TC07687

VALUE ADDED TAX – exemption - Items 1 and 4 Group 7 Schedule 9 VATA 1994 – supplies of various ultrasound scanning services to pregnant women – whether medical care – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/03932
TC/2017/03946
TC/2017/03944

BETWEEN

(1) WINDOW TO THE WOMB (FRANCHISE) LIMITED
(2) D I HARRIES LIMITED
(3) DJC STUDIOS LIMITED

Appellants

-and-

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 9-12 December 2019

Ms Joanna Vicary (instructed by DWF LLP) for the Appellant

Ms Natasha Barnes (instructed by HM Revenue and Customs Solicitor's Office and Legal Services) for the Respondents

DECISION

INTRODUCTION

1. These appeals are lead cases and concern the VAT treatment of supplies of certain ultrasound scanning services to pregnant women. The issue in each appeal is whether the supplies are standard rated for VAT purposes as HMRC contend, or exempt as the appellants contend. The appellants say that they are exempt as supplies of medical care. I shall refer to the appellants as "WTTW", "Harries" and "DJC" respectively.

2. The decisions under appeal are as follows:

   (1) A decision addressed to WTTW dated 21 December 2016 to the effect that supplies of scanning services made by franchisees of WTTW are standard rated. Decisions to the same effect were addressed to the franchisees including Harries and DJC.

   (2) Assessments to VAT dated 20 April 2017 to Harries in the sum of £3,341 for period 01/17 and to DJC in the sum of £24,106 for periods 07/14 to 01/17.

   (3) A decision addressed to WTTW dated 26 March 2018 to the effect that supplies of scanning services made by franchisees of WTTW should continue to be standard rated.

3. WTTW operates a franchise model for businesses which supply various packages of ultrasound scans for pregnant women. Harries and DJC are franchisees. There are 9 other franchisees making the same or similar supplies and their appeals are stayed pursuant to Tribunal Rule 18. The issues of law common to each appeal were stated as follows in a direction released on 22 October 2018:

   " … whether certain supplies made by the appellants at particular times are exempt from VAT either:

   (a) as supplies of services constituting the provision of medical care by a person registered or enrolled in the register kept under the Health and Social Work Professions Order 2001 pursuant to Item 1 Group 7 Schedule 9 Value Added Tax Act 1994, or

   (b) as the provision of care or medical or surgical treatment and, in connection with it, the supply of any goods, in any hospital or state regulated institution pursuant to Item 4 Group 7 Schedule 9 Value Added Tax Act 1994."

4. The appellants provide various different types of ultrasound scan packages and the question of whether the service amounts to the provision of medical care must be answered in relation to each package. The appellants contend that what is being supplied in each case is a supply of medical care. The respondents contend that in each case what is being supplied is a "bonding experience" or a "reassurance scan" for pregnant women based on viewing the fetus and being provided with images.

5. I heard evidence from the following witnesses of fact on behalf of the appellants who had all provided witness statements and were available for cross-examination. I can give a brief description of each witness as follows:

   (1) Mr Anthony Harrison who is one of the founders and a director and shareholder in WTTW.

   (2) Mr Daniel Stothart who is the sales and marketing director and a shareholder in WTTW.

   (3) Ms Jeanette Clewes who has been a clinical lead with WTTW since August 2015. She has various relevant qualifications, is a member of the Society of Radiographers and has many years of experience working and researching in obstetrics, gynaecology and

ultrasound scanning. Her role with WTTW includes providing guidance, training and assessment of sonographers and managers employed by the franchisees.

(4) Ms Anne Walton who has been a clinical lead with WTTW since December 2016. She is a registered nurse and registered midwife. She has many years of experience working in the NHS including as a ward sister, ward manager, nurse practitioner and nurse specialist. Her work in the NHS has involved training nurses, doctors and other healthcare workers in early pregnancy care.

(5) Mr David Harries who is a director and shareholder in Harries and set it up with his wife as a franchise of WTTW, operating from premises in Chester-le-Street. He also has an interest in several other franchisees.

(6) Ms Iona Hughes who is married to Mr Harries, and is a director and manager of Harries. She is a registered midwife, is qualified as a bereavement midwife and also works in the NHS. She has an interest in several other franchisees.

(7) Mr David Cheese who is a director and shareholder in DJC and set it up as a franchise of WTTW.

6. The witnesses were all passionate about the services their businesses provide to pregnant women. In some cases that gave the impression of a tendency to emphasise and exaggerate positive aspects of the appellants' case, especially in their written witness statements. However, where that occurred, those witnesses readily acknowledged this during cross-examination. Having heard all the witnesses I am satisfied that they gave their evidence honestly and with a view to assisting the Tribunal.

7. The parties relied on evidence from the following expert witnesses:

(1) Miss Marion Macpherson, who has many years of experience, including experience as a consultant obstetrician and gynaecologist, and is a Fellow of the Royal College of Obstetricians and Gynaecologists. Her evidence was relied on by the appellants.

(2) Ms Jacqueline Torrington, who has many years of experience as a sonographer and is a lecturer in medical ultrasound at City, University of London. Her evidence was relied on by the respondents.

8. By a direction released on 4 April 2019 the parties were entitled to adduce expert evidence addressing the following matters:

(1) What sonographic services are offered by the NHS, the nature of the appellants' services and a comparison of the appellants' services to those of the NHS.

(2) Whether in the opinion of the expert the services provided by the appellants under scan packages constitute an examination for the purpose of ascertaining whether a person is suffering from a medical condition.

(3) Whether in the opinion of the expert the output of the appellants' scans enable or assist in the process of diagnosis of a medical condition.

(4) Whether in the opinion of the expert the process undergone by a client of the appellants constitutes the provision of medical care by the appellants through sonographers engaged by the appellants.

9. Ms Torrington effectively confined her evidence to the first matter. It seems to me that the other matters, to a greater or lesser extent invite an opinion on the ultimate issue which I must decide. Namely, whether the appellants' services are properly characterised as medical care. Whilst I have had regard to the opinion of Miss Macpherson on those matters, and there

was no objection to her evidence, I have reached my own view based on all the evidence before me.

LEGAL FRAMEWORK

10. In this section I deal with the legal framework for exemption in relation to medical care. Much of the law is common ground, but I also deal here with a number of areas where there was some divergence between the parties.

11. Exemptions from VAT for supplies of medical care are contained in Article 132(1)(b) and (c) of the Principal VAT Directive 2006/112/EC, previously Article 13A(1) of the Sixth Directive. Those provisions are enacted in UK domestic law by section 31(1) and Schedule 9 Value Added Tax Act 1994. Group 7 Schedule 9 provides exemption for the following supplies:

> "Item No
>
> 1. The supply of services consisting in the provision of medical care by a person registered or enrolled in any of the following—
> …
> (c) the register kept under the Health Professions Order 2001; …
>
> 4. The provision of care or medical or surgical treatment and, in connection with it, the supply of any goods, in any hospital or state regulated institution."

12. It is common ground that Item 1(c) includes services provided by radiographers and that all the persons carrying out the services provided by the appellants were registered under the Health Professions Order 2001. The principal issue therefore is the extent to which, if at all the services provided by the appellants consist in the provision of medical care.

13. It is also common ground that exemptions must be interpreted strictly, but that it does not follow that they must be given the most restricted meaning that can be given to the wording of the exemption. The interpretation must be consistent with the objectives pursued by the exemption and should not deprive the exemption of its intended effect.

14. The scope of exemption for the provision of medical care was considered by the CJEU in *d'Ambrumenil and another v Customs and Excise Commissioners; Unterpertinger v Pensionversicherungsanstalt der Arbeiter* [2005] STC 650 ("d'Ambrumenil"). It is well established from d'Ambrumenil and other case law in the CJEU that the purpose of the exemption is to reduce the cost of medical care and that medical care must have a therapeutic aim.

