



Neutral Citation: [2022] UKFTT 00237 (TC)

Case Number: TC08557

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Hybrid in person/video

Appeal reference: TC/2018/07782

*VAT – exemption - - Article 132(1)(b) VAT Directive EU principle of fiscal neutrality - appeal dismissed*

**Heard on:** 13 – 15 December 2021

**Judgment date:** 01 August 2022

**Before**

**TRIBUNAL JUDGE GREG SINFIELD**

**Between**

**SPECTRUM COMMUNITY HEALTH CIC**

**Appellant**

**and**

**THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Melanie Hall QC and Ciar McAndrew, counsel, instructed by RSM UK Tax and Accounting Limited

For the Respondents: James Henderson, counsel, and Ronan Magee, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. Spectrum Community Health CIC ('Spectrum') supplies a range of healthcare services and related goods to prisoners in thirteen prisons in England. The services are supplied by Spectrum to NHS England ('NHSE') under NHS Standard Contracts which are negotiated with the relevant regional NHSE Commissioner. Spectrum delivers some services itself and sub-contracts the remainder while remaining responsible for the provision of all the services under the contracts. Spectrum provides different healthcare services in different prisons. This appeal concerns the treatment for VAT purposes of certain healthcare supplies made by Spectrum.

2. It is common ground that Spectrum makes exempt supplies of medical care under the Value Added Tax Act 1994 ('VATA'). Spectrum contends that it also makes separate taxable supplies, namely zero-rated supplies of the dispensing of prescription drugs (Item 1, Group 12, Schedule 8 VATA) and reduced rate supplies of non-prescribed sexual health products (Item 1, Group 8, Schedule 7A VATA). Spectrum maintains that, as a consequence, it was required to be registered for VAT under paragraph 9 of Schedule 1 VATA and entitled to recover any input tax attributable to its taxable supplies.

3. The Respondents ('HMRC') do not accept that Spectrum makes any taxable supplies. HMRC consider that Spectrum makes a single composite supply to NHSE of care and/or medical treatment and, in connection with it, the supply of goods in or by a state-regulated institution. That supply is, they contend, wholly exempt under Item 4, Group 7, Schedule 9 VATA. Accordingly, Spectrum is not entitled to be registered for VAT and cannot recover any input tax.

4. Spectrum takes the view that if there is one composite supply (which is denied) then it is exempt under Item 1, Group 7, Schedule 9 VATA as the provision of medical care by the persons specified in that item, which must be construed compatibly with Article 132(1)(c) of Council Directive 2006/112/EC (the Principal VAT Directive or 'PVD'). Spectrum contends that the supply of drugs and contraceptive products is excluded from the exemption because they are not strictly necessary at the time that the medical care is provided and they are physically and economically dissociable from the supplies of medical care.

5. If Spectrum makes multiple supplies for VAT purposes, HMRC's alternative case is that Spectrum is making separate "departmental supplies" of the services described in the service specifications in each NHS Standard Contract. Relevantly to this appeal, HMRC assert that Spectrum supplies a "pharmaceuticals and medicines management" service, which is standard rated for VAT, and a "sexual health and genito-urinary medicines (GUM)" service, which is exempt under Item 4, Group 7, Schedule 9 VATA. On HMRC's alternative argument, Spectrum's appeal must be allowed in part because the pharmaceuticals and medicines management service is taxable.

6. In summary, the issues to be decided in this appeal are:

- (1) does Spectrum make a single composite supply or multiple separate supplies?
- (2) if Spectrum makes a single composite supply, what is the VAT status of that supply?
- (3) if Spectrum makes multiple separate supplies, how should they be treated for VAT purposes?

7. For the reasons set out below, I have found that Spectrum makes a single composite supply of medical care to NHSE under each NHS Standard Contract. Those supplies are exempt under Article 132(1)(c) and Item 1 of Group 7, Schedule 9 VATA as supplies by

Spectrum of the provision of medical care by registered medical and paramedical practitioners. I have decided that, as there is a single supply of medical care by Spectrum, no part of Spectrum's supply falls to be taxed differently and Spectrum does not make any separate taxable supplies of drugs or contraceptive products. Accordingly, Spectrum is not entitled to be registered for VAT and its appeal must be dismissed.

#### **EVIDENCE AND WITNESSES**

8. The documentary evidence was contained in an electronic hearing bundle of 3,372 pages and a supplemental bundle of 597 pages.

