[2018] UKFTT 0599 (TC)

TC06761

Appeal number: TC/2017/03738

VALUE ADDED TAX – place of supply of services – reverse charge – consideration of Articles 43 and 44 of the Principle VAT Directive – whether or not taxpayer engaged in non-economic business activity required to account for VAT under reverse charge mechanism — held not

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE WELLCOME TRUST LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT

Sitting in public at Taylor House, London on 3 and 4 October 2018

Frank Mitchell, counsel, instructed by Pricewaterhouse Coopers LLP, for the Appellant

Eleni Mitrophanous, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal against the decisions of the Respondents ("HMRC") rejecting claims by the Appellant, Wellcome Trust Limited ("WTL"), for repayment of alleged overdeclared VAT pursuant to section 80 Value Added Tax Act 1994 ("VATA").

2. The claims in question were made on 29 April 2016 for the period 03/12, on 3 June 2016 for the periods from 06/12 to 03/16 and on 21 June 2017 for the periods from 03/16 to 03/17. The total VAT included in these claims was £13,113,822.

3. The issue in this appeal relates to the correct tax treatment of the management fees paid by WTL to investment managers outside the EU. These fees are consideration paid by WTL for a supply of investment management services and the issue between the parties is whether the place of supply of the investment management services is the UK.

4. HMRC say that the place of supply is the UK, so that WTL was right to account for VAT on the investment management fees in the UK pursuant to the reverse charge provisions set out in EU Directive 2006/112 (the Principal VAT Directive) ("PVD") and the Value Added Tax Act 1994 ("VATA"). WTL says that the place of supply is not the UK such that no tax is due here.

5. HMRC first assessed WTL for VAT on the basis of their position for the period ending 09/10. WTL did not appeal against that assessment and from 2010 onwards, accounted for VAT under the reverse charge mechanism as required by VATA. However, from 29 April 2016 onwards, WTL made a series of error correction claims for repayment under section 80 VATA, as set out above.

The Facts

6. There is no dispute as to the relevant facts in this case and the parties have provided an agreed statement of facts, which is attached as an appendix to this decision.

7. I also received a witness statement from John Hemming, Head of Tax for WTL, which was taken as read and no cross-examination took place.

8. The key facts are:

(1) WTL is the sole trustee of a charitable trust, the Wellcome Trust, which makes grants for medical research. It receives income from investments and also has a number of comparatively minor activities including sales, catering and rental of properties. It is these comparatively minor activities in respect of which it is registered for VAT.

(2) Investment income is predominantly from overseas investments in relation to which WTL receives services from investment managers from within and

outside the EU. The investment income is the source of the majority of the funding for the grants that WTL provides.

(3) WTL is registered for VAT under Registration number 744 4952 11 and is a taxable person under Article 9 of Directive 2006/112.

(4) In the case of *Wellcome Trust Ltd v Commissioners of Customs and Excise* (C155/94) [1996], the CJEU replied to questions posed by the VAT tribunal, stating that the concept of economic activities within the meaning of Article 4(2) of the Sixth Directive (now Article 9(1) of Directive 2006/112) did not include an activity consisting in the purchase and sale of shares and other securities by a trustee in the course of the management of the assets of a charitable trust. As a consequence, WTL was denied input tax recovery on the entirety of the costs incurred in relation to its non-EU portfolio. WTL's activities are agreed to be substantially unchanged from those considered in the 1996 CJEU decision.

The Law

9. The principle legislation in this case is contained in Articles 43, 44 and 45 of the PVD:

"Place of supply of services

Section 1

Definitions

Article 43

For the purpose of applying the rules concerning the place of supply of services:

1. a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him;

2. a non-taxable legal person who is identified for VAT purposes shall be regarded as a taxable person.

Section 2

General rules

Article 44

The place of supply of services to a taxable person **acting as such** shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the

absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.

Article 45

The place of supply of services to a non-taxable person shall be the place where the supplier has established his business. However, if those services are provided from a fixed establishment of the supplier located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the supplier has his permanent address or usually resides."

10. Article 196 PVD provides for the application of a 'reverse charge', *i.e.* for VAT to be paid by the customer rather than the supplier in certain circumstances as follows:

"VAT shall be payable by any taxable person, or non-taxable legal person identified for VAT purposes, to whom the services referred to in Article 44 are supplied, if the services are supplied by a taxable person not established within the territory of the Member State."