15. In d'Ambrumenil, the CJEU was concerned with the following supplies of services provided by doctors:

> (1) acting as an expert appointed by a court or financial institution to determine whether an applicant for a pension was suffering from disability, incapacity to work or invalidity; and
>
> (2) certifying medical fitness, for example fitness to travel; and
>
> (3) conducting medical examinations of individuals on behalf of insurance companies, including taking samples to test for the presence of viruses, infections or other diseases.

16. The CJEU held that these activities would not fall within the exemption for medical care unless the purpose was therapeutic. The position was summarised by the CJEU as follows:

> "58. While it follows from that case-law that the provision of medical care must have a therapeutic aim, it does not necessarily follow therefrom that the therapeutic purpose of a service

must be confined within an especially narrow compass (see, to that effect, *Commission* v *France*, paragraph 23). Paragraph 40 of the judgment in *Kügler* shows that medical services effected for prophylactic purposes may benefit from the exemption under Article 13A(1)(c). Even in cases where it is clear that the persons who are the subject of examinations or other medical interventions of a prophylactic nature are not suffering from any disease or health disorder, the inclusion of those services within the meaning of provision of medical care is consistent with the objective of reducing the cost of health care, which is common to both the exemption under Article 13A(1)(b) and that under (c) of that paragraph (see *Commission* v *France*, paragraph 23, and *Kügler*, paragraph 29)."

17. The CJEU went on to consider each type of activity as follows:

"61. …While it is true that an expert medical report may also be requested by the person concerned and may indirectly contribute to the protection of the health of such person, by detecting a new problem or by correcting a previous diagnosis, the principal purpose pursued by every service of that type remains that of fulfilling a legal or contractual condition in another's decision-making process. Such a service cannot benefit from the exemption under Article 13A(1)(c).

…

63. In relation to services consisting in the provision of medical certificates of fitness, for example certificates of fitness to travel as mentioned in paragraph (c) of the question referred, it is necessary to take into consideration the context in which those services are performed in order to establish their principal purpose.

64. Where fitness certificates are required by a third party as a condition precedent to the exercise by the person concerned of a particular professional activity or the practice of certain activities requiring a sound physical condition, the principal purpose of the service effected by the doctor is to provide the third party with a necessary element for taking a decision. Such medical services are not intended principally to protect the health of the persons who wish to carry on certain activities and cannot therefore be exempt under Article 13A(1)(c).

65. None the less, where the purpose of a certificate relating to physical fitness is to make clear to a third party that a person's state of health imposes limitations on certain activities or requires that they are carried on under particular conditions, the protection of the health of the person concerned may be regarded as the principal purpose of that service. Therefore, the exemption under Article 13A(1)(c) may apply to such a service.

66. Considerations similar to those set out in paragraphs 63 to 65 of this judgment apply in relation to the services described in paragraphs (a) and (b) of the question referred. Where medical examinations and the taking of blood or other bodily samples are carried out with the aim of enabling an employer to take decisions on the recruitment of, or on the duties to be performed by, a worker or to enable an insurance company to fix the premium to be paid by an insured person, the services in question are intended principally to provide that employer or that insurance company with evidence on which to take its decision. Such services do not therefore come within the meaning of provision of medical care exempted under Article 13A(1)(c).

67. By contrast, regular medical checks at the behest of certain employers and certain insurance companies may satisfy the conditions for exemption under Article 13A(1)(c), provided that such checks are intended principally to enable the prevention or detection of illness or the monitoring of the health of workers or insured persons. The fact that such medical checks take place at a third party's request, and may also serve the employers' or insurance companies' own interests, does not preclude health protection being regarded as the principal aim of such checks."

18. It is clear, therefore that the focus is on whether the principal purpose of the supply is therapeutic and/or prophylactic in nature. In order to fall within the exemption for medical care, the principal purpose of the service must be to diagnose, monitor, treat or prevent illness. One

purpose of a supply may be to provide a medical diagnosis, but it is the principal purpose which is determinative. It is not sufficient if the medical care is incidental or ancillary to the principal purpose. It is common ground in this appeal that in considering the purpose of a supply, regard should be had to the perspective of the typical consumer, although that would not in itself be determinative. In this context it is the typical consumer buying each separate scan package that must be considered (cp *HM Revenue & Customs v The Ice Rink Company Ltd* [2019] UKUT 0108 (TCC)).

19. It was also common ground following *Skatteverket v PCF Clinic AB* Case C-91/12 that a therapeutic purpose can include psychological treatment. However, the subjective understanding of the recipient of a supply is not decisive. Whether the intervention, in that case plastic and cosmetic surgery, had a therapeutic purpose was a matter of medical assessment.

20. Ms Vicary went further and submitted that medical care included the relief of stress and anxiety and that it was not limited to treating or preventing a recognisable mental illness. Hence, scans which had the effect of reassuring women at an emotional and vulnerable time fell within the meaning of medical care. Ms Barnes submitted that medical care does not extend to general reassurance where there is no evidence that the supply benefits a woman's mental health.

21. I was referred in passing to the decision of the FTT in *Skin Rich Limited v HM Revenue & Customs* [2019] UKFTT 514 (TC) where it was held that supplies of botox and other injectable treatments were not exempt because the principal purpose was not to protect, restore or maintain the health of the individual. Permission has been given for an appeal to the Upper Tribunal and I was not invited to consider the reasoning of the FTT.

22. Ms Barnes submitted that the term "medical care" should not be interpreted too widely because there were other exemptions which would apply in relation to mental welfare. In particular, Item 9 Group 7 Schedule 9 exempts a supply by a state-regulated private welfare institution or agency of welfare services. In this context, welfare services is defined as "services which are directly connected with … the provision of care, treatment or instruction designed to promote the physical or mental welfare of elderly, sick, distressed or disabled persons".

23. I was also referred to a decision of Nolan J in *Yoga for Health Foundation v Commissioners of Customs & Excise* [1984] STC 630. In that case it was agreed that residential accommodation provided for the practice and study of yoga for health, in particular those suffering from multiple sclerosis, did not fall within the provision of medical care. However, the High Court held that it did fall within the exemption for welfare, which was taken to include both physical and mental well-being.

24. I do not consider that the exemption for welfare services assists in defining the scope of the exemption for medical care. Medical care would in my view clearly include the diagnosis, monitoring, treatment or prevention of mental illness. Ms Vicary submitted that it was sufficient if the principal purpose of a scan was to prevent adverse effects on the mental well-being of an expectant mother and that it was not necessary for the appellant to demonstrate the effectiveness of the scans in preventing mental illness. I agree that it is not necessary to demonstrate the effectiveness of the scans in this context, but in my view there must still be a medical basis to indicate that the principal purpose of the scans is therapeutic or prophylactic, which might include the treatment or prevention of mental illness. Whether or not this includes reducing levels of anxiety in a pregnant woman is essentially a matter for medical opinion and I consider the expert evidence below.

25. There was a further issue between the parties as to whether certain of the scan packages comprised single or multiple supplies for VAT purposes, and if so how those supplies should be characterised for VAT purposes. It is convenient to deal with the parties' submissions on

the law in relation to those issues in the light of my findings as to the elements comprised in each package.

FINDINGS OF FACT

26. WTTW grew out of a business called The Original Window to the Womb. Mr Harrison and his business partner spotted the business in 2013. They did not have any medical qualifications or previous experience in this sector but considered that it was an attractive business opportunity. It was a family business which had been operating since 2003, offering ultrasound scanning for expectant mothers from a high street location in Nottingham. They acquired 50% of WTTW which was a new company set up in late 2013 with the intention of franchising the existing business. The next year or so was spent preparing and refining a business model and documentation. The first franchise was opened by DJC in Norwich in 2014. In September 2016 they acquired a further 40% in WTTW following a dispute with the owners of the original business. In June 2018 they acquired the remaining 10%. WTTW no longer has any connection with The Original Window to the Womb business.

