[2017] UKFTT 0698 (TC)

TC06117

Appeal number: TC/2013/07322 & 06950

VALUE ADDED TAX – supplies of admission to ice skating rink and hire of children's ice skates – when sold as package single or multiple supplies? –* CPP *and* Levob *applied – whether if single supply "concrete and specific" zero-rated element could be carved out – whether differences in wording between s 29A and s 30 VATA decisive –* Colaingrove (fuel issue) *applied.

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE ICE RINK COMPANY LTD **Appellants**
&
PI (MILTON KEYNES) LTD

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
SIMON BIRD

Sitting in public at Priory Court, Bull St, Birmingham on 28 and 29 June 2017 with post-hearing submissions on 25 July 2017.

Charlotte Brown (instructed by Hopwood VAT) for the Appellant

Mr Keith Golder, Litigator HMRC Solicitor's Office, for the Respondents

DECISION

1. In this case The Ice Rink Company Ltd ("IRC") and PI (Milton Keynes) Ltd ("PIMK") (together the "appellants") appeal against assessments made by HMRC:

(1) on IRC for its prescribed accounting periods 05/09 to 12/12 totalling £641,601, and

(2) on PIMK for its prescribed accounting periods 06/12 to 03/13 totalling £43,547.

2. The sole issue in the appeal is whether, when the appellants sell a package deal at a single price allowing a child to skate on the appellants' ice rinks and to hire skates, they are making a single supply or two separate supplies. If they make separate supplies, the hire of skates to children is zero-rated. If it is a single supply, HMRC say that the whole package is standard rated.

Evidence

3. For the appellants we had three witnesses who had made witness statements, which statements stood as their evidence in chief, and who were cross-examined by Mr Golder. The witnesses were Mr Michael Petrouis, a director of and the major shareholder in, the appellants (and other companies in a group or under common ownership carrying on similar activities), Mr Matthew Lloyd, a business consultant specialising in the sports market and Mr Timothy Fife, a tax consultant specialising in VAT and a former VAT Inspector who is Chairman of the North of England Chapter of the VAT Practitioners' Group.

4. We cannot say that we found very much of the oral evidence of Mr Petrouis helpful. He was too keen to avoid answering the questions asked of him and to make the points he had decided he wished to make to us whatever the question. His factual evidence, particularly the exhibits to his statement were useful, and we accept his evidence on these matters as credible.

5. Mr Lloyd had in his capacity as consultant designed and introduced community initiatives for the appellants, and had provided services to the appellant using Insight Data. The Insight Data he supplied to us related to ice rinks in the UK as a whole. He also provided evidence about the operation of ice rinks generally, the different uses made of them and about the economics of them.

6. He also described the "customer experience" when attending the ice rinks of the appellants, and his statement on this matter is agreed by Mr Petrouis to be accurate.

7. Mr Lloyd has impressive credentials, being a former paralympian in Ice Sledge Hockey, having a degree in Business Information Systems and being Vice Chairman of Sport Birmingham and Chairman of the British Sledge Hockey Association. He had also written the Sports Development Plan for three of the four national governing Bodies of ice rink using sports.

8. We consider his to be expert evidence of fact and we accept it as relevant and credible. There are opinions in his witness statement and where they related to the law and the matters we have to decide we discount them except to the extent that they were advanced by Ms Brown as the appellant's submissions where we treat them as just that.

9. Mr Fife's evidence consisted of criticism of HMRC's approach to the case and the reasons why he disagrees with their decision. He also added examples of HMRC's treatment of other ice rinks that he was aware of in support of the appellants' fiscal neutrality arguments. This is the only part of his evidence that provides factual material that is relevant to our decision, and we accept that part of his evidence as a correct statement of his experience of some other cases, the weight which we attach to it being a decision for us.

Findings of fact

10. From the evidence we read, heard and saw we make the following findings of fact. We relate first the facts of the investigation by HMRC leading up to the appeals to this Tribunal, which we have taken from the documents exhibited in the bundle, including HMRC's Statement of Case.

11. Both appellants are registered for VAT, IRC from 1 December 2006 and PIMK from 23 January 2012.

The Ice Rink Company Ltd

12. On 9 April 2013 Mr Richard Merson of HMRC Local Compliance (Small & Medium Enterprises) wrote to IRC saying that it appeared from its VAT returns to be making non-VATable sales which might be exempt or zero-rated, and as it was operating an ice rink he assumed that the non-VATable sales were the hire of children's ice skates. He asked for confirmation of his assumption within 14 days.