11. Council Implementing Regulation (EU) No 282/2011 ("the Implementing Regulation") lays down implementing measures for the PVD including in relation to place of supply. The following provisions of the Implementing Regulation itself are of relevance:

"**Place of supply of services**

(Articles 43 to 59 of Directive 2006/112/EC)

Subsection 1

Status of the customer

Article 17

1. If the place of supply of services depends on whether the customer is a taxable or non-taxable person, the status of the customer shall be determined on the basis of Articles 9 to 13 and Article 43 of Directive 2006/112/EC.

2. A non-taxable legal person who is identified or required to be identified for VAT purposes under point (b) of Article 214(1) of Directive 2006/112/EC because his intra-Community acquisitions of goods are subject to VAT or because he has exercised the option of making those operations subject to VAT shall be a taxable person within the meaning of Article 43 of that Directive.

Article 18

1. Unless he has information to the contrary, the supplier may regard a customer established within the Community as a taxable person:

(a) where the customer has communicated his individual VAT identification number to him, and the supplier obtains confirmation of the validity of that identification number and of the associated name and address in accordance with Article 31 of Council Regulation (EC) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (5);

(b) where the customer has not yet received an individual VAT identification number, but informs the supplier that he has applied for it and the supplier obtains any other proof which demonstrates that the customer is a taxable person or a non-taxable legal person required to be identified for VAT purposes and carries out a reasonable level of verification of the accuracy of the information provided by the customer, by normal commercial security measures such as those relating to identity or payment checks.

2. Unless he has information to the contrary, the supplier may regard a customer established within the Community as a non-taxable person when he can demonstrate that the customer has not communicated his individual VAT identification number to him.

3. Unless he has information to the contrary, the supplier may regard a customer established outside the Community as a taxable person:

(a) if he obtains from the customer a certificate issued by the customer's competent tax authorities as confirmation that the customer is engaged in economic activities in order to enable him to obtain a refund of VAT under Council Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory;

(b) where the customer does not possess that certificate, if the supplier has the VAT number, or a similar number attributed to the customer by the country of establishment and used to identify businesses or any other proof which demonstrates that the customer is a taxable person and if the supplier carries out a reasonable level of verification of the accuracy of the information provided by the customer, by normal commercial security measures such as those relating to identity or payment checks.

Subsection 2

Capacity of the customer

Article 19

For the purpose of applying the rules concerning the place of supply of services laid down in Articles 44 and 45 of Directive 2006/112/EC, a taxable person, or a non-taxable legal person deemed to be a taxable person, who receives services exclusively for private use, including use by his staff, shall be regarded as a non-taxable person.

Unless he has information to the contrary, such as information on the nature of the services provided, the supplier may consider that the services are for the customer's business use if, for that transaction, the customer has communicated his individual VAT identification number.

Where one and the same service is intended for both private use, including use by the customer's staff, and business use, the supply of that service shall be covered exclusively by Article 44 of Directive 2006/112/EC, provided there is no abusive practice."

12. The equivalent UK legislation is set out in s7A VATA as follows:

"**7A Place of supply of services**

(1) This section applies for determining, for the purposes of this Act, the country in which services are supplied.

(2) A supply of services is to be treated as made—

(a) in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and

(b) otherwise, in the country in which the supplier belongs.

(3) The place of supply of a right to services is the same as that in which the supply of the services would be treated as made if made by the supplier of the right to the recipient of the right (whether or not the right is exercised); and for this purpose a right to services includes any right, option or priority with respect to the supply of services and an interest deriving from a right to services.

(4) For the purposes of this Act a person is a relevant business person in relation to a supply of services if the person—

(a) is a taxable person within the meaning of Article 9 of Council Directive 2006/112/EC,

(b) is registered under this Act,

(c) is identified for the purposes of VAT in accordance with the law of a member State other than the United Kingdom, or

(d) is registered under an Act of Tynwald for the purposes of any tax imposed by or under an Act of Tynwald which corresponds to value added tax, and the services are received by the person otherwise than wholly for private purposes."