9. Spectrum served statements from three witnesses who are all employees of Spectrum. The witnesses for Spectrum and, in outline, the areas covered by their evidence were as follows:

(1) Sharon Hardcastle is Director of Finance at Spectrum. Ms Hardcastle is responsible for the day-to-day management of Spectrum's finances. She also oversees the process of bidding to provide services within prisons, putting together the financial aspects of the bid and executing the relevant contractual documentation if the contract is awarded. Ms Hardcastle is also involved in monitoring Spectrum's performance against specified indicators during the contract period.

(2) Linda Harris is the founder and Chief Executive of Spectrum and sits on its board of directors. She is responsible for the overall running and management of Spectrum. In her witness statement, Dr Harris described the creation of Spectrum in 2011 and the subsequent growth of the business.

(3) Christine Rowlands is the Chief Pharmacist and Operational Manager for Health and Justice Services at Spectrum. Ms Rowlands gave evidence about the pharmacy and medicines management services which Spectrum provides in prisons.

10. All three gave evidence at the hearing. Their witness statements stood as their evidence in chief but they expanded on some points in response to questions from Ms Hall. The witnesses were all cross-examined by Mr Henderson whose questions were mostly by way of clarification rather than challenge. I accept the witnesses' evidence of fact in relation to the issues in this appeal. I incorporate the evidence of the witnesses in my findings of fact and discussion below.

11. HMRC did not produce any witness evidence.

12. In addition to the evidence, both parties provided detailed skeleton arguments with useful suggested advance reading and, at the end of the hearing, helpful notes on the evidence. Most helpfully, at my suggestion, the parties produced an agreed note of the issues and any common ground as matters stood after the hearing had concluded. I am grateful to counsel for their extremely clear and helpful presentations, both written and oral, of the issues in this case.

#### **FINDINGS OF FACT**

13. Spectrum is a community interest company ('CIC') which is a form of social enterprise. It is a special type of limited company which exists to benefit the community, rather than private shareholders. As a CIC, Spectrum is regulated by the Office of the Regulator of Community Interest Companies.

14. Spectrum was spun out of the NHS in 2011 under the right to request option. Since April 2011, Spectrum has been regulated by the Care Quality Commission ('CQC') in relation to certain regulated activities including the treatment of disease, disorder or injury, diagnostic and screening procedures and in certain locations, family planning services.

15. NHSE is an independent body which was created pursuant to the Health and Social Care Act 2012. It oversees all aspects of NHS commissioning within England. NHSE

Commissioners are responsible for commissioning healthcare to be provided in a range of secure settings, including adult prisons and young offenders' institutions. They do this by entering into contracts with providers such as Spectrum. Sometimes, NHSE commissions services for a single prison at a time (as with, for example, Spectrum's contracts for HMP Liverpool and HMP Styal). On other occasions, services are commissioned across multiple prisons via a single contract, such as in relation to a group of seven prisons in the North-east of England.

16. In total, Spectrum supplies NHSE with primary healthcare services in 13 prisons in England. The services include GP, nursing, pharmacy, physiotherapy, substance misuse, mental health, dentistry and optometry services. The aim is that prison primary healthcare should resemble primary healthcare in the community as closely as possible. To that end, nurses conduct clinics and GPs conduct regular surgeries in the prison and the prison pharmacy operates in a similar way to a community pharmacy. Spectrum does not provide secondary healthcare supplied by hospitals such as the emergency treatment of serious injuries or specialist treatment for serious illnesses, eg cancer.

17. Typically, NHSE requires providers to provide a full range of primary healthcare related services in prisons under the relevant contract. The contracts in this case were referred to in the witness statements as "apex" contracts. NHSE holds a contract with a single lead (or apex) provider, such as Spectrum, who in turn either directly provides care and/or sub-contracts parts of the care, eg pharmaceutical services, to other specialist providers (under certain conditions). The lead provider will ensure that all services within the prison operate in an integrated way and will be accountable not only for the services provided directly but also for the functioning of the healthcare services as a whole. All current contracts between NHSE and Spectrum are apex contracts and Spectrum is the lead provider. Spectrum provides some services itself and sub-contracts the provision of the remainder.

18. Ms Hardcastle described the procurement and bidding process which varied between different NHSE Commissioners and contracts. At the initial stage, Spectrum decides whether it wishes to participate in a bid and, if it does, completes a pre-qualification questionnaire and provides certain associated information. If the NHSE Commissioner is satisfied with the information provided, they issue an invitation to tender, which includes a specification of the commissioned services and a copy of the draft contract which is usually the NHS Standard contract. The NHS Standard contract is used by all Commissioners and is not subject to negotiation. There are also standard sub-contract templates, although the extent to which these are used tends to vary.