13. That the assumption was correct was confirmed by Mr Fife of Hopwood VAT on 23 April 2013. He added that the zero-rating was industry standard practice and referred Mr Merson to Public Notice VAT714 especially paragraph 9.3.

14. On 3 May 2013 Mr Merson wrote to IRC, copied to Tim Fife, saying that he had recently referred the case of "another rice rink (of which you are no doubt aware)" to "HMRC policy branch" for a ruling. That ruling was then set out in his letter and was said to be based on several "rulings including Card Protection Plan".

15. The ruling listed a number of "Single Supply Indicators" and a number of "Multiple Supply Indicators" and gave Policy branch's views on each as they applied to "another ice rink", not IRC.

16. The letter from Mr Merson added that the facts of this case (which entity "this" referred to is not clear, IRC or "another ice rink", but I assume the former) lean towards it being a single supply. He had therefore prepared a schedule showing the difference between expected output tax on the basis of skate hire to children not being

zero-rated and the actual returns: the difference was £641,601 which was to be the amount of promised assessment to be made shortly.

17. He stressed that output tax must be assessed on *all* (his emphasis) income received by "PIB" in the future. (Who PIB is will become clear).

18. IRC was then warned about the possibility of Schedule 24 Finance Act 2007 penalties (incorrect returns) and told that if they were liable the behaviour would be classed as "deliberate" and he attached a Human Rights Factsheet.

19. On 10 May 2013 the assessment was duly issued and totalled with interest £673,771.39.

20. On 26 May 2013 Mr Fife wrote to Mr Merson accepting the offer of a review that was also included in the letter of 3 May 2013.

21. On 24 September 2013 Mrs L M Cooper, a reviewing officer, wrote to IRC with the conclusion she had come to following her review. This was to uphold the principle of liability.

22. The conclusion was notified in accordance with s 83F(8) Value Added Tax Act 1994 ("VATA").

23. On 24 September 2013 Mr Merson also wrote to IRC to confirm that in accordance with his email to Mr Fife on 18 September, he was in the process of reducing the figures in the assessment to reflect that fact that the gross amounts received needed to be treated as if they included VAT. He also asked for details of magazines and children's gloves so that he could remove them from the assessments.

24. He also asked for any further information about the pricing structure for admission and skate hire if there was any significant difference from that used at PIB.

25. On 24 October 2013 IRC appealed to the Tribunal.

PI (Milton Keynes) Ltd

26. On 9 April 2013 Mr Richard Merson of HMRC Local Compliance (Small & Medium Enterprises) wrote to PIMK saying that it appeared from its VAT returns to be making non-VATable sales which might be exempt or zero-rated, and as it was operating an ice rink he assumed that the non-VATable sales were the hire of children's ice skates. He asked for confirmation of his assumption within 14 days.

27. That the assumption was correct was confirmed by Mr Darren Green, Group Accountant of the Planet Ice Group (the group to which the appellants belonged) on 23 April 2013. He added that the zero-rating also applied to merchandise, which consisted of "children's gloves and magazines.

28. On 21 May 2013 Mr Merson wrote to PIMK saying was aware from recent correspondence concerning Planet Ice (Brixton) Ltd ("PIB") he had recently referred that company's case to "HMRC policy branch" for a ruling. That ruling was then set

out in his letter and was said to be based on several "rulings including Card Protection Plan".

29. The ruling listed a number of "Single Supply Indicators" and a number of "Multiple Supply Indicators" and gave Policy branch's views on each as they applied to "another ice rink", not IRC.

30. The letter from Mr Merson added that the facts of this case (which entity "this" referred to is not clear, PIMK or PIB, but I assume the former) lean towards it being a single supply. He had therefore prepared a schedule showing the difference between expected output tax on the basis of skate hire to children not being zero-rated and the actual returns: the difference was £52,097 which was to be the amount of promised assessment to be made shortly.

31. He stressed that output tax must be assessed on *all* (his emphasis) income received in the future, except on sales of magazines and children's gloves, about which his schedule said that they were recognised zero-rated sales.

32. PIMK was then warned about the possibility of Schedule 24 Finance Act 2007 penalties (incorrect returns) and told that if they were liable the behaviour would be classed as "deliberate" and he attached a Human Rights Factsheet.

33. On 6 June 2013 the assessment was duly issued and totalled with interest £52,783.14.

34. On 7 June 2013 Smith & Williamson, acting for PIB, wrote to Mr Merson seeking a review of the decision in that case, and also in the case of four other companies including PIMK.