Discussion

13. The PVD is directly applicable EU law and therefore, to the extent that there is any difference between the PVD and the VATA the PVD will prevail. I will therefore primarily address the provisions of the PVD.

14. This case turns in its entirety on the meaning of the words "acting as such" in Article 44 of the PVD. WTL claims that these words take it out of Article 44 and therefore out of the requirement to account for VAT on investment management services supplied to it from outside the EU, whereas HMRC claims that they do not.

15. There is agreement between the parties that there are three categories of activity which must be considered:

(1) Economic business activity,

(2) Non-economic business activity, and

(3) Private activity, which includes services supplied for use by a taxable person's staff.

16. As stated above, in the case of *Wellcome Trust Ltd v Commissioners of Customs and Excise* (C155/94) [1996], the CJEU confirmed that the concept of "economic activity" did not include an activity consisting in the purchase and sale of shares and other securities by a trustee in the course of the management of the assets of a charitable trust. As a consequence, WTL falls within the second category above, carrying on non-economic business activity.

17. It would be tempting to treat non-economic business activity and private activity as being the same but it was made clear in *Vereniging Noordelijke Land- en Tuinbouw Organisatie v Staatssecretaris van Financiën* Case C-515/07 that these are two separate categories. This principle was also followed in the earlier FTT case of *Wellcome Trust Ltd v HMRC* [2016] UKFTT 56 (TC).

Interpretation

18. It was established in *SIA "E LATS"* Case C-154/17 that words in directives should be interpreted by reference to their context, the objectives of the legislation and the history of the provisions in question.

19. Mr Mitchell, for WTL, argued that the words "acting as such" were a term of art and that therefore they must carry the same meaning wherever they appear in the PVD, and in particular that they must carry the same meaning as they do in Article 2(1) of the PVD. I do not necessarily accept this as an incontrovertible rule which can be followed blindly to a definitive conclusion and consider that I must interpret the words in the context in which they appear, as qualifying the words which they follow, and in the context of the words which they follow and qualify.

20. Mr Mitchell referred me to Articles 17 and 19 of the Implementing Regulation. These draw a clear distinction between the status of the person, ie is he a taxable person or not (Article 17) and the capacity in which he is acting (Article 19). These terms are not mentioned in Articles 43, 44 and 45 but they are mentioned in the headings to those articles in the Implementing Regulation and Mr Mitchell argued that in effect Article 43 determines the person's status and Articles 44 and 45 address the question as to the capacity in which he is acting. This framework, of status and capacity, should therefore, in Mr Mitchell's submission, be incorporated into the underlying structure of Articles 43, 44 and 45. He argued that:

(1) Article 43 determines the person's status as a taxable person,

(2) Article 44 determines the place of supply for persons acting in the capacity of a taxable person, and

(3) Article 45 determines the place of supply for supplies to a non-taxable person.

21. Miss Mitrophanous, on behalf of HMRC, argued that Article 43 was a deeming provision which acted as a signpost, separating taxpayers between Articles 44 and 45. Miss Mitrophanous argued that this article took taxable persons who received supplies for private purposes out of Article 44 and directed them towards Article 45. I regret that I can find no such words in Article 43. Article 43 is quite clear in saying that anyone who is a taxable person, because some of his activities consist of making taxable supplies, "shall be regarded as a taxable person in respect of all services rendered to him." This must in my view incorporate taxable persons who receive supplies for private purposes and taxable persons who receive supplies for the purposes of a non-economic business purpose, such as WTL. There are no words in Article 43 which specifically separate out supplies for private purposes.

22. There are words to this effect however in Article 19 of the Implementing Regulation, as set out above:

> "For the purpose of applying the rules concerning the place of supply of services laid down in Articles 44 and 45 of Directive 2006/112/EC, a taxable person, or a non-taxable legal person deemed to be a taxable person, who receives services exclusively for private use, including use by his staff, shall be regarded as a non-taxable person."

23. WTL did not argue that it fell within Article 19 and does not in my view need to.

24. It is therefore this provision which takes taxable persons receiving supplies for private purposes into Article 45, but this does not solve the question as to the effect of the words "acting as such" in Article 44. If Article 19 of the Implementing Regulation is sufficient to take supplies for private purposes out of Article 44 then the words "acting as such" are totally otiose and mean nothing, but I must work on the basis that they mean something. I understood Miss Mitrophanous to argue that these words took supplies for private use out of Article 44 but did not operate so as to take supplies for non-economic business use out of Article 44. I find this proposition difficult to accept.