19. Ms Hardcastle described the service specification in the contracts as a "shopping list" of multiple services which together comprise "prison healthcare services". She said that lead providers, such as Spectrum, must bid for the full shopping list but can then sub-contract out various elements on the list. She also said that, in her experience, it would be very unusual for one provider to provide all the elements of the prison healthcare service. For example, at HMP Styal, Spectrum sub-contracted the provision of dental services (to Smart Dental Care Ltd); mental health services (to Greater Manchester West Mental Health NHS Foundation Trust) and optometry services (to Pollards).

20. If it decides to proceed, Spectrum puts the bid together. The bid explains how Spectrum intends to provide the commissioned services, including which services it will provide in-house and which will be sub-contracted. The bid also includes the amount, including the sub-contractors' costs, that Spectrum will be paid by NHSE over the lifetime of the contract for providing the full package of commissioned services. This is referred to as the "expected annual contract values" and is subject to adjustment in certain defined circumstances.

Depending on the specific requirements of the invitation to tender, the model might also indicate what proportion of the total bid price is allocated to the pharmacy and medicines management service. However, the model would not generally indicate the anticipated cost of, for example, dispensing individual prescribed drugs.

21. Once the bid is submitted, it is assessed by the NHSE Commissioner's evaluation panel. The contract is then awarded to the highest scoring bidder.

22. In the following paragraphs, I set out extracts from some of the documents relating to the Spectrum NHSE contracts.

23. I was provided with the 2019 invitation to tender for healthcare provision in relation to a group of seven prisons in the north-east of England. The introduction to the invitation to tender explained:

“To take into account the changing prison landscape and changes to the prison population, new service specifications have been drafted which are prison-type specific, so that the individual healthcare services provided are tailored to meet the specific needs of the population within the different prisons (sic) establishments.

As well as a new specification a new model of care is being commissioned (sic) within this procurement, moving away from the separate lots model of the existing provision, to one which provides for an integrated model of Community Care, Substance Misuse and Mental Health services.”

24. The HMP Styal Healthcare Service Specification in 2016 described the aims of the service as follows:

“The principle (sic) aim of the service is to provide high quality primary care services that are equivalent to that available to patients in the community, within the constraints of custody.

- To make provisions for a coordinating delivery model for the integrated healthcare services at the establishment;
- To deliver an integrated service where all elements work together as a team to deliver patient centred care;
- To provide a comprehensive range of general healthcare nursing services which meet the health needs of the prisoner population and provide equity with community services as far as possible within the constraints of a custodial environment;
- To provide administrative and management support to enable the operation of healthcare services delivery within the prison;
- To deliver services in partnership with the Commissioner and the establishment Operator;
- To provide services that contribute to reducing reoffending targets and best health and well-being outcomes for the detained population;
- To provide services which have capacity and capability to respond to changes in health needs arising from changes in policy, including changes to prisoner population and/or prison estate;
- To provide high quality, safe and effective and best value services, with robust integrated clinical governance arrangements that enable continuous quality improvement in service delivery that demonstrates value for money for the Commissioner;

- Enable the detained population to access services that meet need and support self-care and health promotion to enable health improvement and a sense of health and well-being.”

25. Under the heading Contract Scope, the HMP Styal service specification stated:

“The provider shall deliver a consistent, accessible, high quality, safe, effective healthcare nursing and administration service which is commensurate to that available within the community.”

26. Later in the HMP Styal Healthcare Service Specification, the scope of the service is described as follows:

“The Provider will ensure that prisoners receive high level primary care services by providing an Integrated Primary Care Service that is equivalent to that provided to the local community within the constraints of the environment.”

27. It then goes on to say that “Medical services [are] delivered as part of an integrated healthcare service (as described within the full range of service specifications within this contract).”

28. The overview to the Service Delivery section of the HMP Styal Healthcare Service Specification notes that:

“As the Commissioner is contracting an integrated healthcare service this specification should be read in conjunction with the other specifications attached to this contract for the full service model to be fully understood.”