35. On 14 September 2013 Mrs L M Cooper, a reviewing officer, wrote to PIMK with the conclusion she had come to following her review. This was to uphold the principle of liability but to ask Mr Merson to amend the figures.

36. The conclusion was notified in accordance with s 83F(8) VATA.

37. On 11 September 2013 Mr Merson wrote to PIMK reducing the figures in the assessment to £43,547 net of interest.

38. On 8 October 2013 PIMK appealed to the Tribunal.

Planet Ice (Brixton) Ltd – further matters

39. Mr Petrouis exhibited a letter that PIB received from Mr Merson on 4 May 2012 following his VAT inspection at the Brixton Ice Rink. In that letter he agreed that the hire of children's ice skates had been properly zero-rated, but in relation to certain sales including those for children's birthday parties there was a single supply because there was no discount for children who brought their own skates. He also disputed the split that PIB had made of the fee of £9 for the supplies between the standard and zero-rated elements.

40. Mr Petrouis also exhibited Mr Merson's letter of 21 May 2013 to PIB in which he gave his reversed decision. This letter is identical in all material respects to that of 21 May 2013 to PIMK and of 3 May to IRC.

41. Mr Petrouis also explained that the reason PIB's decision was not under appeal to the Tribunal was that their claim for postponement of the tax due to hardship was denied in that case.

The business operations

42. We find the facts here from the evidence primarily of Mr Lloyd, supported and agreed by Mr Petrouis.

43. By reference to plans of several ice rinks Mr Lloyd told us that it is standard practice for ice rinks, including those operated by IRC and PIMK, to advertise their prices on their website.

44. Screenshots of IRC's website (PIMK's were not available as it had ceased trading at the time of the witness statement) show that in the centre of the screen "times/prices" is a frame showing prices for events on a Thursday.

45. There are two events and against the first there is shown a price for the "skating without skates package" of £8.00 and the price for the "skating with skates package" of £10.00.

46. The second event has process of £10.00 and £12.00 respectively.

47. At the side is a box headed "Hire and concessions" showing:

Student	£6.00
Spectator	£2.00
Spectator Disco	£7.00
Skate Hire only	£8.50
Penguin Hire	£3.00
Credit/debit Card Charge	£1.00
Locker	£1.00
Car Park	Pay and Display.

48. Customers will enter through a reception area, a welcoming area displaying offers and activities on offer.

49. There is a service window where people can buy entry to skating, learn to skate courses, gloves, ice hockey tickets, skate hire tickets and other associated items.

50. There is no difference in pricing between adults and children. If a child is identified as being under 15 and uses either the skate hire option or the skating with skate hire package the sales person will select either "child" or "adult" on the till system.

51. Skate hire only is significantly more expensive than the excess for choosing skate hire as part of the package. This is because the skates may be taken off site and need to go through an inspection process and possible blade sharpening when returned.

52. The "skating with skates" package also includes a number of separate elements such as maintenance of skates (including blade sharpening) and storage of the customers outdoor footwear. The cost of sharpening a pair of skates varies between £5 to £8.

53. Ice rink operators, including IRC and PIMK, will make special offers to include food and beverages or even tuition. They are comparable to offers such as those made by fast food outlets where the total package price is less that the combined price for the component parts.

54. It is standard practice in the industry to offer skating only and skating with skate hire. Some rinks will show skating with skate hire as a "bolt on" but most will display prices as IRC does. Some rinks do not advise skate hire only as they do not wish to incur maintenance and administration costs.

55. If a customer chooses to hire skates they must take their ticket to a separate Skate Hire Zone to redeem it for skates. They will handover their shoes for storage.

56. Skate hire only is undertaken where a customer wishes to take the skates off site or to participate in an activity provided by a third party.

57. A common example of when this might happen is when a third party books the rink for an ice hockey game. If the hire is for four hours and the game finishes in three, the third party will open the rink for skating, though no entry fee for the rink has been paid.

58. It may also happen when people take part in classes or educational activities or if a figure skater or hockey player forgets their skates.

59. The Hire Zone is away from the reception, but in reception there will be a shop which sells among things skates. This encourages skaters to buy skates rather than hire them. Owning a pair of skates encourages a person to become a more frequent skater and to participate in lessons and clubs.