Is there a Gap?

25. Miss Mitrophanous, on behalf of HMRC, argued that all supplies of services must fall within either Article 44 or Article 45, and it was common ground between the parties that WTL did not fall within Article 45. There could not be a gap, or lacuna, between the two because this would lead to uncertainty and complications in the operation of the provisions regarding the place of supply of intra-community services. The objectives of certainty and simplicity are clearly set out in the various recitals to the PVD and the Implementing Regulation.

26. The need for simplicity and certainty is also confirmed by *Welmory sp op zoo v Dyrektor Izby Skarbowei w Gdansku* Case C-605/12 but it does not in my view address the specific issue of whether or not it is possible for there to be a gap between Articles 44 and 45.

27. In contrast, Mr Mitchell argued that this was not a problem because sufficient certainty and simplicity existed within the provisions of Article 18 of the Implementing Regulation, which, essentially, provides that the supplier of services, wishing to know whether or not he should charge VAT on his services, is entitled to rely on whether or not the customer has provided him with a VAT number. If the customer has provided a VAT number then the supplier is entitled not to charge VAT on his supplies, on the basis that the customer would be accounting for VAT under the reverse charge provisions. If on the other hand no VAT number has been provided then the supplier is required to act as if he were supplying services to a non-taxable person and is thus required to account for VAT himself.

28. It was agreed that WTL had provided its VAT number to all its suppliers of investment management services based in the EU but had not provided its VAT number to its investment managers based outside the EU.

29. I am persuaded that because of the provisions of Article 18 of the Implementing Regulation there is no threat to the simplicity and certainty of the VAT treatment of intra-community services if there is a gap or lacuna between Articles 44 and 45.

Travaux Preparatoires

30. Mr Mitchell then referred me to the *Travaux Preparatoires*, and asked me to consider the various reports of the EU Working Party which developed Articles 43, 44 and 45. These discussions took place over a period of over two years. The words

"acting as such" are present in some versions of the text but not in others. In some texts the words "except where these services are for his own private use or for the private purpose of his staff" appear, but these words are again removed in subsequent drafts, only to be replaced by "acting as such", which is again removed.

31. The final version, set out in a report dated 16 March 2006, contains the words "acting as such". It also contains an interesting note:

> "The phrase "acting as such" … as worded in the proposal to be found in FISC 150 (a previous report), was deleted from the text afterwards, since a number of member states had problems with this phrase. Nevertheless, in the light of the ongoing discussion, member states may accept this phrase as a compromise now, as it reflects existing rules for the intra-community supply of goods in Article 28a(1)(a)."

32. This could be an example of the constructive ambiguity which is sometimes used within EU reports, designed to enable all member states to subscribe to the final wording, but, given the significant period of time over which these words were discussed, it is clear that the words were intended to mean something.

33. Mr Mitchell argued that the *Travaux Preparatoires* demonstrated that:

> (1) The phrase "taxable person acting as such" in article 44 means what it says and a taxable person must be "acting as such" in order for the place of supply rule to apply.
>
> (2) The phrase 'acting as such' was intended to have the same meaning in article 43 as it does in article 28a(1)(a).
>
> (3) The deeming provision now contained in article 43 only deems those engaged in non-economic use or private use to be, or have the status of, taxable persons, it does not deem them to be 'acting as' taxable persons.
>
> (4) Article 43 does not distinguish between non-economic use and private use and was not intended to, in that the exception for private use was deliberately and consciously removed from an early draft.

34. In *Effort Shipping Co Ltd v Linden Management SA and another* [1998] UKHL 1, Lord Steyn stated, at page 509:

> "Although the text of a convention must be accorded primacy in matters of interpretation, it is well settled that *Travaux Preparatoires* may be used as a supplementary means of interpretation. … Following *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696, I would be quite prepared, in an appropriate case, involving truly feasible alternative interpretations of a convention, to allow the evidence contained in the *Travaux Preparatoires* to be determinative of the question of construction."

Importantly however he went on to say:

> "But that is only possible where the court is satisfied that the *Travaux Preparatoires* clearly and indisputably point to a definite legal intention. Only a bull's eye counts. Nothing less will do."

