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VAT – Supply of investment management services within VAT group – supplier leaving the group – performance fees attributable to services provided while member of the VAT group – invoiced in years following cessation of group membership – whether liable to VAT

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/07480

BETWEEN

THE PRUDENTIAL ASSURANCE COMPANY LIMITED **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC

The Tribunal determined the appeal on 17 February 2021 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of the restrictions on hearings due to the COVID-19 pandemic and the parties being satisfied that the issue could be dealt with on the papers. The documents to which I was referred are described in the decision and included the written submissions of the Appellant dated 16 and 27 March 2020 and written submissions of the Respondents dated 23 March 2020.

Zizhen Yang, counsel, instructed by Baker & McKenzie LLP for the Appellant

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

DECISION

INTRODUCTION

1. The Prudential Assurance Company Ltd (the "**Appellant**") appeals under section 83(1)(b) of the Value Added Tax Act 1994 ("**VATA**") against HMRC's decision that VAT is chargeable on the provision of certain investment management services provided to the Appellant by Silverfleet Capital Ltd ("**SCL**").

2. There is no disagreement on the facts. The issue is a pure point of law: briefly, whether the payments for SCL's services are outside the scope of charge because it rendered its services to the Appellant while it was a member of the Appellant's VAT group (the Appellant's position), or whether the payments are within the charge to VAT because they were invoiced and paid after SCL had ceased to be a member of the Appellant's VAT group (HMRC's position).

3. I had in evidence before me a witness statement of John Euers, a Director at M&G Private Funds Investment, and a co-leader of the team of investment professionals responsible for managing the private equity funds investments of the Appellant's with-profits fund (otherwise known as "**the Funds Fund**"). HMRC raised no objection to the admission into evidence, without more, of Mr Euers' witness statement and did not require to cross-examine him. So far as relevant to my decision, Mr Euers' evidence is incorporated in the summary of the facts that I have set out below.

THE FACTS

4. The Appellant is a regulated life assurance company and at the time in question carried on with-profits and non-profit life and pensions insurance business. The Appellant's with-profits fund is a segregated part of the Appellant's business and the Appellant outsources the management of its investments to a number of authorised management companies of which SCL was one. SCL (which at the time was known as PPM Ventures Limited) provided investment management services to the Appellant and, in particular so far as concerns this appeal, to the with-profits fund known as "the Funds Fund".

5. The Funds Fund consisted of a portfolio of third-party private equity investments. The funds had a term of at least 10 years and could be subject to fund extensions of up to an additional 2 years. Normally, the underlying fund manager would make investments over years 1 to 5 of the fund term. The holding period for each underlying investment was typically 4 to 6 years. As such, the underlying fund manager would typically realise those investments over years 6 to 10.

6. The Funds Fund was divided into a number of distinct sub-funds, each with a sequential commitment period (during which new investments are made) dating from 1 January 2000. "Sub-Fund 1" was the sub-fund established for all commitments made to the Funds Fund between 1 January 2000 and 31 December 2003; "Sub-Fund 2" was the sub-fund established for all commitments made to the Funds Fund between 1 January 2004 and 31 December 2006.

7. Under an investment management agreement date 30 August 2002 (effective as of 1 January 2002), the consideration that SCL received for its services comprised two elements-

> (1) A management fee calculated by reference to the amount of investments made in the Funds Fund and accruing on a daily basis over the period during which the Funds Fund services were provided.
>
> (2) Performance fees, payable in respect of Sub-Funds 1 and 2 in the event that the performance of these sub-funds exceeded a set benchmark rate of return.

8. The purpose of the management fee was to cover the cost of running the portfolio. As SCL had no role in the management of the Funds Fund after 8 November 2007, it had no right to management fees after this date. As regards the performance fee as it related to the Funds Fund and, specifically, Sub-Funds 1 and 2, the Appellant was to receive all receipts until it had received in aggregate an amount equal to the amount committed to the fund plus a set hurdle rate of return. SCL was then to receive an amount equal to 10 per cent of the hurdle rate and thereafter subsequent receipts were to be apportioned 90:10 between the Appellant and SCL. Accordingly, given the time required to create value from the Funds Fund investments, a performance fee in respect of SCL's Funds Fund investment management services only became payable more than 10 years after the fund investments were made.

9. Similar provision was made in a further investment management agreement dated 31 August 2004, effective as of 1 January 2004.

10. At the time at which SCL rendered its investment management services, the Appellant was the representative member of a VAT group and SCL was a member of the Appellant's VAT group. However, on 8 November 2007, a management buy-out of SCL was effected and, as a result, SCL ceased to be a member of the Appellant's VAT group. SCL also ceased to provide investment management services to the Appellant's Funds Fund and the role of investment manager of the Funds Fund was taken over by M&G Investment Management Ltd ("MAGIM"). SCL provided advisory and administration services to MAGIM between 8 November 2007 and 9 November 2011, for which it received a fixed advisory fee. The VAT treatment of that fee is not in issue in this appeal.

11. The obligations in the 2004 investment management agreement were varied by a Variation Agreement dated 8 November 2007. The Variation Agreement provided that SCL would not be entitled to receive management fees in respect of the Funds Fund for any period after 8 November 2007 but would continue to be entitle to performance fees in respect of the Funds Fund.

12. During 2014 and 2015 the hurdle rate set under the original investment management agreement with the Appellant was passed. As result SCL invoiced the Appellant at various dates between 16 January 2015 and 11 July 2016 for performance fees totalling £9,330,805.92 plus VAT at 20 per cent.