The Insight Data

60. Mr Lloyd's witness statement contains figures from a survey on "Ice Rink Activities". To the question: "Do you own your own skates?" the answers were:

Answer	Count	Percentage
Yes	8756	45.10%
No	10659	54.90%

61. Another question asked "Which if any of various activities do you take part in?" 69.86% said "skating for fun". Figure skating (13.10%), Ice Hockey Playing

(7.42%) and Ice Dancing (5.48%) were the other answers with any significant percentages.

Inferences from these facts

62. From the facts we have found above, we draw some inferences which also stand as findings of fact.

63. Where we have accepted from Mr Lloyd that something is standard practice in the industry we find that it was the practice of IRC and PIMK.

64. We accept Mr Lloyd's assertions that "It is clear to the customer that skate hire is an optional and additional purchase" and "there is a clear distinction between the skate only option and the option to purchase a skating with skates package" are true of IRC and PIMK.

65. We accept that those who buy skates are likely to use the rink more frequently than those who have to hire them.

66. It follows from this fact and from the Insight Data that while a minority (just) may have their own skates, a majority of visits in any one year will be by those who have their own skates.

Law

67. VAT applies in principle to all transactions of supply of goods or services which are not exempt. Where a person makes both taxable and exempt supplies, VAT on supplies made to it ("input tax") is deductible from the VAT on supplies made only to the extent that the supplies made are taxable supplies.

68. Some member states however have historically applied a system to some supplies of what the European Union calls "exemption with deduction", ie input tax may be deducted from the VAT charged on taxable supplies even though it relates to non-taxable supplies. In the United Kingdom this system is called zero-rating because the fiction is that VAT is charged, but at a rate of 0%.

69. The European Commission does not like zero-rating. Member States are not permitted to widen the scope of existing categories of supply that are zero-rated nor introduce new ones. Existing ones are to be interpreted narrowly.

70. The UK law on zero-rating generally is in s 30 VATA:

> "(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section—
>
> (a) no VAT shall be charged on the supply; but
>
> (b) it shall in all other respects be treated as a taxable supply;
>
> and accordingly the rate at which VAT is treated as charged on the supply shall be nil.

(2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified.

(4) The Treasury may by order vary Schedule 8 by adding to or deleting from it any description or by varying any description for the time being specified in it."

71. Group 16 in Schedule 8 contains the zero-rating in this case:

"Group 16 — Clothing and footwear

Item No

1 Articles designed as clothing or footwear for young children and not suitable for older persons.

…"

72. VAT Notice 714 "Zero rating young children's clothing and footwear" does not have the force of law but explains HMRC's views on what is covered by Item 1 in Group 16:

"2. **Articles of clothing or footwear**

…

2.3 Articles of footwear

Articles of footwear include:

- boots, shoes, sandals and slippers, even if they're designed for special purposes (such as ballet shoes or studded football boots)
- ice-skating or roller-skating boots, with or without skating blades or rollers attached

but not:

- blades or rollers sold on their own, or platform type roller skates for attaching to normal shoes
- shoelaces, insoles, heel protectors and stick-on soles sold as separate items"

73. It also adds:

"**9. Services**

…

9.3 Hire or loan of children's clothing and footwear

You can zero rate the hire or loan of any item that would itself be zero rated. This includes items such as bridesmaids and page boys outfits, fancy dress costumes and nappy hire services where the nappies are collected for laundering and replaced with fresh ones.

> The separate supply of ice-skates, roller skates, ten-pin bowling shoes, is also eligible for the relief in accordance with the size criteria for footwear in paragraph 4.3. However, if you charge a single price for admission that also includes the loan of footwear, you must consider your supply in the light of the guidance on mixed supplies in VAT Notice 700: the VAT guide."

74. Paragraph 9.3 must be seen in the light of Section 8:

> "**8. Single or multiple supplies**
>
> **8.1 How to decide the correct treatment**
>
> If you sell play outfits consisting of both zero-rated clothing and incidental standard-rated items at an inclusive price (such as a cowboy suit with a toy gun or a policeman's uniform with toy handcuffs), the supply is seen as a single supply of children's clothing. This is because the gun or handcuffs are considered to be incidental to the main supply of the clothing you may zero rate the whole sale.
>
> Where the standard rated element is not incidental, such as a babies gift set comprising of a bib and feeding cup, you will need to consider the liability of the supply in the light of the guidance on mixed supplies in VAT Notice 700: the VAT guide."

The appellants' submissions

75. Ms Brown argued that the components of a skating with skates package (when bought by or for a child) should be taxed separately for the following reasons:

(1) Skating with skate hire is a mixed supply, as the supply of skates is distinct and separate from the supply of admission.