35. This view was confirmed in relation to EU law in *Ozlem Kupeli and 668 others v Atlasjet Havacilik Anonim Sirketi* [2017] EWCA Civ 1037, at para 13.

36. I am not sure that the note accompanying the inclusion of the words "acting as such" in the final version of the *Travaux Preparatoires* qualifies as a bull's eye, and I do not regard it as determinative, but it does in my view clearly indicate that the words were meant to mean something and are not meaningless, as HMRC's interpretation seems to require.

Equal Treatment

37. Mr Mitchell also raised the question of equal treatment, or fiscal neutrality. He maintained that it would offend this principle if WTL were to be treated differently from, say, a barrister, who is registered for VAT in respect of his work as a barrister, but also has an investment portfolio. It was common ground that HMRC would not require the barrister to account for VAT under the reverse charge rules in respect of investment management services received from outside the EU but they are arguing that WTL should account for VAT in this manner even though it is in precisely the same position.

38. I do not however find this argument persuasive. In my view the investment activities the barrister is carrying out are private activities. The investment activities carried out by WTL are at the very core of its corporate purposes. The situation is very different and in my view the principle of equal treatment does not come into play in this appeal.

Summary

39. The key question remains. What do the words "acting as such" mean, if anything?

40. HMRC argue that the words in Article 43:

> "a taxable person who also carries out activities or transactions that are not considered to be taxable supplies of goods or services in accordance with Article 2(1) shall be regarded as a taxable person in respect of all services rendered to him."

over-ride anything in Article 44 and mean that anyone who is a taxable person is treated as such for all purposes.

41. The problem with this interpretation is that it would mean, without any further language excluding such a person, that a taxable person receiving supplies for private

purposes would still fall within Article 44 and would be required to account for VAT under the reverse charge rules. HMRC accept that this does not happen. They must therefore argue that the words "acting as such" exclude taxable persons receiving supplies for private purposes from Article 44 but do not take out taxable persons receiving supplies for non-economic business purposes. This is simply not a logical proposition. There is nothing in those words which permits such an interpretation.

42. Where someone who is receiving supplies for private purposes is excluded from Article 44 then Article 19 of the Implementing Regulation clarifies that he will fall within Article 45, along with other non-taxable persons, but I can see nothing in the construction of these provisions which requires someone to fall within either Article 44 or Article 45.

43. In conclusion therefore I find that the words "acting as such" in Article 44 of the PVD effectively exclude WTL from the provisions of Article 44 to the extent that those services are supplied for the purposes of WTL's non-economic business activity, ie for its activities consisting of the purchase and sale of shares and other securities by WTL in the course of its management of the assets of the charitable trust. I find that WTL is not therefore required to account for the VAT on the investment management services it receives from outside the EU under the reverse charge rules.

UK Legislation

44. I must now, for the sake of completeness, address the UK legislation as it applies to this issue. It is clearly not compliant with my interpretation of Articles 43 and 44 of the PVD.

45. It is well accepted that in such circumstances the Courts must apply the principles of conforming interpretation to the UK legislation.

46. In *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Commis*sioners [2017] STC 696 the Court of Appeal confirmed that:

> "105 the court is not constrained by the conventional rules of statutory construction but is permitted not only to depart from the strict application of the words of the statute but to imply words necessary to comply with EU law…
>
> 106 What is required is that the interpretation arrived at should 'go with the grain of the legislation' and be 'compatible with the underlying thrust of the legislation being construed'…"
>
> 107 The process of interpretation cannot create a wholly different scheme from any scheme provided by the legislation: *Vodafone* at [70] per Longmore LJ, citing Lord Rodger of Earlsferry in *Ghaidan v Mendoza* at [110]."

47. Mr Mitchell submitted that s7A VATA could be rendered entirely in conformity with the PVD if subsection (4)(d) is construed as requiring that the services be "received by the person otherwise than for private [or non-economic] purposes". The

simple insertion of these two words goes with the grain of the exclusion for those who are not "acting as" taxable persons and does not "create a wholly different scheme from any scheme provided by the legislation".