THE ISSUE THAT ARISES

13. The Appellant contends that these performance fees are consideration for the services that SCL rendered to the Appellant at a time when they were members of a VAT group. Accordingly, the Appellant says that no VAT should be charged in respect of them.

14. HMRC say that SCL's services represented a continuous supply of services, which were supplied over a period of time, under terms that provided for consideration to be determined periodically, or from time to time. HMRC say that, in the case of such services, the tax point, or time of supply, is when an invoice is issued or when the consideration is received by the supplier. Accordingly, HMRC say that the relevant tax point is when SCL invoiced the Appellant, at which time they were not members of a VAT group. Accordingly, VAT was properly charged by SCL in invoicing the performance fees.

15. I am told that on 25 March 2019, SCL made a claim under section 80 VATA to recover the VAT on the performance fees invoiced to the Appellant on the basis that the performance fees were consideration for services performed entirely during the period when SCL and the Appellant were members of the same VAT group. As part of that claim, I understand that SCL confirmed that it had "provided no services to which the performance fees were linked other than the investment management services performed during [SCL's] membership of the

[Appellant's] VAT group." On 30 May 2019, HMC rejected SCL's claim. SCL has appealed against that rejection and its appeal has been stayed behind the present appeal.

THE LEGISLATION

16. Section 1(1)(a) of the Value Added Tax Act 1994 ("**VATA**") provides that VAT shall be charged on the supply of goods or services in the United Kingdom (including anything treated as such a supply).

17. Section 4(1) VATA provides that 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.

18. Section 5(2) VATA provides that (a) "supply" includes all forms of supply, but not anything done otherwise that for a consideration, and (b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.

19. Section 6 VATA deals with the time of supply and, so far as relevant for present purposes, provides as follows—

> "(1) The provisions of this section shall apply … for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge to VAT.
>
> …
>
> (3) Subject to subsections (4) to (14) below, a supply of services shall be treated as taking place at the time when the services are performed.
>
> (4) If, before the time applicable under subsection … (3) above, the person making the supply issues a VAT invoice in respect of it or of, before the time applicable under subsection … (3) above, he receives payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received.
>
> (5) If, within 14 days, after the time applicable under subsection … (3) above, the person making the supply issues a VAT invoice in respect of it, then, unless he has notified the Commissioners in writing that he elects not to avail himself of this subsection, the supply shall (to the extent that it is not treated as taking place at the time mentioned in subsection (4) above) be treated as taking place at the time the invoice is issued.
>
> …
>
> (14) The Commissioners may by regulations make provision with respect to the time at which (notwithstanding subsections (2) to (8) and (11) to (13) above or section 55(4) a supply is to be treated as taking place in cases where—
>
> (a) it is a supply of goods or services for a consideration the whole or part of which is determined or payable periodically, or from time to time, or at the end of any period, or …
>
> And for any such case as is mentioned in this subsection the regulations may provide for goods or services to be treated as separately and successively supplied at prescribed times or intervals."

20. Pursuant to section 6(14), regulation 90(1) of the Value Added Tax Regulations 1995 (1995 SI 2518) (the "**Regulations**") provides as follows:

> "Subject to paragraph (2) below, where services, except those to which regulation 93 applies, are supplied for a period for a consideration the whole

> or part of which is determined or payable periodically or from time to time, they shall be treated as separately and successively supplied at the earlier of the following times-
>
> (a) each time that a payment in respect of the supplies is received by the supplier, or
>
> (b) each time that the supplier issues a VAT invoice relating to the supplies.

21. Section 43(1) VATA (so far as relevant) provides-

> "Where under sections 43A to 43D any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and—
>
> (a) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and
>
> (b) any supply which is a supply to which paragraph (a) above does not apply and is a supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member; and
>
> (c) any VAT paid or payable by a member of the group on the acquisition of goods from another member State or on the importation of goods from a place outside the member States shall be treated as paid or payable by the representative member and the goods shall be treated-
>
> (i) in the case of goods acquired from another member State, for the purposes of section 73(7); and
>
> (ii) in the case of goods imported from a place outside the member States, for those purposes and the purposes of section 38, as acquired or, as the case may be, imported by the representative member;
>
> and all members of the group shall be liable jointly and severally for any VAT due from the representative member."

22. Section 43B VATA, so far as relevant, provides-

> "(2) This section also applies where two or more bodies corporate are treated as members of a group and an application is made to the Commissioners—
>
> …
>
> (c) for the bodies corporate no longer to be treated as members of a group.
>
> …
>
> (4) Where this section applies in relation to an application it shall, subject to subsection (6) below, be taken to be granted with effect from—
>
> (a) the day on which the application is received by the Commissioners, or
>
> (b) such earlier or later time as the Commissioners may allow …"

23. These provisions of the VATA give effect to the relevant provisions of Council Directive 2006/112/EC on the Common System of Valued Added Tax ("**PVD**"). Article 2(1)(c) PVD provides for VAT to be charged on "the supply of services for consideration within the territory of a Member State by a taxable person acting as such" and a "supply of services" in the PVD is defined in article 24(1) as meaning "any transaction which does not constitute a supply of goods".

24. Article 11 PVD provides for Member States to treat certain persons as a single taxable person, as follows-

> "After consulting the advisory committee on value added tax (hereafter, the 'VAT Committee'), each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.
>
> A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision."

There is no suggestion that there is any form of "tax evasion or avoidance" in this case.