(2) If that is wrong, the supply of the hire of children's skates is a "concrete and specific" aspect of its supply of ice skating, so as to be capable of being carved out from the single supply.

(3) Further, treating the supply as a standard-rated composite supply offends the principle of fiscal neutrality.

76. Elaborating on the first submission, Ms Brown says that there is a package which contains two elements. The starting point for the examination of the facts following Case C-349/96 *Card Protection Plan Ltd v Commissioners of Customs and Excise* [1999] ECR I-973 and [2001] All ER (EC) 714 ("*CPP*") is that each supply is distinct and independent.

77. She adds that:

(1) A single "package" price is not determinative – in this case is it clear to the customer that they have freedom of choice and the components are available separately.

(2) HMRC's case is based on a misunderstanding of the appellants' case especially as to pricing. Despite what they say it is clear that skate hire is additional and optional.

(3) About half of skaters will bring their own skates to the rink, and in some cases skates only will be hired.

(4) Neither supply is predominant and neither ancillary, as HMRC have previously accepted

(5) To treat the supplies as a single supply would be artificial (see in this connection Case C-41/04 *Levob Verzekeringen v Staatssecretaris van Financiën* [2005] ECR I-9433, [2006] STC 766 ("*Levob*")

(6) There is physical separation between the admission booth and the skate hire zone.

(7) There are political and socio-economic reasons to zero rate children's skates and to treat those hired on their own differently from those hired as part of a package would be unjust and illogical.

78. As to her second argument she seeks to argue that if there is a single supply it is one where the component parts may be charged at different rates.

79. UK legislation has specifically identified the hire of children's footwear as attracting a lower rate of VAT and, in accordance with the C-94/09 *EC v France* ("the *French Undertakers* case"), this amounts to a concrete and specific supply.

80. *Colaingrove v HMRC* [2015] UKUT 80 (TC) and [2017] EWCA Civ 332 ("*Colaingrove fuel"*) is distinguishable. Only UK and Ireland zero rate children's clothing and footwear by virtue of art. 114 of the PVD. It is submitted that Parliament intended that the zero rate would apply to a wider interpretation of supply in s 30 and Group 16 Schedule 8 than the "supply" in Schedule 7A VATA (the reduced rate).

81. Children's skates are only ever hired in the context of ice skating whereas electricity and fuel as in *Colaingrove fuel* can form parts of many different packages. It is conceivable that Parliament did intend for the zero rate in Group 16 to be carved out.

82. As to fiscal neutrality, it is standard practice in the industry to treat packaged supplies of admission and hire of skates as separate supplies, as indeed HMRC initially accepted with PIB.

83. It is also standard in the ten pin bowling industry as confirmed in HMRC correspondence.

HMRC's submissions

84. Mr Golder submits that in this case there is a single transaction for the supply of access to and use of an ice rink together with the supply of children's skates, and there is therefore a single composite supply chargeable to VAT at the standard rate.

85. Elaborating, Mr Golder says that HMRC's submission breaks down into three parts.

86. The first is the fact that multiple services including skate hire are advertised as a package and customers pay a single price, in support of which proposition Mr Golder submits that:

(1) The websites show they advertised "skating with skates" as a package at a single price on their websites.

(2) Customers without their own skates will purchase the whole package at reception, the first place a customer goes to when they arrive.

(3) It is likely that most users will not own their own skates, and consequently typical customers will have to obtain skates to enjoy the facilities. It therefore makes perfect sense for the appellants to supply customers with skates at the same time the customer intends to skate.

(4) Customers admittedly have an option to go for the package but if a customer does not have skates the easiest option is to hire the skates in the package.

87. The second is that for typical customers skating is their aim, in support of which proposition Mr Golder submits that:

(1) The appellants have developed their business to encourage customers to skate at their facilities.

(2) It follows that the hire of skates must be an ancillary supply, as it is, following CPP, "a means of better enjoying the principal service". The skates are a necessary, but ancillary means of achieving the aim of skating.

88. The third is that the supply of ice skates is integral to the use of the ice rink, in support of which proposition Mr Golder submits that:

(1) The supply of skates and the access to and use of the rink are so closely integrated that they form an integral operational and economic transaction. A customer cannot have one without the other.

(2) While some customers will have their own skates, if a customer does not posses their own ice skates they expect the ice rink to supply them.

(3) The Insight data shows that nearly 70% of ice rink skaters skate for fun and half do not own their own skates. For them the skating with skates package is the only viable option.