29. In 2016, Spectrum entered into a contract with NHSE in relation to HMP Full Sutton. It was a NHS standard contract under which Spectrum was the lead provider (referred to as the “Head Provider” in the contract). Both Spectrum and HMRC agreed that the HMP Full Sutton contract was a typical contract. Originally, the contract was due to end in 2021 but NHSE exercised its option to extend the contract until 2023. Schedule 2 sets out the services to be provided by Spectrum as follows:

- (1) Health Promotion and Prevention
- (2) Information Management & Technology
- (3) Pharmacy and Medicines Management
- (4) Mental Health and Learning Disability Service
- (5) Healthcare Nursing and Administration Service
- (6) Optometry Service
- (7) Prison General Practitioner (GP) Service
- (8) Sexual Health and Genito Urinary Medicines (GUM)
- (9) Substance Misuse Service
- (10) Therapies
- (11) Dental

30. Each heading is linked to detailed specifications. By way of example, in relation to the pharmacy and medicines management service, it states:

“The provider shall deliver a consistent, accessible, high quality, safe, effective and evidence-based pharmacy and medicines management service which is commensurate to that available within the community.”

31. The scope of the pharmacy and medicines management service includes the following:

“2. The Commissioner requires a service that provides the following: -

- i. Sourcing of Medicines
- ii. Dispensing of medicines
- iii. Medicine Optimisation Services: For example, Medicines Use Reviews; providing the pharmacist input for the development of Patient Group Directions
- iv. Monitoring stock control directly within each prison or indirectly
- v. Monitoring Controlled Drug administration systems by healthcare and substance misuse providers
- vi. Analysing and Reviewing prescribing against national prescribing indicators for cost and clinical effectiveness
- vii. Delivering training on the use of medicines and clinical effectiveness to those health professionals administering the medication
- viii. Actioning and implementing drug and patient safety alerts
- ix. All essential services as detailed under the National Pharmacy Contract, consistent to those available to patients in the community, whilst operating within the constraints of a custodial setting.
- x. Medicines Management services
- xi. Routinely reports medication safety incidents via the provider’s organisational process AND share these incidents with the healthcare teams, Commissioner via the Medicines Management Committee, contract monitoring AND enter relevant incidents onto the National Reporting and Learning System (NRLS) to meet requirements in the NHS Outcomes Framework Domain 5.
- xii. To work with the Commissioner and the Prison Operator to support a reduction in the number of unnecessary patient transfers to hospital. This is to be achieved by ensuring that all patients that can be appropriately and safely treated within the prison are done so.

...

#### Sourcing of Medical Supplies

1. The Commissioner requires a pharmacy service that includes the cost effective sourcing and purchase of all required pharmaceuticals, and that ensures continuing patient treatment.”

32. Schedule 3 sets out the payments to be made under the contract. Part A of Schedule 3 deals with “Local Prices” for separately priced services and is stated to be “Not Applicable”. Schedule 4 specifies national quality requirements. Part F sets out expected annual contract values payable for the services to be provided at HMP Full Sutton as a single amount, subject to certain adjustments, eg for inflation.

33. Spectrum sub-contracts the provision of certain services which it is obliged to provide under the HMP Full Sutton contract. For example, until January 2021, Spectrum sub-contracted the provision of out-of-hours GP services. Clause 1 of the sub-contract states:

“The Head Provider has entered into an agreement with the Commissioner for the provision of Out of Hours services at HMP Full Sutton. The Head

Provider now wishes to sub-contract provision of certain of these services to the Sub-Contractor.”

34. Spectrum initially also sub-contracted the provision of dental services in HMP Full Sutton but that sub-contract was terminated in June 2020, following the NHSE Commissioner’s decision to begin contracting dental services directly. The HMP Full Sutton contract also specifies that the psychiatry aspect of the specified mental health services must be contracted out although Spectrum provides the remainder of the mental health services at the prison.

35. Spectrum also provided services in HMP Liverpool. The documents relating to those services included the Service Specification for the Prison Integrated Health & Social Care Service which states under the heading “Aims and Objectives of Prison Integrated Health & Social Care Service”:

“The Provider will deliver a comprehensive prison integrated health and social care service to meet the needs of the population within HMP Liverpool. This will include GP, Nursing, Pharmacy, Integrated Substance Use, Mental Health, Therapy Services, Administration and Information Management & Technology. Care provided will be equivalent to that provided in the community.”