27. All the franchisees operate from high street premises. Both parties referred to these premises at various times as clinics and I shall adopt the same shorthand, although I emphasise that nothing should be read in to this description in terms of the issues which must be determined. Franchisees now conduct in excess of 120,000 ultrasound scans on pregnant women each year. The business has developed so that there are now two separate franchises. WTTW franchisees conduct scans on women in the 16-40 week gestation period. Many of those franchisees also have a "First Scan" franchise and conduct scans on women in the 6-15 week gestation period.

28. WTTW and First Scan each provide franchisees with comprehensive operations manuals setting out all the protocols, practices and procedures that franchisees are required to follow. In addition to the clinical leads, Ms Clewes and Ms Walton, WTTW engages one of the UK's leading authorities in ultrasound to advise in relation to protocols and to meet regularly to review the business' practices.

29. Staff at each clinic fall into one of three defined roles – a registered manager who has been assessed and approved by the Care Quality Commission ("CQC"); sonographers who conduct the scans; and sonographer assistants who support the sonographers and are responsible for customer service.

30. All franchisees are registered with the CQC to carry out a "regulated activity" at specified premises. The regulated activity on the certificates of registration is "diagnostic and screening procedures". The Regulated Activities Regulations 2014 made under the Health and Social Care Act 2008 defines diagnostic and screening procedures as including the use of ultrasound to examine the body. The evidence before me included a CQC quality report following an inspection of Harries from 2019 with an overall rating of outstanding. Ratings under various subheadings were as follows: Are the services safe? – Good; Are the services caring? – Outstanding; Are the services responsive? – Good; Are the services well led? – Outstanding.

31. The CQC did not provide a rating for "Are the services effective?". It did however make some observations in relation to the effectiveness of Harries' services, although the reference to treatment must be read in the context that the appellants acknowledge that they do not offer treatment as such:

> "We do not currently rate the effective domain for diagnostic imaging services. However, we found:
>
> - The service used current evidence-based guidance and good practice standards to inform the delivery of care and treatment.

- Referral pathways to other agencies were in place for staff to follow to benefit patients.
- Managers monitored the effectiveness of care and treatment …
- The service made sure staff were competent for their roles. Staff had the skills knowledge and experience to deliver effective care …"

32. The scan packages offered by WTTW, using the current names, are summarised in the following table. Save for the Growth and Presentation Scan, the description of each scan is cumulative. For example, the Well-being + 4D scan provides everything that the Well-being scan and the Well-being + Gender scans provide. A 4D scan is a video incorporating a 3-dimensional image of the fetus.

WTTW Scan Package	**Timing (Weeks)**	**Description**
Well-Being Scan	16-40	Confirmation of single/multiple pregnancy, heartbeat check, detection of some abnormalities, growth check, position of baby and placenta and a Well-Being report. A single image of the fetus is provided
Well-Being + Gender Scan	16-22	Gender confirmation, peek in 4D, 4 x photo prints with digital copies. There is a free re-scan if the gender cannot be clearly identified.
Well-Being + 4D Scan (Picture Box)	24-34	4D baby scan. There is a free re-scan if suitable 4D images cannot be obtained, although that is rare.
Well-Being + 4D Scan (Born to be a Star)	24-34	50% longer 4D baby scan
Well Being + 4D Scan (Very important Baby)	24-34	100% longer 4D baby scan, 2 further photo prints and 2 large photo prints, scan movie recording, 2 x keyrings and prints.
Growth and Presentation Scan	26-40	Well-Being scan and report, position of baby and placenta, head circumference, femur length, estimated fetal weight, 4 photo prints and digital images

33. Each scan lasts between 5 and 10 minutes. In the first 5 minutes the sonographer identifies information to complete the Well-Being report and identifies the gender of the fetus. The fetus is then positioned for 4D scanning depending on the package purchased. The data gathered throughout the scan is then rendered into 3D images and a 4D video. When the 4D video is played to the customer and her guests it is effectively a recording of the images produced during the scan. It is not played in realtime. It was not clear from the evidence exactly how long the 4D video was played for during the appointment.

34. The documentation and marketing material used by WTTW has evolved gradually in the period since 2013. I am satisfied that in 2015 and 2016, much of the marketing and other material used by WTTW emphasised that the scans were a "baby bonding experience". This includes material and branding found in the retail premises of franchisees, and in marketing material available online. For example, the website emphasised the availability of 4D imagery and the use of state of the art scanners to obtain good images. Having said that, material at this time also referred to each package commencing with a well-being scan similar to a hospital scan. Despite an emphasis on a baby bonding experience and the imagery available, the appellants case is that from 2015 the service being offered was medical care in the form of diagnostic scanning.

35. WTTW sold some packages via Groupon. Even in 2018 the Groupon website marketed WTTW as "a non-diagnostic ultrasound baby bonding studio" which emphasised the imagery available. Mr Harrison's evidence, which I accept, is that this wording was based on material provided in relation to The Original Window to the Womb business. The wording remained on Groupon's website, despite requests by WTTW to correct it, until January 2018.

36. By 2019, the WTTW website made reference to a mother bonding with the baby, but the emphasis was on health and well-being. I am satisfied that bonding remains an important part of the service for those customers who choose packages which include imagery.

37. First Scan Limited was incorporated on 6 December 2016. Since the end of 2016 or the beginning of 2017 it has offered an early pregnancy scanning service from 6-15 weeks gestation. The first clinic to offer this service was Harries, at Chester-le-Street. First Scan is now operated by most of the franchisees, although under a separate franchise agreement. WTTW is not concerned with the scans operated by First Scan. The scans offered by First Scan are categorised and recorded by reference to the specific reasons a woman has chosen to have the scan. For example, a woman may indicate when booking a First Scan that she has had pain or bleeding. In those circumstances an early pregnancy scan may be available on the NHS although a First Scan may be available sooner through the appellants.

38. The following descriptions are based on the First Scan sonographer training programme, as updated in October 2019. It was not suggested that these descriptions did not apply prior to that date:

First Scan Package	**Description**
Viability Scan	To determine pregnancy viability
Dating Scan	To date the pregnancy
Reassurance Scan	General pregnancy reassurance
Fertility Treatment Scan	Women pregnant as a result of fertility treatment
Symptomatic Scan	Women experiencing pain or bleeding
Recurrent Miscarriage Scan	Women who have suffered 2 or more previous miscarriages
Previous Ectopic Scan	Women who have suffered a previous ectopic pregnancy

39. The descriptions above are for the most part self-explanatory. The fertility treatment scan is most often used by women who have had fertility treatment abroad, to provide a confirmation or viability scan to confirm a pregnancy. Scans carried out up to 10 weeks will generally use a vaginal scan probe as opposed to the abdominal probe used in scans after 10 weeks. No guests are present and the only imagery provided is a single 2D image. Customers receive a First Scan Obstetrics Report confirming whether there is an intrauterine pregnancy, the number of fetuses, whether there is a fetal heartbeat and various other findings relevant to the pregnancy, such as whether or not the yolk sac is present. There is also a brief summary of findings. In the report I was taken to by way of example there was no fetal heartbeat and the ultrasound findings completed by the sonographer stated "suggestive of missed miscarriage".

40. The opening hours of clinics are broadly Monday to Friday 4-9pm and Saturday and Sunday 9-5pm. Within these opening hours, First Scan franchisees operate clinics at different times to WTTW clinics. This is to avoid women having early pregnancy scans, where they may be symptomatic, being in the waiting room at the same time as women having later pregnancy scans. Clinics offer a warm and welcoming environment in which the scans take place.