(4) It would then be artificial to separate the supply of ice rink access from the supply of skates (see *CPP* and *Levob*), as that would distort the functions of the VAT system.

(5) *Levob* shows that it is a strong indication of a single composite supply is two or more supplies would not be of particular use to the typical customer is they were supplies in isolation.

(6) That HMRC zero rates gloves and magazines is correct because they are not supplies as part and parcel of another predominant supply. Here access is

the predominant supply and the hire of skates ancillary (per *CPP*) or equally, per *Levob*, they form an economically indissociable supply.

89. In relation to the argument put in the grounds of appeal that HMRC had not taken account of developments since *CPP*, Mr Golder assumes that to be a reference to the *French Undertakers* case.

90. That case permitted a member state to derogate from the general principle of VAT by allowing a lower rate of VAT 'for concrete and specific' aspects of what would otherwise be a single composite supply.

91. In *Wm. Morrison plc v HMRC* [2013] UKUT 247 (TCC) ("*Morrisons*") the Upper Tribunal (Vos J as he then was) dismissed the notion that *French Undertakers* allowed Morrisons to carve out the charcoal element in their otherwise fully taxable supply of disposable barbecues because the lower rate for fuel legislation did not seek to describe any specific and concrete application of the fuel rate to charcoal supplied in a barbecue.

92. The logic of *Morrisons* applies equally to an attempt to carve out children's footwear.

The "section 30 is different" argument

93. In oral argument Ms Brown sought to draw a distinction, on the basis of the Court of Appeal's reasoning in *Colaingrove fuel*, between the legislation for reduced rating in s 29A VATA and that for zero rating in s 30 VATA with a view to distinguishing *French Undertakers* and *Morrisons.* This argument had not been included in her skeleton, and while Mr Golder dealt with it on the hoof, I permitted him to make post-hearing submissions if he wished, which he did.

94. Ms Brown's argument was that the reasoning in *Colaingrove fuel* (and in *Morrisons* and *French Undertakers*) depended on the precise wording in s 29A VATA and the wording in s 30 was different.

95. The additional words in s 30(1) are "whether or not VAT would be chargeable on the supply apart from this section" before the paragraph stating that "no VAT shall be charged on the supply."

96. These she said make it clear that a zero-rated supply included in a composite supply are always to be carved out.

97. HMRC say that the additional words are there for a completely different purpose. The words in s 29A that have the effect of allowing no carve out (the precise description of the lower-rated supplies) are the same as the words in s 29(2), the precise description in the saw terms of zero-rated supplies. Parliament could not have intended any difference.

98. The true purpose of the additional words is to establish a hierarchy of liability in a case where a supply might be both exempt or zero-rated. They cite in support *CGI*

Pensions Trust Ltd v Commissioners of Customs and Excise [1998] VAT Decision 15926.

Discussion

99. Unlike many VAT cases on the general issue of single and multiple supplies, this case was mercifully free of great long lists of European and domestic authorities. This is the correct approach because, as we have been told by Lord Hoffmann everything starts with *CPP*, and with the exception of *Levob* and maybe a domestic case or two, everything ends there.

100. In the House of Lords, after the Court of Justice ("CJEU") had given its decision, Lord Slynn of Hadley said of that decision:

> "18. The court further held that in deciding whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately, regard must first be had to all the circumstances in which that transaction takes place, taking into account:
>
> '29. . . . first, that it follows from article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, secondly, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.
>
> 30. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied: *Customs and Excise Commissioners v. Madgett and Baldwin (trading as Howden Court Hotel)* (Joined Cases C-308/96 and 94/97) [1998] STC 1189, 1206, para 24.' (p 627.)
>
> Even if a single price is charged for the arrangements, which may indicate a single supply, it must still be considered whether the arrangements in the present case indicated that
>
> '31. . . . the customers intended to purchase two distinct services, namely an insurance supply and a card registration service, then it would be necessary to identify the part of the single price which related to the insurance supply, which would remain exempt in any event. The simplest possible method of calculation or assessment should be used. . . . '

Accordingly it is for the National Court

> '32. . . . to determine, in the light of the above criteria, whether transactions such as those performed by CPP are to be regarded for VAT purposes as comprising two independent supplies, namely an exempt insurance supply and a taxable card registration service, or whether one of those two supplies is the principal supply to which the other is ancillary, so that it receives the same tax treatment as the principal supply.'"