25. Article 62 PVD provides—

> "For the purposes of this Directive:
>
> (1) 'chargeable event' shall mean the occurrence by virtue of which the legal conditions necessary for VAT to become chargeable are fulfilled;
>
> (2) VAT shall become 'chargeable' when the tax authority becomes entitled under the law, at a given moment, to claim the tax from the person liable to pay, even though the time of payment may be deferred."

26. Article 63 PVD provides—

> "The chargeable event shall occur and VAT shall become chargeable when the goods or services are supplied."

27. Article 64 PVD, so far as relevant, provides—

> "1. Where it gives rise to successive statements of account or successive payments, … the supply of services shall be regarded as being completed on expiry of the periods to which such statements of account or payments relate.
>
> 2. Member States may provide that, in certain cases, the continuous supply of goods or services over a period of time is to be regarded as being completed at least at intervals of one year."

28. Article 65 PVD provides—

> "Where a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received."

THE PARTIES' CONTENTIONS

29. Both parties provided detailed skeleton arguments setting out their contentions on the legislation and the various authorities on which they relied. The Appellant also provided a Reply to HMRC's arguments. I am grateful to both counsel for their detailed written arguments and I mean no disrespect to those arguments if they are not specifically referred to or reflected in this decision. I have considered them carefully and they have been fully borne in mind in the following analysis and in my decision, In the end, however, I consider that the point that arises for my decision is a short one, although by no means an easy one to answer. If my decision is appealed, the parties will have the opportunity to rehearse their arguments again for the benefit of the Upper Tribunal.

30. On an initial reading, the VATA appears to be clear: SCL's supply of services would be treated under the basic rule as taking place at the time at which they were performed, subject only to the timing of invoicing and payment as provided for by subsections (4) and (5) of section 6 VATA. However, Regulation 90 prescribes that SCL's services are to be treated as separately and successively supplied at the earlier of invoice or payment. In this respect, I do

not understand the Appellant to dispute that SCL's services were of a type that are correctly described as supplied for a consideration the whole or part of which is determined or payable periodically or from time to time. Section 6 VATA and Regulations made pursuant to section 6(14) state quite clearly that they dictate the time at which the supply is treated as made, and not just the time at which tax must be accounted for or paid. The PVD, in particular article 64, appears to be to similar effect. There is no suggestion that the VATA fails to implement the PVD in some respect.

31. The Appellant, however, says that section 43 has a fundamental effect on the analysis, namely that there is no supply to which the time of supply rules can apply. I should interpolate here that the authorities to which I refer below clearly establish that the time of supply rules do apply to determine whether or not a supply is made at a time at which two entities are within a VAT group. The Appellant's point, however, is that section 43(1)(a) requires one to disregard, for VAT purposes, transactions taking place between the Appellant and SCL during the time that they were both members of the same VAT group. Since these are the transactions by which SCL provided the Funds Fund Services to the Appellant, the effect of disregarding them is that there is no "supply" (in VATA language) or "chargeable event" (in PVD language) that can give rise to a VAT liability. In the absence of a supply, the timing provision in section 6(14)(a) VATA (which is premised on a "supply of goods or services") and regulation 90(1) (which is premised on services being "supplied") simply do not come into play.

32. The Respondents ("**HMRC**") submit that VAT is due because, applying the relevant rules for time of supply of services, that for continuous supplies of services (in regulation 90(1)), SCL's services have to be treated as being separately and successively supplied each time that SCL receives a payment or issues a VAT invoice relating to those services. At the dates on which the VAT invoices relevant to this appeal were issued, SCL and PAC were not members of the same VAT Group.

33. HMRC, for their part, suggest that there is no dispute that there has been a chargeable event in the form of the services that were supplied by SCL to the Appellant; a point with which the Appellant fundamentally disagrees. Nevertheless, as HMRC note, the issue is whether SCL's services should be disregarded *entirely* as a result of section 43(1) VATA. The Appellant says that that is the effect of section 43. HMRC, on the other hand, say essentially that they are only disregarded to the extent that SCL's services are treated as supplied while SCL is a member of the Appellant's VAT group: in other words, applying section 43 in conjunction with the time of supply rules of section 6 VATA and Regulation 90.

AUTHORITIES AND ANALYSIS

B J Rice

34. Both parties refer to a number of authorities in support of their position. One of the earliest is the decision of the Court of Appeal in *B J Rice & Associates* v *Customs and Excise Commissioners* [1996] STC 581 (**"*B J Rice*"**). The taxpayer in *B J Rice* had supplied tax consultancy services and had invoiced the payment due for those services before it became liable to be registered for VAT. The client, however, failed to pay and the amount was written off as a bad debt. Several years later, however, the client sought further tax advice and was told that he must first pay off his bad debt, which he duly did. By that time, however, the taxpayer was registered for VAT. As a result, the Commissioners, relying on the then equivalent of Regulation 90, said that VAT should be accounted for on the payment because the taxpayer was a taxable person and the supply was fully taxable. They argued that the invoice was not a tax invoice (being issued before the taxpayer was registered or liable to be registered) and that the services should therefore be treated as supplied on the receipt of payment.

35. The VAT Tribunal (in the guise of His Honour Stephen Oliver QC (as he then was)) and the High Court agreed with the Commissioners that VAT was correctly charged on the payment. The majority of the Court of Appeal disagreed. Staughton LJ for his part commented that if the Commissioners interpretation of the Value Added Tax Act 1983 was right, it produced an unjust result. There is, of course, no necessary justice in any tax that Parliament chooses to impose. A taxpayer is taxed or not according to the law, and not according to some preconception as to whether tax ought or ought not to be charged. In reaching his decision in *B J Rice*, however, Staughton LJ considered whether the then equivalent of Regulation 90 fixed the time for deciding whether a person was a taxable person for the purposes of the charge to tax under what is now section 4(1) VATA. He agreed with the taxpayer that all four elements of the charge referred to in section 4(1) VATA – (i) a UK supply, (ii) which is taxable, (iii) by a taxable person (iv) in the course or further of their business – must be met before the time of supply rules in section 6 VATA are engaged.