41. The following table summarises the price at which various scans and packages are sold, and the relative numbers sold of each type of scan and package ("the Service Analysis"). It covers the period 1 September 2019 to 30 November 2019 for one clinic at Newcastle South:

WTTW Scan Package	**Confirmed Bookings**	**Average Price £**
Well-Being Scan	289	55
Well-Being + Gender Scan	195	59
Well-Being + 4D Scan (Picture Box)	14	86
Well-Being + 4D Scan (Born to be a Star)	95	80
Well Being + 4D Scan (Very important Baby)	22	91
Growth and Presentation Scan	23	69

First Scan Package		
Viability Scan	72	79
Dating Scan	66	79
Reassurance Scan	45	79
Fertility Treatment Scan	4	79
Symptomatic Scan	92	79
Recurrent Miscarriage Scan	4	79
Previous Ectopic Scan	2	79

42. The respondents did not take any point on the accuracy of the Service Analysis, but invited me to approach it with caution given that it represented only a single clinic and a 3 month period in 2019. There is no reason for me to doubt that it is representative of the period affected by the decisions under appeal, and I treat it as such to the extent that it shows the relative costs of each scan and package, and the proportion of each scan and package sold.

43. Scan packages involving 4D imagery are marketed at higher prices on the WTTW website than those reflected in the table, ranging from £99 to £135. However, they are invariably discounted to the prices shown in the table.

44. There was also evidence as to the gestation period of women attending the Chester-le Street clinic for scans in the year ending June 2019. It is summarised in the following table, which I also accept is representative of the franchisees generally and the period affected by the decisions under appeal:

Gestation	**Customers**
First Scan	
6-15 weeks	1,308
WTTW	

16-22 weeks	1,821
22-34 weeks	730
34+ weeks	23
Total	3,882

45. Ms Clewes' evidence, which I accept is that not many women would attend First Scan at 14 or 15 weeks gestation because they will recently have had the NHS 12 week scan (see below), which can take place up to 14 weeks gestation. Further, it can be seen that some 71% of WTTW scans are conducted at 16-22 weeks and do not therefore include 4D imagery other than a "peek" included within the Well-being Scan + Gender.

46. All franchisees are required to use qualified Sonographers. These are sonographers who are registered with the Health and Care Professions Council, full members of the Society of Radiographers and hold professional indemnity insurance providing cover for mis-diagnosis. Sonographers earn in the region of £45 per hour, and may be distinguished from "ultrasound technicians" who can produce images using ultrasound equipment but might earn in the region of £15 per hour.

47. The WTTW website identifies the various scan packages available and the location of franchisees' clinics. A link provides a description of each clinic. I was taken to the material currently available in relation to the Darlington and Norwich clinics. Even in 2019, this emphasised the "baby bonding experience", although material on the website prior to clicking on those links emphasises the health and well-being of the baby.

48. When booking a scan, the website has a special offer for customers booking 2 scans, for example a Well-being scan plus gender and then a later 4D scan. The evidence available suggested that this offer was not often taken up, if at all.

49. Clearly, the more scans a woman has, the more profit the franchisees derive from that woman. Ms Clewes' evidence, which I accept is that franchisees would not encourage a woman to have too many scans. She said that there should be at least a week between each scan in early pregnancy and at least two weeks thereafter. However, the appellants would not encourage scans at that frequency because in her view scans themselves can generate anxiety in a pregnant woman.

50. WTTW provides franchisees with various scripts for use by scan assistants with the aim of putting the mother at ease and explaining what to expect. The scripts also encourage scan assistants to "soft sell", which involves explaining the available packages and ensuring that the mother is happy with the chosen package.

51. Customers purchasing WTTW scans can bring guests to the scan. For example, Darlington can accommodate up to 10 guests and Norwich can accommodate up to 5 guests. In the NHS only one person is generally permitted to attend. The scan room has the sonographers equipment which includes a basic monitor. There is also a TV screen for the woman and TV screens on the wall which guests can watch. These screens are not switched on until after the sonographer has completed the Well-being scan. Music will be played in the room to put the mother at ease. The music does not appear in the 4D scan videos.

52. Customers of WTTW get an opportunity to purchase keepsakes, including keyrings and picture frames. There is also a "Heartbeat Bear" which includes a recording device with a recording of the fetal heartbeat. These are treated as standard rated and such supplies are not in issue in this appeal, although the respondents say that they do help to indicate the nature of the disputed supplies as a baby bonding experience.

53. The evidence included a cross-section of online reviews by customers of the franchisees. Some customers emphasised the experience of being told the gender of the fetus and seeing the imagery. Other customers emphasised the reassurance they felt that the fetus was healthy. Others were grateful that abnormalities and potential problems were picked up by the scan.

54. Customers are asked to bring their maternity notes to a scan. These are notes which would be available to a sonographer at an NHS scan. The notes should be distinguished from GP notes which are not available to a sonographer save where there is a special request. A sonographer in the NHS would also have access to a woman's hospital notes, if she had previously attended a hospital in the same NHS Trust, for example in relation to a previous pregnancy. If a customer does not bring her maternity notes then whether the scan goes ahead will be a matter of judgment for the sonographer. If the scan does go ahead the absence of notes will be identified in the Well-being report.

55. 4D scans do not increase ultrasound exposure above that required for 2D scans. Data is collected using various 2D planes which are then "stitched together". This process occurs offline. Hence the 4D scan when it is seen is not being seen in realtime.

56. As appears above, the appellants offer free re-scans if the images obtained are less than adequate, or if the gender cannot be identified. BMA guidelines state that ultrasound scanning should not be used solely for the purpose of obtaining souvenir videos. Mr Stothart accepted that where a re-scan was conducted solely to produce better images then this was in breach of those guidelines, however he stated that re-scans were only necessary in less than 1% of cases.

57. I was invited to consider the services supplied by the franchisees in the light of NHS provision of ultrasound scanning for pregnant women. There are two circumstances in which ultrasound scans of pregnant women are carried out in the UK within the NHS. These may be described as screening scans and diagnostic scans.

58. Screening is the process of identifying healthy people who may have an increased chance of having a disease or condition. In the case of all pregnant women, NHS screening is offered and performed under national standards set by the Fetal Anomaly Screening Programme ("FASP"). The aim of the programme is to identify specific fetal abnormalities. There are two aspects to FASP. The first combines an ultrasound scan and a blood test between 11 and 14 weeks gestation. This is sometimes referred to as the combined test. The second is an ultrasound scan between 18 and 20 weeks + 6 days gestation which is also known as the anomaly scan. For convenience I shall refer to these scans as the 12 week scan and the 20 week scan.

59. The timing of NHS screening scans is based on detailed research. In broad terms, the 12 week scan has been set as the best time to confirm the presence of a viable pregnancy, accurately date the pregnancy, establish the number of fetuses and detect certain major structural anomalies which may be identified in early pregnancy. The blood test is used together with the scan to identify certain diseases such as Down's syndrome, Edward's syndrome and Patau's syndrome. The timing of the 20 week scan has been set because this period in a pregnancy offers the best opportunity for detailed ultrasound examination of fetal structures and the best opportunity to detect abnormalities, ensuring adequate time for subsequent diagnosis and counselling, including counselling on termination decisions.

60. Screening scans look for certain specific conditions and FASP has an associated target detection rate for each condition. For example, FASP aims to detect 50% of major structural defects of the fetal heart and 98% of cases of anencephaly where the top of the scull and much of the brain are missing. There are three broad categories of abnormalities which are screened for under FASP. Abnormalities from which the fetus may or will die before birth or shortly

after birth, abnormalities which may benefit from antenatal treatment and abnormalities which require early intervention following birth.