48. I agree with this approach.

Decision

49. For the reasons set out above therefore I have decided that WTL's appeal should be ALLOWED.

50. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 10 October 2018

Agreed Statement of Facts

Background to the Appellant, the Wellcome Foundation and the Wellcome Trust

1. In 1924 the Wellcome Foundation Limited (the "Foundation") took over the pharmaceutical business of Burroughs, Wellcome and Co., founded as a partnership in 1880 by two pharmacists, Silas Burroughs and Henry Wellcome.

2. Sir Henry Wellcome, who died in 1936, provided in his will that the management of all his shares in the Foundation was to be entrusted to the Wellcome Trust (the "Trust"), the trustees of which were to use the proceeds from the shares for the advancement of medical and scientific research for the improvement of the wellbeing of mankind.

3. The Appellant, a company incorporated in England on 24 April 1992 under number 2711000, was appointed to act as the sole corporate trustee of the Trust by an order of the High Court dated 1 June 1992, replacing the natural persons who had previously exercised that function.

The Trust's constitution and objects

4. The current constitution of the Trust was established by a Scheme of the Charity Commission for England and Wales dated 20 February 2001 and further amended on 4 October 2011. The Appellant, as trustee of the Trust may perform or discharge its functions as trustee of the Trust in any manner permitted by this constitution, by law or by its memorandum or articles of association from time to time.

5. The objects of the Trust are set out at clause 4 of this constitution which are:

> (1) to protect, preserve and advance all or any aspects of the health and welfare of humankind and to advance and promote knowledge and education by engaging in, encouraging and supporting:
>
> (a) research into any of the biosciences; and
>
> (b) the discovery, invention, improvement, development and application of treatments, cures, diagnostics and other medicinal agents, methods and processes that may in any way relieve illness, disease, disability or disorders of whatever nature in human beings or animal or plant life; and
>
> (2) to advance and promote knowledge and education by engaging in, encouraging and supporting:
>
> (a) research into the history of any of the biosciences; and
>
> (b) the study and understanding of any of the biosciences or the history of any of the biosciences.

6. Clause 5 of this constitution provides that in pursuing research in accordance with clause 4(1), the Appellant shall do so with the intention of producing results that add or may add to scientific knowledge. It is expected that a large part of such research may lead to results that will benefit the life, health and well-being of humankind.

Background to the Appellant's investment activities

7. In 1980 the value of the Trust's holding in the Foundation was £250 million. In 1984, it was considered prudent to diversify this holding, the assets of the Trust having consisted until then of shares and securities in the Foundation.

8. In 1985 the Charity Commissioners drew up a scheme authorising the sale of part of the shareholding in the Foundation, subject to the condition that the Trust retained 50% of its voting shares. The shares in the Foundation were also exchanged for shares in a new holding company, Wellcome plc. The sale effected in 1985 made £200 million, which was used for making other investments.

9. In July 1987 the Trustees' investment powers were increased by the Charity Commissioners (and approved by the High Court) so as to permit the trustees to make investments in land, and in any recognised new forms of investment. The High Court Order approving this increase required the Trustees to have paramount regard to Wellcome's charitable status and make all reasonable efforts to avoid engaging in trade when exercising their investment powers.

The Appellant's activities

10. The Appellant is registered for VAT under Registration number 744 4952 11 and is a taxable person under Article 9 of Directive 2006/112.

11. Clause 1(1) of Schedule C of the current constitution of the Trust allows the Trust to invest, lay out or apply trust money in investments in any part of the world and administer, manage, realise and dispose of any investments as freely as if the Trustee were absolutely and beneficially entitled to the money so invested, laid out or applied. Clause 1(2) of Schedule C states that the word "investments" shall be deemed to include any and every form of property, interest or rights in or upon or for which money or other property is capable of being laid out, applied or exchanged; whether or not producing income, of a wasting nature, or involving liabilities or risk; whether with or without security; and whether or not the same shall fall within the meaning ascribed to that word by law or by common usage. Investments shall include in particular the following:

a. stocks, shares, debentures, bonds, loan stock, deposits, certificates of deposit and any other securities;

b. rights and interests in limited partnerships, limited liability partnerships and other entities conferring limited liability, collective investment schemes, open ended investment companies and unit trusts;

c. land and any interest in land of any tenure and the development of land for investment purposes;
d. chattels;
e. loans, including loans upon personal credit;
f. units, warrants, cash and currencies;
g. instruments convertible into any other form of investment;
h. options, futures (including future foreign exchange contracts), swaps and contracts for differences;
i. stock lending contracts; and
j. any other form of investment recognised from time to time in reputable financial circles.