36. In *B J Rice*, the only requirement of section 4(1) that was not satisfied when the supply was first made was that the requirement that the supply be "by a taxable person". In SCL's case, however, the opening words of section 43(1) make clear that while it was a member of the Appellant's VAT group, SCL's business was treated as carried on by the Appellant and not by SCL. Accordingly, leaving aside the specific "disregard" under section 43(1)(a) of any supply that SCL made to the Appellant, SCL did not satisfy the fourth requirement of section 4(1) VATA at the time that it actually supplied its services to the Appellant.

Broadwell Land

37. In reaching their conclusion that the requirements for liability had to be satisfied by reference to the actual supply, both Staughton LJ and Ward LJ derived some support from what Sir Stephen Oliver has said in *Broadwell Land plc* v *Customs and Excise Commissioners* [1993] VATTR 346 (at 355) ("***Broadwell Land***"). At first glance, this might appear somewhat surprising given that Sir Stephen had decided against the taxpayer in *B J Rice*. His decision in *Broadwell Land*, however, post-dated his decision in favour of the Commissioners in *B J Rice* and raised a different question.

38. The taxpayer in *Broadwell Land* had contracted to buy land and had paid a deposit on exchange. In anticipation of completion, the taxpayer had been issued with an invoice stating the VAT on the full amount of the purchase price. Completion, however, never occurred. Nevertheless, the taxpayer sought input tax relief for the VAT, relying on what is now section 6(4) VATA. The Tribunal concluded that the invoice was not in fact a tax invoice. However, it went on to consider the position if it had been a tax invoice.

39. On that basis, the Commissioners argued that, section 6(1) VATA "does not create a supply: it only fixes the time where a supply actually takes place" and "identifies the time of a supply where a supply is made but it does not create a supply where there would not otherwise be one under the charging provisions of [sections 4 and 5 VATA]". As Ward LJ noted in *B J Rice*, the time of supply rules, "did not create a wholly fictitious supply where there otherwise would not have been one under the charging provisions of [sections 4 and 5]." As he put it, "Common sense prevailed in [*Broadwell Land*]: so it should in [*B J Rice*]."

40. However, as Templeman J (as he then was) commented in *Tucker (HMIT) v Granada Motorway Services Ltd* (1979) TC 393, "The practice of judicial common sense is difficult in revenue cases." Certainly, common sense does not dictate that HMRC are always correct to deny input tax relief or in charging output tax, any more than the taxpayer should be taken to be correct. Looked at when SCL actually provided its services, as in *B J Rice*, there can be no liability; looked at when SCL invoiced the performance fees, there might be, as HMRC claim, if the effect of Regulation 90 is to treat SCL's supply as what might be considered to be a

'stand-alone' supply made at that time. If section 6 and Regulation 90 are designed to work 'in tandem' with the actual supply, however, it seems more difficult to conclude with any degree of certainty that the combination of the actual supply and the time of supply rules produce a liability for VAT, given the terms of section 43.

41. Furthermore, even on a stand-alone basis, there is a question as to whether the invoicing and payment of the performance fees at that later time was in the course or furtherance of any business that SCL was carrying on. As I have noted, at the time at which SCL actually rendered its services, section 43 prescribed that its business was to be treated as carried on by the Appellant. SCL's entitlement to the performance fees arose from the investment management agreements that it had entered into in 2002 and 2004 (as varied on leaving the VAT group) and in that sense did not arise from the business that it was carrying on when it raised its invoice or received payment, but from the prior contractual obligations created at a time when its business was treated as carried on by the Appellant.

Thorn Materials

42. In contrast to *B J Rice* and *Broadwell Land*, the VAT group provisions were directly in point in *Customs and Excise Commissioners* v *Thorn Materials Supply Ltd & Anor* [1998] 1 WLR 1106 (**"*Thorn Materials*"**). The taxpayers had participated in a tax avoidance scheme, under which they had agreed to supply goods to a buyer that was a member of the same VAT group as the taxpayers. 90 per cent of the purchase price was paid immediately. The taxpayers then left the VAT group and acquired the goods for delivery to the buyer under the previously agreed contract. The goods were then delivered to the buyer, which paid the 10 per cent balance of the price. The Commissioners, however, claimed output VAT by reference to the full price rather than 10 per cent only. The taxpayers, as was their aim, contended that VAT was due on only 10 per cent on the basis that the supply as regards the initial 90 per cent was at a time when the taxpayers and the buyers were members of the same VAT group.

43. An immediate point to note is that the planned 'avoidance' in *Thorn Materials* relied upon an intra-group transaction – payment of 90 per cent of the price – being taken note of (i.e. not disregarded) for the purposes of the time of supply rules, while the actual supply (the delivery of the goods) was effected after the taxpayers had left the VAT group. In SCL's case, the reverse is true: the actual supply was intra-group but the tax charge is said to arise from the operation of the time of supply rules after SCL has left the group.

