent with the evidence of Mr Stephen Hughes, the Chief Executive Officer of Birmingham City Council, cited at paragraph [182] of the FTT's decision, that local authorities have a statutory obligation to maintain balanced budgets, with the consequences that "those in charge of the transportation portfolio might face a choice between raising prices or making cuts to the department and the service it provides". It is also consistent with the common sense consideration that local authorities would wish to avoid or minimise a situation in which the money available to finance activities out of the general fund having a higher priority than OSCP would be

diminished because the cost of providing OSCP was higher than its receipts. Contrary to Mr Ghosh's submission, I can detect nothing at all in the legal framework which precludes such an approach by the local authorities. Indeed, on one view (which it is unnecessary to decide) the constraint of needing to maintain a departmental balanced budget is expressly permitted under section 122(2)(d).

69. For those reasons I can see nothing wrong with the FTT's conclusion at paragraph [59] of its decision that local authorities must be permitted to set OSCP charges with a view at least to covering the cost of operating loss-making or free of charge car parks.
70. Accordingly, when local authorities fix OSCP charges so as to give effect to the various traffic management, planning, economic and environmental policies properly to be taken into account in the provision of OSCP under section 32 and section 122 of the RTRA 1984, it is entirely lawful and correct of them to have regard to the overall constraints of meeting the cost of providing OSCP (save that they can charge more than cost for some specific relevant policy objective).
71. I should record that, although there were submissions on the point in the appellants' skeleton argument, in his oral submissions Mr Ghosh said that he did not wish to advance arguments before us on the issue whether OSCP charges could be used to raise income for other traffic management purposes. He accepted that it is not necessary for us to determine that issue in order to dispose of this appeal.
72. The absence of any liability of local authorities to pay VAT on OSCP charges would permit local authorities to meet the cost of providing OSCP while charging less to those using that facility. The FTT concluded (at paragraph [221]) that, in those circumstances, that is precisely what local authorities would do by not increasing charges in line with inflation, producing a reduction in real terms over time. More to the point, the FTT concluded that, in the hypothetical non-taxation world that always existed, the downward pressure on OSCP charges resulting from the wish of local authorities to contribute to the economic vitality of their areas through charging that does not deter shoppers, and the unpopularity of car parking charges, the ultimate responsibility for which rests with locally elected councillors, would have caused charges to find a lower level than in circumstances of taxation by a margin approaching the VAT fraction: see paragraphs [203] to [223] of the FTT's decision.
73. In support of that conclusion the FTT took into account that there was no good reason to think that non-taxation would cause any change in the relative priority of the activities financed out of the general fund or that OSCP charges would give rise to a greater contribution to or drain upon local authority resources than has in fact occurred: paragraphs [205] and [218]-[219].
74. Those are findings by the FTT as the fact finding body by way of inference and assessment based on the considerable oral and written evidence placed before it, some of which is summarised in paragraphs [178] to [196] of its decision. It is impossible to say that they are plainly wrong or outside the bounds within which reasonable disagreement is possible. They should not be disturbed on appeal: *Assicurazioni Generali Spa v Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 WLR 577, at [14] – [21].

75. Mr Ghosh's submission that the FTT failed properly to take into account that the general fund of a local authority is an undifferentiated fund, out of which many activities are financed, and that it would be a matter of the local authority's discretion how the funds no longer required to pay VAT on OSCP charges would be expended, misses the point. That submission is based on the scenario of an existing fund budgeted to meet VAT but which is no longer required to meet that liability. That is, in other words, a "change" scenario as opposed to the correct approach in the present case, namely a hypothetical one in which there never was, and no one ever thought there was, a VAT liability.
76. I would, therefore, dismiss this appeal since the appellants have not contended that, if the FTT was entitled to reach its conclusion on pricing, it was not also entitled to conclude that the non-taxation would lead to significant distortion of competition within Article 4.5(2). It is plain that if one supplier in the market for OSCP is able to have lower prices over time because of its special tax status that is likely significantly to distort competition.
77. On the issue of outsourcing, I consider it clear that the FTT did decide that non-taxation would cause a distortion of competition in the market for outsourcing: see paragraphs [256] to [258] and [265]. Mr Ghosh, as I have said, criticised the FTT's summary of Mr Gallagher's evidence in paragraph [257] of its decision but that does not raise an issue of law and is, in any event, not a ground of appeal. I do agree with Mr Ghosh, on the other hand, that the FTT did not reach any conclusion that such distortion of the market in relation to outsourcing would be significant in itself, and the UT was wrong insofar as it said the contrary. In view of my conclusion on pricing, however, I would dismiss the appeal in any event.

Conclusion

78. For all those reasons I would dismiss this appeal.

Lord Justice Underhill:

79. I agree.

Lord Justice David Richards:

80. I also agree.