36. The HMP Liverpool Service Specification later states under the heading “Service Model”:

“The Prison Integrated Health & Social Care Service is an integrated model of care encompassing the following services:-

- General Practitioners (GP)
- Prison Primary Care Nursing
- Drug and Alcohol Recovery Team (DART) (Clinical and Psychosocial Substance Use Services)
- Mental Health, Learning Disabilities, Cognitive Impairment and Dementia Care
- Optometry
- Dental Services
- Pharmacy and Medicines Management
- Prison Health & Social Care Administration
- Sexual Health & GUM
- Therapies
- Information Management and Technology (IM&T)”

37. Although there are some minor variations, the services provided in the different prisons are essentially the same.

38. Nurses deliver a wide range of healthcare in prisons which is similar to the nursing care which individuals would receive in the general community. Nurses conduct an initial health screening of prisoners when they arrive at the prison to assess their needs and ensure continuity of any previous care or treatment they received in the community. Nurses also conduct clinics with medically unwell patients and refer patients who require further medical assessment to a doctor. Nurses may treat minor illnesses and injuries, and some senior nurses are qualified to prescribe a limited number of medications. In addition, nurses support patients to manage their long-term conditions and encourage them to adopt healthier behaviours, eg stopping smoking.



39. Doctors conduct regular surgeries in prisons which are similar to the GP surgeries that individuals might visit in the community. Doctors assess patients' medical needs and, if appropriate, prescribe medication. Each prison has a separate consulting room for this purpose. In more serious cases and where appropriate, the doctor will refer the prisoner to a hospital. Doctors may be present or on call at an initial health screening by a nurse in order to assess more serious medical conditions or prescribe urgent medication. There is generally also an on-call doctor who can provide out-of-hours clinical advice and prescriptions remotely, as required.

40. Spectrum provides pharmacy services in all the prisons in which it operates, however, in some prisons, Spectrum sub-contracts the supply and dispensing functions to community pharmacies. The pharmacy services are equivalent to those available in a community pharmacy. Each prison has at least one pharmacist who is supported by pharmacy technicians. The services include sourcing and purchasing medicines, dispensing prescribed drugs to named patients, contributing to the development of the prison formulary, storing drugs safely and securely, managing controlled drugs, securely disposing of pharmacy waste, administering medicines to patients, health promotion and dispensing drugs for minor ailments. Spectrum's pharmacy staff purchase drugs directly from wholesalers at the lowest price available. Pharmaceutical sub-contractors are responsible for purchasing their own drugs, although Spectrum checks that they are not paying too much.

41. Spectrum is generally responsible for providing an integrated substance misuse service for individuals in prison who have issues with drug or alcohol addiction. Doctors or, where appropriate, trained nurses provide prescribed interventions for patients who are dependent on drugs. They also provided recovery services to equip patients to deal with the psychological, behavioural or social factors which may relate to their addiction. In some prisons, Spectrum contracts out the recovery element.

42. Spectrum sub-contracts the provision of mental health services in almost all the prisons in which it operates. The only exception is HMP Full Sutton, in which Spectrum provides some mental health services but sub-contracts the provision of psychiatry services.

43. As part of provision of healthcare, Spectrum provides sexual health services in the prisons. These services are principally provided by specialist nurses, with clinical interventions and secondary care referrals provided by doctors where appropriate. The services include screening for and diagnosis and treatment of sexually transmitted diseases such as Hepatitis C, HIV and chlamydia as well as the provision of certain sexual health items such as condoms, dental dams and lubricants to prisoners that require them.

44. Spectrum provides a number of highly specialist healthcare services including optometry, podiatry and physiotherapy under the NHSE contracts. These services (in particular optometry and dentistry) require particular licenses and qualifications. Spectrum is not able to provide these services itself and sub-contracts them in all prisons in which it operates.

45. As stated above in [16], Spectrum provides primary healthcare and not secondary healthcare services of the type provided in hospitals. This is so notwithstanding the fact that some prisons (for example, HMP Preston and HMP Liverpool) have inpatient units. These are not equivalent to hospital wards as they are lockable cells and are not equipped to provide hospital care. Their purpose is to offer enhancements to the level of primary care nursing and clinical monitoring. They are also commonly used to house patients awaiting transfer to a hospital or secure mental health hospital. They may also be used to provide enhanced primary care to a prisoner who has been discharged from hospital.

46. Each NHSE contract specifies the agreed expected annual contract values which Spectrum is to be paid for providing all the services commissioned under the contract.