61. Some of these abnormalities would be detectable by a competent sonographer prior to the 20 week scan, for example spina bifida and anencephaly. Others might not be detectable at 16 weeks but be detectable at 20 weeks, for example certain heart abnormalities and cleft palate. Similarly, a scan later than 20 weeks would give a better opportunity to detect certain heart defects or cleft palate.

62. Where a high risk of a specific abnormality is identified in the screening programme or otherwise, a referral will be made to a fetal medical consultant and any further scans are referred to as diagnostic scans. Risk may be identified outside the screening programme. A woman may have pre-existing risk factors, such as smoking or drug misuse, risks arising from her previous pregnancy history or risks arising from her medical history, such as high blood pressure or diabetes. Decisions as to the need for diagnostic scans are taken on a case by case basis by the obstetrician responsible for the woman's care. There are exceptions to this in the case of a second scan to confirm a miscarriage and a third trimester scan (28+ weeks) to confirm a low lying placenta previously been identified at the 20 week scan. In those cases, the scans are organised by the sonographer or a nurse.

63. Scans performed at 16 weeks onwards can generally identify the gender of a fetus. It is only in rare cases that gender will be medically relevant. However, an expectant mother will usually be given the option to know the gender of a fetus at the NHS 20 week scan.

64. Ms Torrington's evidence, which was not challenged, was that the ultrasound scans offered by the appellants are not clinically justified, in the sense that there is no clinical reason for pregnant women to have the scans. She acknowledged that women would derive reassurance from the appellants' scans, but that reassurance was not a clinical indication for an ultrasound scan. She did not consider that the appellants' scans contributed to the clinical management of the pregnancy. Ultrasound scanning in the NHS before the 12 week scan was not routinely offered. Women had access to Early Pregnancy Assessment Units and would be scanned if clinically indicated, for example if there was a history of multiple previous miscarriages or ectopic pregnancy. In relation to scans in the third trimester for low risk women, there was research evidence that it was not associated with improvements in overall perinatal mortality and no evidence of maternal psychological benefit.

65. Ms Torrington described medical care in early stage pregnancy in the following terms:

> "Management of the clinical problems of early pregnancy is multi factorial, involving a full clinical history, the request of appropriate tests and the correlation of the results of the tests with the history and clinical condition of the mother."

66. In conclusion Ms Torrington described the appellants' services as follows:

> "I have concluded that the services provided by the Appellant either replicate services already provided free at the point of use by the NHS or are non-evidence based non-clinically indicated scans accessed on an ad hoc basis by a self-selecting population."

67. Miss Macpherson attended one of the franchisee clinics on 16 April 2019 and she described her observations in her report. Her evidence was that the ultrasound scans offered by the appellants were for the purpose of ascertaining whether a pregnant woman was suffering from a medical condition. The scans enabled or assisted in the process of diagnosing medical conditions. She considered that the appellants' practices and procedures were equivalent to the NHS. She also considered that FASP screening was the result of financial limitations in the NHS and that pregnant women would be well-advised to opt for early scans at 6-10 weeks and 32 week scans in addition to the FASP screening scans. Further, the provision of images by the

franchisees could help relieve psychological suffering of women who have late miscarriages or still births. Miss Macpherson answered "yes" to questions (2), (3) and (4) posed in the direction relating to expert evidence referred to above.

68. There was some material in evidence to suggest that routine scanning, in the sense of scanning which is not clinically indicated and which is in addition to the NHS screening scans, may be beneficial to the health of women and babies generally. Miss Macpherson's evidence was that a scan in later pregnancy, such as the Growth and Presentation Scan offered by WTTW, would identify an undiagnosed breech baby. The position of a baby may be identified manually using hands on the abdomen, in a process known as palpation. This is not always reliable and some medical practitioners are better at it than others. She described an undiagnosed breech as "phenomenally common". If it is not discovered until the woman is in labour then an emergency caesarean may be necessary which has a much higher mortality rate than a planned caesarean. Miss Macpherson relied on a news item from Southend hospital trust which had added a 36 week routine scan for pregnant women. The head of midwifery and clinical director for women and children was quoted as follows:

> "… we see about one stillbirth a month here so with this extra screening at 36 weeks as standard we expect to be able to save up to seven lives. We know that about 60% stillbirths after 34 weeks are due to insufficient bloodflow to baby and this can be prevented if diagnosis is made by scan earlier.
>
> This extra scan has many advantages: it will help to diagnose any problems with growth restrictions., it will also help to diagnose babies that are in breech position and wouldn't otherwise be diagnosed until late in labour and it will also be able to tell hospital staff where the placenta is lying."

69. The article acknowledged, as did Miss Macpherson, that this was in the nature of research and that it could be 20 years before evidence would support routine scanning at 36 weeks. Guidance of the National Institute for Health and Care Excellence ("NICE") for antenatal care in uncomplicated pregnancies does not support routine scanning in later pregnancies. Having said that there was some evidence that other European countries provide more scanning than the NHS.

70. I cannot say on the evidence adduced that additional routine scanning over and above the NHS provision under FASP would be beneficial to health generally, whether physical or mental. There is no research evidence to that effect. Indeed, the only evidence before me other than anecdotal evidence suggested there was no improvement in outcomes from routine late pregnancy scanning and no evidence of any maternal psychological effects whether positive or negative. Nor was there any reliable evidence before me that the UK offers more limited scanning under the NHS than other countries.

71. The franchise model operated by WTTW includes detailed policies and standards which must be complied with by all franchisees. There are guidelines and standard form documentation in relation to the booking process, the arrival of customers at the clinic, preparation for the scan, the scan itself and dealing with matters following the scan. The scanning machines used in each clinic are the latest GE Voluson models which are at least equal to and in many cases superior to models used in the NHS.

72. The appellants policies include detailed fetal abnormality policies. If an abnormality is identified during a scan, the scan continues in order to gather as much diagnostic information as possible. In WTTW scans, which are recorded, once the sonographer has gathered all diagnostic information the recording is stopped. There are procedures in place to ensure that the woman is provided with an explanation of the sonographer's concerns in an open, honest and sympathetic way.

73. The appellants have procedures and pathways for referral to the NHS. In First Scan, the clinic manager will contact the local NHS Early Pregnancy Unit directly with a view to arranging an appointment for the woman. A detailed scan report will be given to the woman together with a covering letter to take to an appointment at the Early Pregnancy Unit. It is made clear that the sonographer will be prepared to discuss their observations with the woman's medical team.

74. Ms Walton has been responsible for documenting the pathways for referrals to the NHS since 2017. For all locations where there is a clinic, she has contacted the local hospitals and obtained a direct line contact number, including emergency contact numbers. In relation to First Scan clinics, this would be the contact number and details of Early Pregnancy Units in those hospitals. Ms Walton has discussed the services provided by the franchisees with staff in those hospitals. The details are documented and available to the franchisees. When referrals are made through these pathways, including obtaining appointments, the woman involved is supported and kept informed by the scan assistants to ensure that they understand what is going to happen and when.

75. There was some evidence, albeit not comprehensive as to how NHS hospitals might rely on a scan conducted by the franchisees, if at all. I accept Ms Walton's evidence based on her experience and feedback from customers that the NHS will rely on scans provided by the franchisees in relation to a missed miscarriage. This is the situation where a scan reveals death of the fetus but without any physical symptoms. It is only diagnosed as a missed miscarriage after two scans. The NHS accepts a franchisee's scan as the first scan and will then arrange a second scan to complete a diagnosis.

76. In WTTW, contact is made with Fetal Medicine Units and Maternity Units at hospitals local to the franchisees. Where an abnormality is identified the process includes a phone call by the sonographer to the NHS hospital as soon as reasonably possible whilst the woman is still in the clinic. This is followed by a written report sent to the NHS hospital either with the woman or directly to the hospital.