44. In delivering the majority speech, Lord Nolan effectively endorsed the conclusion that the Tribunal had reached in *Broadwell Land* (although he does not refer to it) when he noted that while the Sixth Council Directive (77/388/EEC), the predecessor of the PVD, authorised tax to be charged in advance of the transfer of ownership of goods where there had been a payment in advance, the transfer of ownership had to follow because, "otherwise there is no chargeable event, and no justification for the imposition of the tax" ([1998] 1 WLR 1106, 1112A).

45. Lord Nolan also noted that this principle extended to a situation in which the prepayment was followed by a transfer of ownership intra-group. Thus (at 1112C-E):

> "The corollary for present purposes, which again I understood [Counsel for the Commissioners] to accept, was that if the sequence of events in the present case had been reversed, and if the sale agreement and advance payment had taken place before [the supplier] and [the recipient] became members of the same group, but the agreement had been completed after that date, any tax charged on the advance payment would fall to be refunded. The transfer of ownership in the goods, and thus their supply, would duly have taken place, but this would have to be disregarded under [section 43 VATA], and so, for

> the purposes of the charged tax, the chargeable event anticipated by the charge of tax upon the advance payment would have failed to materialise."

46. This appears to be a close analogy to the Appellant's situation. If, as HMRC assert, Regulation 90 has the effect that SCL's invoicing the performance fees and the Appellant's payment of the same amounts to a supply of SCL's investment management services, even though SCL's actual services fall to be disregarded under section 43(1)(a) VATA, why would a prepayment prior to a supplier of goods entering the VAT group not also have the same effect? In Lord Nolan's illustration, there is still an actual supply of goods in the real world but, as he notes, section 43 operates to ensure there is no chargeable event by reference to which tax can be charged. Similarly, in SCL's case there was no chargeable event at the time the actual supply was made. If the time of supply rules are inadequate to bring forward a future intra-group supply of goods to a time at which group membership did not exist, it is difficult to see why the same time of supply rules should be effective to attribute a past intra-group supply of services to a later payment of the consideration for those services.

47. The nuance on which HMRC rely is the proposition that the "chargeable event" in the case of services paid for periodically or from time to time occurs at the time of invoice or payment, without regard to whether any services were rendered for the purposes of the tax (the actual services being disregarded by virtue of section 43(1)(a) VATA). In the real world those services were rendered; in the VAT world, they were not. In the real world the services were rendered while SCL was a member of the Appellant's VAT group; in the VAT world, they are treated as rendered only when invoiced or paid. If Regulation 90 does not 'stand alone' to resolve the matter, should one consider the real world supply in conjunction the VAT world time of supply to produce the answer HMRC seek? Or does one remain wholly rooted in the VAT world, to conclude that SCL never made a supply to which Regulation 90 can apply, as the Appellant seeks?

48. It should be recalled that Lord Nolan was dealing with an intra-group pre-payment of 90 per cent of the price for a non-group supply of goods. Absent the group rule, therefore, the pre-payment would have been treated as a supply of those goods but, as Lord Nolan noted at 1113A, "the 90 per cent supply to which those facts gave rise must be disregarded or, as Mummery LJ put it, ignored, for tax purposes." The fact that the eventual supply was not intra-group did not therefore vitiate the application of the group rules to the pre-payment. However, because the pre-payment was disregarded or ignored, the consideration that could be charged by reference to the eventual non-group supply of the goods was 100 per cent and not 10 per cent.

49. In concluding that the VAT group rules did not prevent the 90 per cent pre-payment being taken into account on the eventual non-group supply of the goods, Lord Nolan commented on the design of the group rules. He said this (at 1113C-F):

> "[Article 10 PVD and section 43 VATA] are not designed to confer exemption or relief from tax. They are designed to simplify and facilitate the collection of tax by treating the representative member as if it were carrying on all the businesses of the other members as well as its own, and dealing on behalf of them all with non-members. It is entirely consistent with this approach that the 90 per cent supplies effected by [the taxpayers] to [the recipient] should be disregarded for the purposes of the Act, because [the taxpayers] and [the recipient] were not to be treated as carrying on their own businesses at the time. … The section may have the effect of deferring the charge to tax upon the added value of goods until they are subject to a supply outside the group, but it does not prevent that charge.

> When [the taxpayers] left [the group] they emerged into the value added tax world as separate taxable persons, each carrying on its own business for VAT purposes. The delivery of the goods by them to [the recipient] undoubtedly constituted a transfer of the whole property in the goods in the course of business. It constituted a supply of the goods …"

50. For their part, HMRC rely in this appeal on *Thorn Materials*. Their principal point is that the time of supply rules must be applied to determine when a supply, including a continuous supply, is made, and in particular whether that supply was made when two companies were members of the same VAT Group. Thus, if, on the application of the time of supply rules, a supply was made in the period when two companies were members of the same VAT Group, that supply must be disregarded by reason of s 43(1)(a) VATA. If, on the application of the time of supply rules, a supply was made in the period when two companies were not members of the same VAT Group, that supply should not be disregarded.

51. The relevant legal principle that HMRC say is to be extracted from *Thorn Materials* is that the time of supply rules have to be applied first, in order to apply the disregard in s 43(1)(a) VATA. They dictate whether a supply is at a time when the supplier and recipient are in the same VAT Group. Recourse cannot be had to other approaches including, in particular, taking a view on when the supply was "actually" made.

52. HMRC also point out that Lord Hoffmann in the course of his dissenting speech in *Thorn Materials*, referred to the Court of Appeal's decision in *B J Rice* with an apparent element of disapproval. None of the other Law Lords in *Thorn Materials*, however, considered *B J Rice* and Lord Hoffmann's disagreement with the majority on the correct application of the time of supply rules and the group rules to the transactions in question makes it difficult to say to what extent the majority would have agreed with Lord Hoffmann's comments on *B J Rice*, or indeed whether Lord Hoffmann himself would have reversed the Court of Appeal's decision in that case.