12. Clause 1(3) of Schedule C states that:

'If the Trustee is in doubt as to the suitability of any form of investment in which trust money has not previously been invested, neither the Trustee nor any investment manager referred to in paragraph 6 of this Schedule [Appointed Investment Managers for the Trust] shall be entitled to invest trust money in such form of investment unless and until the Trustee is satisfied, having obtained proper investment advice, that the form of investment in question is suitable for the investment of money comprised in the Trust Fund.'

13. Clause 2(4) of the Scheme provides as follows:

'In exercising the foregoing powers the Trustees shall observe the following policy guidelines:

(a) they shall have paramount regard to the charitable status of the Wellcome Trust so that (without prejudice to the general implications thereof) they shall make all reasonable efforts to ensure that they do not at any time by reason of the exercise of any such powers

(i) engage in a trade or

(ii) jeopardise the continuity of any work to which they may have committed themselves in the implementation of the charitable purposes of the Wellcome Trust

(b) they shall aim so far as practicable to diminish the exposure of the Trust Fund to the risk of losses incident upon disorderly market forces (notwithstanding that so to do may necessitate a course of action whereby the Trustees may deprive the Trust Fund of possibilities of speculative gain) and generally to secure:-

(i) a realistic income return on their investment

(ii) a due proportion of capital growth and

(iii) a due protection against risk.'

14. The Appellant, as trustee of the Trust, engages in the pursuit and fulfilment of its charitable purposes. The Appellant has committed to awarding grants of up to £5bn over the next 5 years. In order to achieve this, the Appellant has approximately £23bn of net investment assets, a significant proportion of which are managed through third party managers in order to generate funds that can be distributed as grants whilst ensuring the longevity of the underlying endowment.

15. Under the terms of the constitution, the Appellant is permitted to, and does, invest in publicly listed equities, private equity, hedge funds, property, bonds and cash. A significant proportion of the Appellant's investment portfolio relates to non-EU investments ("non-EU portfolio") in respect of which the Appellant obtains and relies upon investment management services purchased from non-EU suppliers.

16. In the case of Wellcome Trust Ltd v Commissioners of Customs and Excise (C155/94) [1996], the CJEU replied to questions posed by the VAT tribunal, stating that the concept of economic activities within the meaning of Article 4(2) of the Sixth Directive (now Article 9(1) of Directive 2006/112) did not include an activity consisting in the purchase and sale of shares and other securities by a trustee in the course of the management of the assets of a charitable trust. As a consequence, the Appellant was denied input tax recovery on the entirety of the costs incurred in relation to its non-EU portfolio. The Appellant's activities are substantially unchanged from those considered in the 1996 CJEU decision.

Background to the Appeal and the issues in dispute between the parties

17. With effect from 1st January 2010, the Appellant commenced accounting for output tax in the UK in respect of the investment management services purchased from its non-EU suppliers.

18. Prior to this, the Appellant did not account for output tax in the UK in respect of the investment management services purchased from its non-EU suppliers.

19. For the purposes of Article 44 of Council Directive 2006/112/EC 'The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. In the absence of such place of establishment…the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides.'

20. Following the Appellant's review of the relevant provisions of Council Directive 2006/112/EC, the Appellant has submitted a claim under Section 80 of VATA 1994 in respect of overpaid output tax accounted for on investment management services purchased from non-EU suppliers on the claimed basis that, following the judgment of the CJEU, the Appellant is a taxable person under Article 2

and 9 of Council Directive 2006/112/EC but is not a taxable person acting as such within Article 44 of Council Directive 2006/112/EC where it is engaged in the investment activities considered in the CJEU case of *Wellcome Trust Ltd v Commissioners of Customs and Excise* (C-155/94) [1996].

21. The Respondents disagree with the Appellant's view and consider that the Appellant is a taxable person for the purposes of Article 44 and is therefore required to account for VAT on the investment management services purchased from non-EU suppliers. The Respondents' position is set out in their Statement of Case dated 13 October 2017.