77. There was a question as to whether NHS hospitals had actually agreed and operated these pathways. I accept Ms Walton's evidence that save in unusual circumstances, NHS hospitals would not question the need for a referral by franchisees. The CQC Report for Darlington dated 30 May 2019 includes the following information about WTTW:

> "Scans available at the location are offered as an additional service, and are provided to complement NHS pregnancy pathway scans. The service does not offer diagnostic anomaly scans, but there are established pathways to refer women to primary antenatal (NHS) providers; should a potential anomaly or concern be identified."

78. The NHS anomaly scan has a better chance of spotting heart defects. This is because the NHS carry out what is known as a "four chamber heart view" which WTTW does not carry out. There are other abnormalities which the WTTW scan does not look for but which are looked for in the NHS anomaly scan. For example, an increased nuchal fold. WTTW has an 18 point scanning sequence. There are no anomalies included in the WTTW scan which would not be observed in the NHS anomaly scan. However, WTTW and First Scan might pick up certain anomalies earlier than the NHS. For example, ectopic pregnancies can be spotted before the NHS 12 week scan. The evidence was that 17% of scans conducted by First Scan and 7% of WTTW scans identify an abnormality. Ms Hughes' evidence, which I accept, is that clinics in which she had an interest had identified 7 ectopic pregnancies in the last year. A woman suffering from an ectopic pregnancy might not be showing any symptoms. There was also evidence that on one occasion a woman suffering vaginal bleeding and cramps at 10 weeks was able to get a quicker appointment through the Appellant.

79. The appellants adduced evidence that their detection rate of abnormalities compares favourably to the NHS detection rate. However, that evidence was not convincing and I cannot make any finding in this regard. In any event, as Ms Vicary submitted, I am not strictly concerned with the quality of the appellants' services, still less with the quality of those services compared to NHS services. It was no part of the appellants' case that they provided a better service than the NHS, rather that the service was complementary to provision under the NHS and to some extent at least it replicates the NHS service. I am satisfied that at all material times the appellants' terms and conditions have emphasised that their scans are not a substitute for the NHS screening programme.

80. The appellants witnesses estimated that if they were simply providing a baby bonding service with the ability to view and keep images including 4D images then there would be a cost saving of approximately £100,000 per clinic per year. This relates principally to a saving of £62,000 if ultrasound operators were used rather than qualified sonographers, £31,000 if scan assistants were not employed and £8,000 if cheaper ultrasound equipment was used. Further, WTTW would save approximately £84,000 per annum in respect of professional indemnity insurance premiums for all franchisees. I accept that evidence.

81. The respondents relied on a "Position Statement on Screening" issued by the Royal College of General Practitioners ("RCGP") and the British Medical Association ("the Position Statement"). This stated as follows:

> "The RCGP does not support non-evidence-based screening which has not been approved by the UK National Screening Committee (NSC) or NICE …
>
> The RCGP believes that if presented with results of screening which has not been approved by UK NSC [or] NICE … the organisation initiating the screening should not assume that general practitioners will deal with the results. Organisations offering these interventions must organise and fund follow up so that patients are adequately supported and so that the interventions do not impact negatively on the use of NHS resources."

82. Ms Torrington's evidence was that whilst the Position Statement did not refer specifically to antenatal screening and the franchisees would be referring to hospitals rather than GPs, the principles in the Position Statement were applicable to the appellants' scans. It was not clear to me which principles were said to be applicable, but the Position Statement does refer to such screenings lacking evidence of benefit, having the potential to mislead patients and the tests themselves causing stress. The guidance suggests that screening providers should only offer screening recommended by NSC or NICE, otherwise ensure that patients give fully informed consent and offer follow up and appropriate care to manage the results of the tests.

83. It does not seem to me that the Position Statement adds anything to the other evidence adduced by the parties. Ms Torrington has already distinguished screening scans and diagnostic scans, explaining that the appellants' scans are not diagnostic scans in that sense because they are not clinically indicated. It was common ground that the appellants' Well-being report following a scan does not cover all the abnormalities covered by the FASP scans. Further, the scans conducted by the appellants were not intended as a substitute for the FASP scans.

84. The appellants' case is that the terms and conditions on which customers contract have evolved in the same way as the marketing material. However, they contend that the service provided has always been the same. As I understand it, both parties accept that the services provided by the appellants have remained the same throughout the periods covered by the decisions. The appellant says that the later terms and conditions and marketing material properly reflect those services. The respondents say that the earlier terms and conditions and marketing material properly reflect those services. I shall focus on the nature of the services

provided, although I also take into account that the terms and conditions at any one time might shed light on the true nature of the services.

85. Prior to February 2017, the terms and conditions did not refer to a Well-being scan. It is fair to say that they focussed on imagery and obtaining the best imagery. Scans were offered on the understanding that they were not a substitute for NHS scans. After February 2017 the terms and conditions referred to the primary purpose of every package as the protection and maintenance of the health of the mother and fetus.

86. Before and after February 2017, the terms and conditions included a clause in capital letters stating that WTTW could not guarantee full face images of the baby which would depend on the baby's position in the womb. A similar provision was found in the marketing material.

87. It was suggested to Mr Harrison that the terms and conditions changed in February 2017, only after WTTW had received HMRC's decision in December 2016 and with the present dispute in mind. Mr Harrison said that this was a coincidence and that the terms and conditions were drafted by a firm of solicitors who were unaware of the VAT issue. I do not accept that it was a co-incidence and it seems more likely that Mr Harrison was mistaken in this regard. However, I do accept Mr Harrison's evidence that notwithstanding the terms and conditions, all scans carried out by WTTW would start with a Well-being scan.

88. I accept that women purchasing a package that included 4D imagery would want to see reasonably good imagery. It was appropriate therefore to manage such expectations with an appropriate clause in the terms and conditions. I do not accept that the presence of such a clause in capitals is a significant indicator that either the appellants or their customers considered that the principal purpose of the scan package was to produce imagery. I accept Mr Harrison's evidence that once a mother knows that everything is alright with the fetus, her priorities might change and then focus on the imagery available in the package.

DISCUSSION

89. During the parties' submissions there was some discussion as to whether the supplies made by the appellants were single supplies, or single composite supplies. Ms Vicary submitted that all supplies in relation to First Scan and supplies in relation to WTTW of Well-being scans were single supplies. They provided a report on the pregnancy and little if any imagery. She also submitted that the other scan packages were single composite supplies. I was referred to the principles to be applied in distinguishing a single composite supply from multiple supplies, derived from decisions of the ECJ and CJEU in *Card Protection Plan Ltd v Commissioners of Customs and Excise* Case C-349/96 ("Card Protection") and *Levob Verzekeringen v Staatsecretaris van Financien* Case C-41/04 ("Levob").

90. In *Card Protection Plan*, the ECJ said as follows:

> 27….[It] is not possible to give exhaustive guidance on how to approach the problem correctly in all cases.
>
> 28. However, as the court held in *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* (Case C-231/94) [1996] STC 774 at 783, [1996] ECR I-2395 at 2411–2412, paras 12 to 14, concerning the classification of restaurant transactions, where the transaction in question comprises a bundle of features and acts, regard must first be had to all the circumstances in which that transaction takes place.
>
> 29. In this respect, taking into account, first, that it follows from art 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, second, 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 (see *Customs and Excise Comrs v Madgett and Baldwin (trading as Howden Court Hotel)* (Joined cases C-308/96 and C-94/97) [1998] STC 1189 at 1206, para 24).

91. It was held by the Upper Tribunal in *HM Revenue & Customs v The Ice Rink Company Limited [2019] UKUT 108 (TCC)* **t**hat the "typical consumer" must be a recipient of the package of supplies whose characterisation is in dispute, and not simply a general customer of the business.