Svenska

53. In *Svenska International plc v Commissioners of Customs & Excise* [1999] 1 WLR 769 ("***Svenska***"), the taxpayer was a UK subsidiary of a Swedish bank. The Swedish bank also had a London branch and the subsidiary provided management services to the London branch, for which it was to be paid. Initially, the branch was not registered for VAT and as a result the subsidiary and the branch were not within a VAT group. Subsequently, however, the subsidiary and the branch were brought within a VAT group, with the subsidiary as the representative member. Prior to that event, the subsidiary had issued no invoice and the branch had made no payment for the services that the subsidiary had provided to the branch. It was only after they were within a group for VAT purposes that the subsidiary issued an invoice to the branch for its services.

54. In the ordinary course, the services that the subsidiary had provided to the branch were taxable services but as they were only invoiced after the group was established, the supply fell to be disregarded. Indeed, in that respect, Svenska might be considered to illustrate for services paid for periodically or from time to time the example that Lord Nolan gave in *Thorn Materials* of an advance payment for the supply of goods where that supply is subsequently made intra-group.

55. The issue in *Svenska*, however, related to the right to deduct the input tax which the subsidiary had incurred on goods and services used in providing services to the branch. In prior periods, it had recovered input tax in full. The London branch, however, had suffered no VAT because it had not been invoiced for those services, In the event, as just noted, it suffered no VAT when it was invoiced. As a person making exempt supplies, the London branch's

right to recover input tax would have been restricted. Understandably, therefore, as Lord Slynn noted, the result arrived at by the House of Lords might have appeared decidedly odd to someone unfamiliar with the legislation, but having regard to the principle of fiscal neutrality, it was the correct one.

56. The issue that had to be resolved was described by Lord Hope at 777H—

> "It was submitted by [counsel for the taxpayer] that the services which Svenska supplied to the London Branch were taxable supplies when they were made within the meaning of section 2(1) of the Act, and that what regulation 23 was concerned with was the time of supply not whether the supplies were taxable. He said that the fact that they were taxable supplies was not to be confused with the point in time at which the value added tax became chargeable. But we are concerned in this case with the question whether an adjustment falls to be made under regulation 34 to the credits which Svenska received by way of input tax."

57. The subsidiary argued, relying on what is now Article 62 PVD, that as Article 62 drew a distinction between 'chargeable event' and the tax becoming 'chargeable' and as Regulation 90(1) related to the time when the tax became 'chargeable' and not the 'chargeable event', Regulation 90 did not prevent the services in fact supplied to the London branch before it joined the subsidiary's VAT Group being treated as taxable supplies made before the Branch joined. These submissions were, however, rejected. As Lord Hutton shortly stated (at 783C)—

> "My Lords, I am unable to accept those submissions. In my opinion [s 6(14) VATA] and [Regulation 90(1)] make it clear that where there is a continuous supply of services, no supply shall be treated as having been made until there has been a payment or a tax invoice has been issued."

58. He then went on to distinguish the situation in *Svenska* from that in *Thorn Materials*—

> "In my opinion Svenska cannot derive assistance from that decision. In *Thorn* [s 43(1) VATA] required the supply which was to be treated as taking place at the time of the payment of 90 per cent of the price to be disregarded. Therefore, there was a supply which took place in the normal way at the time of delivery of the motorcars pursuant to section 4(2)(b). But in the present case Svenska cannot argue that, as after [the date the branch joined the VAT Group] the supplies provided by it to the London branch are to be disregarded pursuant to [s 43(1) VATA] because they were members of the same group, the consequence must be that the "actual supplies" provided by Svenska to the London branch [prior to the date the branch joined the VAT Group] can be regarded as supplies for VAT purposes. The reason why Svenska cannot advance this as a valid argument is because the effect of [Regulation 90(1)] is that those "actual supplies" cannot be treated as supplies for VAT purposes. In short, the distinction between the present case and Thorn is that in the latter the Act and the regulations of 1985 permitted the delivery of the motorcars to be treated as a supply, whereas in the present case [Regulation 90(1)] prohibits the "actual supplies" provided by Svenska to the London branch [before the Branch joined the Svenska VAT Group] being treated as supplies because prior to [that] date no payment had been received and no tax invoice had been issued. Accordingly, the present case has to be approached on the basis that, no matter that in fact Svenska supplied services to the London branch prior to 1 August 1991, as a matter of the law governing VAT no supplies were made during the period [before the Branch joined the Svenska VAT Group]."

Royal & Sun Alliance

59. *Royal & Sun Alliance Insurance Group plc v CCE* [2003] STC 832 ("***RSA***") concerned relief for input tax. The taxpayer owned a number of properties as tenant and suffered input VAT on the rent that it paid. The taxpayer did not, however, immediately elect to tax any corresponding supplies that it made of the properties. The properties were vacant for a period and in due course the taxpayer elected to tax its supplies of the properties and sought repayment of the input tax it had suffered on the rent it had paid in the meantime. The only supplies that the taxpayer ever made of the properties concerned were taxable supplies and an important aspect of the taxpayer's case was that the principle of fiscal neutrality that underpins the tax therefore dictated that relief should be given for the input tax that it had suffered. Nevertheless, the House of Lords, by a 3:2 majority, ultimately concluded that relief should not be given for the input tax suffered in respect of the rental periods during which the taxpayer had not elected to tax its supplies of the properties.