101. In *CPP* the VAT & Duties Tribunal had found that there were 15 elements in what was supplied by CPP to the customer. Holding that the characterisation of those elements as forming a single supply or more than one, the House, considering the elements from an economic point of view held that there was a principal supply, insurance, and an "ancillary" supply, the card registration service and other minor matters. Thus there was a single supply of an insurance transaction and the supply was therefore exempt.

102. *CPP* did not seem to decide what the approach should be to a package of supplies where it could not be said that there was only one principal supply to which any others were ancillary.

103. The CJEU faced this issue in *Levob*. In that case *Levob*, an insurance company, imported computer software from a US company and also commissioned the US company to customise the software for its operations (by translating it into Dutch etc) and to provide installation and training. Separate payment was made for the different elements (unlike the position in *CPP* where a single payment was made to CPP).

104. The CJEU said, of the approach that must be taken:

> "19 According to the Court's case-law, where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place in order to determine, firstly, if there were two or more distinct supplies or one single supply and, secondly, whether, in the latter case, that single supply is to be regarded as a supply of services (see, to that effect, Case C-231/94 *Faaborg-Gelting Linien* [1996] ECR I-2395, paragraphs 12 to 14, and *CPP*, paragraphs 28 and 29).
>
> 20 Taking into account, firstly, that it follows from Article 2(1) of the Sixth Directive that every transaction must normally be regarded as distinct and independent and, secondly, that a transaction which comprises a single supply from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must in the first place be ascertained in order to determine whether the taxable person is making to the customer, being a typical consumer, several distinct principal supplies or a single supply (see, by analogy, *CPP*, paragraph 29).
>
> 21 In that regard, the Court has held that there is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal supply, whilst one or more elements are to be

> regarded, by contrast, as ancillary supplies which share the tax treatment of the principal supply (*CPP*, cited above, paragraph 30, and Case C-34/99 *Primback* [2001] ECR I-3833, paragraph 45).
>
> 22 The same is true where two or more elements or acts supplied by the taxable person to the customer, being a typical consumer, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split."

105. It went on to say:

> "24 With regard to the dispute in the main proceedings, it is apparent, as held by the Gerechtshof te Amsterdam whose decision was the subject of the appeal in cassation pending before the referring court, that the economic purpose of a transaction such as that which took place between FDP and Levob is the supply, by a taxable person to a consumer, of functional software specifically customised to that consumer's requirements. In that regard, and as the Netherlands Government has correctly pointed out, it is not possible, without entering the realms of the artificial, to take the view that such a consumer has purchased, from the same supplier, first, pre-existing software which, as it stood, was nevertheless of no use for the purposes of its economic activity, and only subsequently the customisation, which alone made that software useful to it.
>
> 25 The fact, highlighted in the question, that separate prices were contractually stipulated for the supply of the basic software, on the one hand, and for its customisation, on the other, is not of itself decisive. Such a fact cannot affect the objective close link which has just been shown with regard to that supply and that customisation nor the fact that they form part of a single economic transaction (see, to that effect, *CPP*, paragraph 31).
>
> 26 It follows that Article 2 of the Sixth Directive must be interpreted as meaning that such supply and such subsequent customisation of software are, in principle, to be regarded as forming a single supply for VAT purposes."

106. In our view in the light of the decisions in these two cases it is plain that in this case there are two supplies, a supply of the use of a skating rink and the supply of hire of ice skates. Neither is ancillary to the other as they both can be, and are, purchased on their own. Far from it being artificial to split the package into two, that is precisely what is in effect done in a substantial percentage of the appellant's transactions with those using its facilities.

107. We do not think it matters at all that there is one price for the package which is different from the combined prices of the two elements taken separately, any more than it mattered in *Levob* that there were separate prices for the elements of a single supply.

108. From the customers' viewpoint a consumer of the package is getting the two things they want. The two elements are dissociable, not because of any spatial

separation between the ticket office and the skate hire booth, but because that is the only appropriate way of looking at the supply of the elements.

109. It is also a notable feature of this case that is not present in *CPP*, *Levob* or any other similar case of which we are aware that a substantial percentage of customers will choose to buy one or other of the element but not both, and that it is possible that the same customer may at one time buy a package and at another buy only one of the elements. Therefore it makes no sense to say that the elements are not dissociable when on a majority of the occasions that users enter the reception to use the rinks they choose only one of the two main elements, entry to the rink.

110. We therefore hold that the appellant's appeal succeeds.

111. The appellant had what might be regarded as a first fall back and a second fall back position.

112. The first fall back position is that case law in the CJEU and domestically establishes that even though there is a single supply, an element of that supply taxed at a different rate may be carved out.