92. In *Levob*, the CJEU affirmed the approach that had been set out in Card Protection where one supply is "principal" and others are "ancillary". However, in that case neither supply could be said to be ancillary to the other. The CJEU went on to identify another situation in which composite supplies might arise:

> "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."

93. The facts of Levob involved a supply of basic software which was customised for Levob to use in its business. In applying that test the CJEU stated as follows:

> "24. … 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."

94. The principles to be derived from the authorities in this area were summarised by the Upper Tribunal in *HM Revenue & Customs v The Honourable Society of Middle Temple* [2013] UKUT 0250 at [60]:

> "60. The key principles for determining whether a particular transaction should be regarded as a single composite supply or as several independent supplies may be summarised as follows:
>
> (1) Every supply must normally be regarded as distinct and independent, although a supply which comprises a single transaction from an economic point of view should not be artificially split.
>
> (2) The essential features or characteristic elements of the transaction must be examined in order to determine whether, from the point of view of a typical consumer, the supplies constitute several distinct principal supplies or a single economic supply.
>
> (3) There is no absolute rule and all the circumstances must be considered in every transaction.
>
> (4) Formally distinct services, which could be supplied separately, must be considered to be a single transaction if they are not independent.
>
> (5) There is a single supply where two or more elements are so closely linked that they form a single, indivisible economic supply which it would be artificial to split.
>
> (6) In order for different elements to form a single economic supply which it would be artificial to split, they must, from the point of view of a typical consumer, be equally inseparable and indispensable.

(7) The fact that, in other circumstances, the different elements can be or are supplied separately by a third party is irrelevant.

(8) There is also a single supply where one or more elements are to be regarded as constituting the principal services, while one or more elements are to be regarded as ancillary services which share the tax treatment of the principal element.

(9) A service must be regarded as ancillary if it does not constitute for the customer an aim in itself, but is a means of better enjoying the principal service supplied.

(10) The ability of the customer to choose whether or not to be supplied with an element is an important factor in determining whether there is a single supply or several independent supplies, although it is not decisive, and there must be a genuine freedom to choose which reflects the economic reality of the arrangements between the parties.

(11) Separate invoicing and pricing, if it reflects the interests of the parties, support the view that the elements are independent supplies, without being decisive.

(12) A single supply consisting of several elements is not automatically similar to the supply of those elements separately and so different tax treatment does not necessarily offend the principle of fiscal neutrality."

95. Ms Barnes submitted that the supply of a First Scan and a Well-being scan would be a single supply on the basis of Levob because the report and the imagery provided to customers were closely linked such that that they form a single, indivisible economic supply which it would be artificial to split. The other packages were single composite supplies on the basis of CPP because they comprised a principal service, which was the imagery and baby bonding to which any medical element was to be regarded ancillary.

96. I have set out the parties' submissions for the sake of completeness, but it does not seem to me that the question of whether a scan package involves a single supply or a single composite supply takes matters very much further in relation to the ultimate issue in this appeal. The question is not whether there is a single supply or a multiple supply. It is agreed that each package is a single supply. The real question is whether those single supplies are properly characterised as supplies of medical care. The test in d'Ambrumenil is in some respects similar to the test for single and multiple supplies in CPP. D'Ambrumenil involves identifying whether the principal purpose of the supply is therapeutic and/or prophylactic in nature. CPP involves identifying whether there is an element which is to be regarded as constituting the principal service, with one or more elements regarded as ancillary services. Hence, applying a CPP analysis involves identifying what elements are the principal service and what elements are ancillary. It might follow from that analysis that a single composite supply is characterised by reference to the principal service. However, in my view that is an unnecessary step in the analysis. What is required is an approach based on the principles set out in d'Ambrumenil. The question, looking at the supply, is whether the principal purpose of the supply is therapeutic and/or prophylactic in nature. In other words, is the principal purpose for which a typical consumer purchases a scan package the diagnosis, monitoring, treatment or prevention of illness. In general terms, the protection of health.

97. Ms Barnes submitted that the appellants' business model does not suggest that the primary purpose of the supplies is the protection of health. She relied on a number of factors which she submitted, cumulatively point towards supplies which are not medical care:

(1) The scans are not clinically indicated and are offered in isolation without any other medical checks such as blood tests, blood pressure tests or reference to customers' full medical histories. The efficiency of the scans in terms of diagnosis was therefore reduced. Further, the scans are limited in nature, and do not purport to check for all abnormalities screened for in the NHS screening programme under FASP. In relation to First Scan, all

the abnormalities identified in the appellants' fetal abnormality policy would be identified at an NHS 12 week scan. In many instances the woman would be entitled to an early scan in the NHS. First Scan may be characterised as a reassurance service.

(2) Whilst scans may provide reassurance, it is only at a single point in time and reassurance does not amount to a therapeutic aim. There is insufficient evidence to establish any medical benefits for scanning in the third trimester. In some cases the appellants undertake scans contrary to BMA guidance. Mr Stothart accepted that re-scans may be carried out simply because the images obtained were not adequate.

(3) The appellants do not provide any treatment which may be required in the light of a scan. The referral pathways are simply telephone numbers to NHS hospital departments and sometimes contact names. Further, there is no evidence that the NHS would rely on the appellants' scans, save possibly in relation to First Scan where a missed miscarriage was identified.

(4) The appellants' marketing of the services emphasises the "bonding experience" and the clinics were set up in such a way as to support that bonding experience. Similarly, the appellants' terms and conditions focus on the provision of high quality images because that is the primary purpose of the supplies. Customer reviews suggest that their perception was of a bonding experience.

98. Overall, Ms Barnes submitted that the core feature of the appellants' supplies is the opportunity to see and keep the images, determine the gender of the fetus and/or have a baby bonding experience. The fact that part of the service might involve a medical diagnosis is not determinative of the issue. On the present facts any diagnosis, including the detection of abnormalities is an "incidental benefit".

99. The fact that there is no clinical indication requiring a scan is not true of all scans offered by the appellants. In particular there is evidence that some of the First Scans do have a clinical indication. Even where there is no clinical indication, that does not mean that the scans do not amount to medical care. For example, HMRC accept that hearing tests or sight tests amount to medical care without the need for any clinical indication.

100. I was referred to HMRC's *VAT Notice 701/57 Health professionals and pharmaceutical products* which sets out HMRC's understanding as to the scope of the exemptions for medical care. It is not authoritative and as such in the context of the present issues it does not add much to the submissions of the parties. I do note however, the Notice states that health screening under private medical insurance policies to detect early signs of disease and routine check-ups provided by employers such as blood pressure, diabetes and cholesterol checks are treated as exempt because they are aimed at protecting, restoring and maintaining health. There is no suggestion the exemption is limited to tests for which there is a clinical indication. Having said that, I accept Ms Barnes' submission that there is little utility in comparing and contrasting the treatment of supplies in different contexts.

101. It is common ground that the appellants' supplies are not intended to replace NHS services. I am satisfied that they are complementary to the NHS services. It is undoubtedly the case that they provide reassurance to customers and may reduce anxiety, even if the principal purpose of some customers might be to have a baby bonding experience and to view and obtain imagery of the fetus. However, I am not satisfied on the evidence that the appellants' services provide a psychological benefit. I accept that simply providing reassurance is not sufficient to characterise the supply as a supply of medical care.

102. I accept Ms Vicary's submission that it is not relevant whether the appellants' services are superior or inferior to the screening scans provided by the NHS. I am not concerned with a

qualitative analysis in that sense. Having said that, if the appellants' services did simply replicate the NHS provision with the addition of imagery then that might suggest that the principal purpose of customers was to obtain the imagery.