60. The key to the majority's conclusion can be seen in Lord Hoffmann's speech:

> "[32] That makes it important to identify exactly what goods or services were supplied to RSA by the superior landlords during the vacant unelected period. There are two ways in which one could think of the grant of a time-limited interest in land (such as a lease or licence) as a supply of goods or services. One is to regard it as a single supply of the leasehold estate in consideration of periodic payments of rent and the other lessee's covenants. That is how a real property lawyer would describe the grant of a lease. If that is the right way to look at the supply to RSA in this case, then it first had an intention to use its leasehold estate in making an exempt supply and afterwards decided to use the same estate in making a taxable supply. It would a change of plan about the use of 'the goods or services concerned' within the meaning of reg 109.
>
> [33] But another way of looking at the matter is to treat the superior owner as granting rights of occupation in successive units of months, quarters, or whatever, depending upon the stipulated intervals for payment of the rent. In that case, the goods or services supplied during the vacant unelected period are different from those supplied afterwards and a change of plan about the use to be made of the leases in the future is not a change of intention about the use of the leases in the past.
>
> [34] In my opinion VAT law has clearly adopted the second analysis for both leases and licences. Section 6(14) of the 1994 Act gives the commissioners power to make regulations:
>
> > '… with respect to the time at which … a supply is to be treated as taking place … where:
> >
> > (a) it is a supply of goods or services for a consideration the whole or part of which is determined or payable periodically …
> >
> > and … the regulations may provide for goods or services to be treated as separately and successively supplied at prescribed times or intervals.'
>
> [35] Pursuant to this power, the commissioners made regs 85 and 90 of the 1995 regulations, which are in similar terms and deal respectively with leases which are treated as supplies of goods and with services supplied for a periodically payable consideration."

61. Accordingly, the taxpayer's claim for repayment of the input tax failed on the basis that the conditions for repayment were not satisfied in the earlier unelected rental periods. While this illustrates that the effect of section 6(14) and Regulation 90 is to treat each invoiced supply

of goods or services supplied periodically or from time to time as a separate supply of services, in contrast to a supply of the goods paid for in more than one instalment, as in *Thorn Materials*, it does not necessarily answer the question whether each such supply satisfies all the elements for charge to tax identified in *B J Rice*.

62. In the Court of Appeal, Arden LJ, in a dissenting judgment that was subsequently endorsed by the majority in the House of Lords, referred at [48] to *B J Rice*, in the following terms as follows—

> "Nor does the case of [*B J Rice*], a decision of this court, on which the judge relied … require this distinction to be made: in that case very different considerations arose because the issue was whether the time of supply rules could result in the imposition of a liability to account for VAT on a person who was not a taxable person at the time he supplied and raised an invoice for the services in question (and in so far as the case is thought to establish any wider restriction on the time of supply rules, see per Lord Hoffmann, dissenting, in [*Thorn*] [1998] 1 WLR 1106 at 1119.)"

63. Lord Hoffmann did not take the opportunity in *RSA* to comment further on *B J Rice*. Lord Walker at [83], however, said this—

> "In my opinion Arden LJ was correct in her analysis and conclusion as to the scope of s 6(14) and reg 85. That does not necessarily involve saying that [*B J Rice*] was wrongly decided, as it was concerned with a different factual situation (an invoice sent to a client before the consultant was registered for VAT) …"

Other case law

64. The parties' skeleton arguments referred to a number of other authorities, which I have listed at the end of my decision. I have reviewed them all. However, in the end, I do not consider that they advance matters to any significant extent.

Fiscal Neutrality

65. The Appellant advanced detailed arguments as to why its construction of the legislation furthered the principle of fiscal neutrality. It explained this on the basis that a fundamental objective of the VAT regime was to ensure that the incidence of VAT was similar, whether the same economic activities are conducted through a single company or a group of closely-bound companies.

66. In response, HMRC said that the principle of fiscal neutrality gave no support to the Appellant's case. HMRC accepted that it was a very important principle of EU VAT law but said that fiscal neutrality is only a principle. It could not override or require the disapplication of Article 64 PVD or Regulation 90(1) implementing it.

67. Again, I have not found the principle of fiscal neutrality of great assistance in resolving this issue. It is not suggested that the VATA has failed to implement correctly the provisions of the PVD and, as regards the group rules, article 11 PVD is permissive rather than prescriptive and to my mind does not offer particular assistance in resolving the application or interaction of section 43 and Regulation 90.

68. The concept of fiscal neutrality was important in resolving *Svenska*, as I noted in paragraph 55 above. It was also relied on in *RSA*, where the only supplies of the properties in question were fully taxable supplies, providing the basis for the taxpayer's argument that it should be entitled to credit fully the input tax that it had suffered.

69. It is true that had the Appellant employed fully 'in-house' investment managers, rather than seeking investment management services from a fellow group company, it would have

suffered no unrelieved VAT (as compared to engaging external investment management services). However, in a fully 'in-house' situation, the Appellant would be unlikely to be called upon to pay 'performance fees' at a later date. The 'performance' of its investments would be likely to accrue entirely for its own benefit. Accordingly, reliance on the principle as expounded in paragraph 65 above does not appear to be completely straight forward or determinative of the issue.