113. In our view *Colaingrove fuel* gives the conclusive answer in this case, without any need for us to embark on a lengthy survey of other decisions. In giving the only reasoned judgment Arden LJ said at [45] – [48]:

> "45. In my judgment, HMRC are correct to say that the meaning of VATA is plain. The fuel charge does not apply where the supply is a composite supply of some other service.
>
> 46. Section 5 VATA applies to supplies of any form, but, as Mr Hyam submits, that does not mean that something which is not a supply for VAT purposes is to be treated as such. Moreover, a statute is not the place for a variable contextual meaning. Unless there is good reason for some other interpretation, a word used in a statute conventionally has the same meaning wherever it occurs in that statute. Paragraph 4 of Schedule 4, which states that the supply of fuel is to be treated as a supply of goods, throws no light on the issue in this case.
>
> 47. Section 29A applies the reduced rate to supplies which are 'of a description' specified in Schedule 7A. So the fuel charge is defined not by reference to use but by reference to the supplies described in Schedule 7A. It is not therefore a mere use-based test, as Mr Cordara submits.
>
> 48. Within Schedule 7A and 8 are a number of provisions for apportionment, but none of them applies where the fuel is part of a composite supply of fuel and some other goods or services. So the provisions for apportionment are not an indication that Parliament intended the fuel charge to apply where there was a composite supply of which fuel was the minor part, but to the contrary. If it had been Parliament's intention that the reduced rate should apply to an element of the supply, it would have inserted some similar apportionment provision. This is not a case (such as the exclusion of contents from

> caravans) where the CPP principles need to be excluded since fuel forms the minor part of a composite supply and is subject to the limitation that it must be supplied for domestic use."

114. The reference by Arden LJ to Schedule 8 in [48] makes it clear that the scope of the decision is not limited to reduced rate cases such as *Colaingrove fuel*, *Morrisons* or *French Undertakers*. We can see nothing in the wording of Group 16 in Schedule 8 that could found the beginnings of an argument that it is outside the scope of the decision in *Colaingrove fuel*.

115. As to the argument in the hearing about whether Colaingrove fuel and the other cases cited in it do not apply to Schedule 8 (zero-rating) because of a difference in wording, we find wholly convincing HMRC's post-hearing submissions (and indeed Mr Golder's submissions orally) as set out at §97 and §98 that there is no relevant difference between the wording of s 29A and that in s 30 VATA. Therefore *Colaingrove fuel* and *Morrisons*, which are both binding on us, apply to deny a carve out.

116. Thus if we had found for HMRC on the main issue, we would not have changed our view because of this argument.

117. We do not intend to consider the fiscal neutrality arguments because we do not need to, but more than that we do not think we had anything like the materials that would enable us to form any view. Mr Fife's anecdotal experiences are not enough.

Further observations

118. We were not asked to consider whether the assessments made in this case were in fact made to the best of Mr Merson's judgment. But we find it decidedly odd that following a VAT inspection and meeting with the management of PIB in 2012 after which he took policy advice and approved their zero-rating the hire of skates, he later reversed that decision, apparently because of the issue by HMRC of revised guidance to its staff about *CPP* (which had been heard years before) – see §14.

119. Even odder was the decision to apply this guidance (or to have it applied by specialists for him) to the companies in this case without any attempt to discover whether there were any differences between PIB's operations and that of the appellants and without visiting their operations or talking to their management. Indeed all he asked the appellants was whether their exempt or zero-rated sales covered children's ice skates, and on the basis of their confirmation he justified his assessments.

120. That the text of his letter to IRC was simply cut and pasted can be seen from the initially puzzling reference to PIB's future conduct in it – see §17.

121. Mr Merson also seems to have confessed that his figures in his assessments were obviously wrong.

122. We also do not understand why PIB and possibly other cases in common ownership were not able to convince HMRC that it would cause them hardship to pay the VAT demanded, but the appellants could.

123. Nor do we understand why if HMRC changed their view of *CPP* etc in 2012 or 2013 they felt it appropriate to assess large amounts (over £600,000 in IRC's case) going back four years: obviously they had the statutory right to, but that should not necessarily the be all and end all.

124. Finally to threaten Schedule 24 FA 2007 penalties on the basis of what Mr Merson knew (or did not know) when he threatened them was not, to our minds, the action of a reasonable VAT officer.

Decision

125. The appeals succeed and the assessments are cancelled.

126. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 20 SEPTEMBER 2017