103. Ms Barnes correctly pointed out that the Service Analysis shows that the majority of WTTW customers, some 55% choose a package including gender and 4D imagery. She submitted that this suggests that what those customers wanted was a bonding experience and/or the imagery to take away. Further, it suggested that identifying gender was a significant incentive to those customers even though it had nothing to do with medical care. In my view that latter point overstates the case, given that identifying the gender together with a "peek" at 4D imagery and the provision of 4 digital photographs costs only £4 more than a Well-being scan. It seems to me that the pricing of the WTTW scans does give some indication of the relative importance to customers of what is being purchased. A Well-being scan costs £55, and the most expensive 4D scan costs a further £36, suggesting to some extent that the Well-being report is a significant element of the supply.

104. The Service Analysis also indicates that 45% of WTTW customers choose only the Well-being scan. Ms Barnes maintained that the primary purpose of such scans remained seeing the baby on a monitor, but realistically accepted that the respondents' case was less strong in relation to such supplies.

105. The most commonly purchased service from First Scan was where a pregnant woman is showing symptoms of pain and bleeding. This accounted for some 32% of early pregnancy scans. Again, Ms Barnes realistically accepted that the respondents' case was less strong in relation to such scans. However, she also submitted that there was no evidence as to whether such customers might have also had an NHS scan but wanted further reassurance. Ms Barnes characterised all First Scan supplies as "re-assurance scans".

106. I acknowledge that the appellants do not check for all the abnormalities which the NHS checks for, and they do not offer any treatment following a scan. They merely refer to the NHS as appropriate through established pathways.

107. As I have said, it is necessary to consider each scan package separately, in light of what is provided in that package, why a typical customer of that package is purchasing that package and the evidence as a whole as to the circumstances in which the package is provided. I shall consider each scan package on that basis.

108. Early pregnancy scans under the First Scan franchise provide an obstetrics report directed towards confirming whether there is a viable pregnancy, including the identification of any medical issues arising in the pregnancy, for example an ectopic pregnancy. Some of these scans appear to be clinically indicated, in that some 32% of them are "symptomatic scans" where a customer indicates that she has been suffering pain or bleeding. The only imagery available is from the sonographer's monitor and the provision of a single 2D image. I do not consider that these scans, or the other types of First Scan, involve women whose principal purpose in purchasing the scans is a baby bonding service or obtaining imagery. Scans which are purchased as viability scans and dating scans confirm the existence of a viable pregnancy and provide medical information about that pregnancy. I am satisfied that the principal purpose of typical customers purchasing those scans is to diagnose a medical condition, including pregnancy and associated conditions.

109. Approximately 16% of First Scans are purchased as "reassurance scans". As I have said, reassurance in itself does not amount to a supply of medical care. However, these reassurance scans do not simply provide reassurance to the pregnant woman. They provide an obstetrics report including information about a known pregnancy. The woman is herself choosing to monitor her medical condition. That is her purpose in obtaining the scan. The fact that a medical

professional might say that there is no clinical need for such monitoring does not mean that the woman's principal purpose is not to monitor her medical condition. The fact that such scans are available through the NHS where clinically indicated does not affect that conclusion.

110. I am satisfied on the evidence before me that the principal purpose of typical customers of the appellants for First Scans is the diagnosis, prevention or monitoring of a medical condition. The appellants' supplies of First Scans are therefore exempt as a supply of medical care.

111. In my view the same can be said of the Well-being scan supplied by WTTW franchisees. There is only a single 2D image provided with those scans. What customers get is a Well-being report which confirms a single or multiple pregnancy and a heartbeat, detects certain abnormalities, provides a growth check and confirms the position of the baby and the placenta. This is all information which either diagnoses or monitors a medical condition in the woman or the fetus. I am satisfied that the principal purpose of a typical customer purchasing such a scan is to enable a sonographer to diagnose and/or monitor a medical condition in the same way as a First Scan and the supply is an exempt supply of medical care.

112. Turning now to the Well-being + Gender scan. The evidence is that 45% of WTTW scans purchased are Well-being scans, and 31% are Well-being + Gender scans. Together, these scans amount to some 76% of all scans purchased. It is usually the case that the gender of a fetus will be disclosed to a pregnant woman at her NHS 20 week scan. It is not clear why a woman might therefore purchase a Well-being + Gender scan rather than simply a Well-being scan. It may be because the scan is purchased prior to the 20 week scan. It may be that £4 is a small price to pay, either to have an earlier indication of the gender or as confirmation of an NHS scan which has already taken place. Miss Macpherson said in evidence that the principal purpose of many women having a scan is often to find the gender. I'm not sure that is right where some 45% of women having a scan at WTTW clinics purchase only a Well-being scan. Be that as it may, it seems unlikely to me that a woman would purchase a Well-being + Gender scan with the principal purpose of identifying the gender of the fetus when that information is very likely be available at the NHS 20 week scan. In my judgment, the principal purpose is likely to be obtaining the Well-being report. As such, I am satisfied that the supply of a Well-being + Gender scan is an exempt supply of medical care.

113. The Growth and Presentation scan provides customers with very little in the way of imagery, just 4 images. It provides a Well-being report and information as to the position of the baby and placenta, head circumference, femur length, and estimated fetal weight. The only reason to be interested in this additional information is to diagnose possible abnormalities, monitor the woman's medical condition and prevent illness associated with a breech baby or the way in which the placenta is lying. The need for such a scan may not be clinically indicated, but as a matter of fact it enables a sonographer to monitor the woman's medical condition and medical care. As such, I am satisfied that the supply of a Growth and Presentation scan is exempt as a supply of medical care.

114. The remaining scans offered through WTTW all involve the significant provision of 4D imagery in addition to the Well-being report and gender of the fetus. They cover some 21% of scans sold by WTTW franchisees.

115. Ms Vicary submitted that the imagery would have little benefit to a typical customer if these scans did not at the same time confirm that the fetus was healthy. I accept that may be true, but it does not say anything about the principal purpose of a pregnant woman purchasing one of these scans. It is however significant that the imagery is only available together with a Well-being scan. A woman cannot simply choose to obtain the imagery without also having a

Well-being scan. That is so, even though the appellants could choose to offer only imagery without the use of qualified sonographers.

116. Ms Vicary posed the question in these terms: What is the primary thing any customer wants from these scans? Is it to know that the fetus is healthy and the pregnancy is progressing normally, or is it to obtain the imagery. Ms Barnes's submission is effectively that a typical customer will get all the medical care she requires from NHS screening and any necessary diagnostic scans. It follows that what she wants from the WTTW scans is the baby bonding experience and the imagery.

117. If Ms Barnes is right, then it does raise a question as to why the appellants would choose to spend an additional £100,000 per clinic per year when the imagery could be provided without that expenditure. It strikes me that is a significant sum if it is simply aimed at providing some sort of credibility or unique selling point for a baby bonding and imagery service offered by the appellants.

118. Echoing the test in CPP, Ms Vicary submitted that the additional cost of generating the images is a matter of pence on top of the cost of producing the Well-being report. Again, I do not think that says much if anything about the principal purpose of a typical customer in purchasing these scans.

119. It is notable that a large majority of customers, some 79% purchase scans where their principal purpose is to obtain the Well-being report or information about the growth and presentation of the fetus. At this stage I am focussing on the remaining 21% who purchase the well-being report together with significant 4D imagery. In my view it is likely that those remaining 21% are not purchasing scans principally for the 4D imagery. Some may well do so, but most will be principally concerned to satisfy themselves that the fetus is healthy. Their principal purpose is to monitor the pregnancy and if necessary receive a diagnosis of any abnormality.

120. Whilst the position is less clear in relation to scans which include 4D imagery, I am satisfied that supplies of those scans are also exempt as supplies of medical care.

CONCLUSION

121. For the reasons given above, I am satisfied that the appellants' supplies are exempt supplies of medical care. The appeal is therefore allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

122. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

Release date: 29 April 2020