MY DECISION

70. To my mind the authorities to which I have referred clearly establish that the time of supply rules – in this case Regulation 90 – are applied to determine when a supply of services should be treated as taking place, including for determining whether the supply is between two members of a VAT group. On that basis, SCL's actual supply of investment management services to the Appellant are treated as supplied when they were invoiced, at which time the Appellant and SCL were not members of a VAT group. On that basis, therefore, those supplies do not fall to be disregarded.

71. That might suggest that I should conclude the appeal in favour of HMRC. However, as I have noted, while it was a member of the Appellant's VAT group, SCL's business was treated as being carried on by the Appellant. As Lord Nolan recognised in *Thorn Materials*, on 9 November 2007 SCL emerged blinking into the sunlight of the 'real' world from the dark subterrains of the VAT group world, to start life as a separate taxable person, carrying on its own business for VAT purposes. Prior to that event, in the VAT world, SCL had no business and made no supplies. And yet the operation in the VAT world, rather than the real world, of Regulation 90 is said to suffice to satisfy all the elements of the charge to tax identified by section 4 VATA. In other words, it seems to me that one must take SCL's real world supplies – the investment management services that it provided to the Appellant as a group member – and in the VAT world treat them as being supplied when they were invoiced.

72. I have two difficulties with that approach: first, it mixes the real world with the VAT world to create a tax charge. In the tax world that might not be such an unusual result and if it is in fact what the legislation provides for, I must respect it. On the other hand, to lift supplies out of the VAT group world only to place them in an alternative VAT time of supply world must give pause for thought. I do not detect such a mixed approach in the authorities to which I have referred in order to impose tax or to deny input tax credit. In the real world, SCL only ever supplied investment management services as a member of the Appellant's VAT group. Regulation 90 may be intended to treat that supply as made when the performance fees are invoiced, but does it go so far as to direct that in its VAT time of supply world, what were group services are not group services and that those services are supplied in the course or furtherance of a business that in the VAT group world was not being carried on?

73. One might possibly be persuaded that this is the effect of Regulation 90 and that when section 6(1) VATA and Regulation 90 refer to "a supply of goods or services" and to "services being supplied for a period for a consideration", they are extracting real world services from the VAT group world in which they exist and treating them as supplied at a later time in the VAT time of supply world, so as to create a liability to tax. None of the various authorities to which I have referred, however, are direct authority for that result, and two of them – *Svenska* and *RSA* – concern the rules governing entitlement to input tax credit, which can raise different considerations. More to the point, however, I have been unable to see what feature distinguishes the Appellant's case from that of the taxpayer in *B J Rice*.

74. Certainly, *B J Rice* did not involve the VAT group rules. However, the character of the supply in that case was a taxable supply made in the course or furtherance of the taxpayer's business. The only missing element for liability was that that the taxpayer was not registered

or liable to be registered when the supply was originally made. If, in the Appellant's case, Regulation 90 operates to lift its services out of the VAT group world and, for the purposes of charging tax, place them in the situation that exists in the Regulation 90 time of supply world, then I am unable to see why there was no charge to tax in *B J Rice*.

75. The fact that the taxpayer in *B J Rice* was not within the scope of the tax at the time of the original supply (and its invoicing) might perhaps be suggested as a distinguishing feature. The same, however, must surely be the case for SCL. SCL was a member of the Appellant's VAT group throughout the time when it actually rendered the investment management services in question. Section 43(1) VATA clearly states that throughout that time any business carried on by a member of the group is to be treated as carried on by the representative member. This direction is not tied to any of the time of supply rules and would seem to place SCL in a similar position to that of the taxpayer in *B J Rice*.

76. Otherwise, Lord Hoffmann's remarks in *Thorn Materials* are insufficient for me to distinguish *B J Rice* and neither Arden LJ nor Lord Walker in RSA suggested that *B J Rice* was wrongly decided. If there is a point of distinction – and I have not been convinced by HMRC's arguments in this appeal that there is one – I think it must be for a higher Tribunal or Court to find it.

77. Accordingly, I decide this appeal in favour of the Appellant.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

78. 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.

MALCOLM GAMMIE CBE QC
TRIBUNAL JUDGE

Release date: 26 FEBRUARY 2021

ADDITIONAL CASES REFERRED TO IN THE PARTIES' SKELETON ARGUMENTS AND CONSIDERED BUT NOT REFERRED TO IN THE DECISION

(1) *Marleasing SA v La Commercial Internacionale de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135

(2) *BUPA Hospitals Ltd v CCE* (Case C-419/02) [2006] STC 967

(3) *Vodafone 2 v HMRC (No 2)* [2009] STC 1480

(4) *Ampliscentifica Srl & Anor v Ministero dell'Economia e delle Finanze & Anor* (Case C-162/07) [2011] STC 566

(5) *Royal Bank of Scotland v HMRC* [2012] STC 797

(6) *European Commission v Ireland* (Case C-85/11) [2013] STC 2338

(7) *Scandia America Corp (USA), filial Sverige v Skatteverket* (Case C-7/13) [2015] STC 1164

(8) *Beteiligungsgesellschaft Larentia + Minerva mbH & Co KG v Finanzamt Nordenham; Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG* (Joined Cases C-108/14 and C-109/14) [2015] STC 2101

(9) *Compass Contract Services Ltd v HMRC* (Case C-38/16) [2017] STC 1358

(10) *Clark Hill Ltd v HMRC* [2018] SFTD 922

(11) *Taylor Clark Leisure plc v HMRC* [2018] 1 WLR 3803

(12) *Baillie Gifford & Co v HMRC* (TC07225) [2019] UKFTT 410 (TC)

(13) *Lloyds Banking Group plc & Ors v HMRC and Anor* [2019] STC 1134