Typically, the contract provides that the NHSE Commissioner will pay Spectrum 1/12th of the agreed expected annual contract value each month. Spectrum generally invoices the Commissioner for this sum on a monthly basis. The invoices are not usually itemised. In relation to pharmacy services and specifically the provision of medication, Spectrum does not invoice NHSE on a per-prescription basis and the contract price does not generally change to reflect the drug costs incurred by Spectrum. A similar system applies to pharmaceutical sub-contractors who estimate the number of pharmaceutical products to be supplied in any given year but, in contrast, their invoices are itemised by reference to drug type.

#### **SINGLE COMPOSITE SUPPLY OR MULTIPLE SEPARATE SUPPLIES?**

47. The first issue to be decided is whether, for VAT purposes, Spectrum makes:

- (1) a single composite supply; or
- (2) multiple separate supplies.

48. It has been settled law for many years that there are two types of single composite supply, namely:

- (1) where one or more supplies constitute a principal supply and the other supply or supplies constitute one or more ancillary supplies which do not constitute for customers an end in themselves but a means of better enjoying the principal service supplied (see *Card Protection Plan Ltd v Customs and Excise Comrs* (Case C-349/96) [1999] STC 270, [1999] ECR I-973 ('*CPP* ') at [30]); and
- (2) where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split (see *Levob Verzekeringen BV v Staatssecretaris van Financiën* (Case C-41/04) [2006] STC 766, [2005] ECR I-9433 ('*Levob* ') at [22]).

49. I attempted to summarise the key principles for determining whether a particular transaction should be regarded as a single composite supply or as several independent supplies (whether of a *CPP* or *Levob* type) in *Honourable Society of Middle Temple v HMRC* [2013] UKUT 250 [2013] STC 1998 ('*Middle Temple* '), at [60]:

- “(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.”

50. Since *Middle Temple*, the CJEU has given further guidance on how to determine whether a transaction that comprises a bundle of elements and acts should be regarded as a single composite supply or several separate supplies. In Case C-581/19 *Frenetikexito – Unipessoal Lda v Autoridade Tributária e Aduaneira* (*Frenetikexito*), the CJEU identified three exceptions to the principle that each individual supply must be regarded as distinct and independent for VAT purposes.

51. The first exception is where two or more elements or acts supplied by the taxable person are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split. This is the single supply first identified in *Levob*. In paragraphs 22 to 33 of her opinion, which were specifically approved by the CJEU, the Advocate General (Kokott) in *Frenetikexito* set out how to determine whether a bundle of goods and services is a *Levob* type single supply. The first step is to ascertain the essential features or characteristic elements of the transaction from the perspective of the ‘typical consumer’, ie the typical recipient of the supply. The perspective of the typical consumer is to be determined according to the generally accepted view, ie the understanding of the general public. The Advocate General then identified four “indications” which should be considered from the perspective of the typical consumer. These are:

(1) Indivisibility of the elements of the supply, ie do the individual elements of the supply merge into a new distinct supply such that, in the generally accepted view, there is only a single supply?

(2) Separate availability of the supplies, ie are the different elements that make up the supply available separately or must the customer take all the elements together?

(3) Indispensability of the elements of the supply for the aim of the supply, ie does the transaction have a single economic aim or is the combination of different elements important to the typical recipient of the supplies?

(4) Separate invoicing as an indication that supplies are divisible, ie is there a single invoice and price for all the elements or are they invoiced and/or charged separately?

52. The CJEU condensed the Advocate General’s observations into a single paragraph as follows (cases references removed):

“39 ... it is necessary to identify the characteristic elements of the transaction in question from the perspective of the average consumer. The body of evidence relied on for this purpose comprises various elements, the first of which, being of an intellectual nature and of decisive importance, seek to establish whether or not the elements of the operation in question are indivisible and its economic purpose, whether or not this is unique, and the second of which, being of a substantive nature and not of decisive importance, support, where appropriate, the analysis of the first elements, such as separate access or joint access to the services in question or the existence of a single invoice or a separate invoice.”

53. Although the CJEU endorsed the Advocate General’s analysis, it went further than she did. The CJEU did not call two of the matters to be considered, ie indivisibility and indispensability, “indications” but described them as “of decisive importance” while assigning the other two elements only a supporting, and not decisive, role.

54. The second exception to the principle that each supply must be regarded as a distinct and independent supply is where one or more elements are to be regarded as constituting the principal supply while, by contrast, other elements are to be regarded as one or more ancillary supplies which share the tax treatment of the principal supply. This is the single supply first clearly identified in *CPP*. The CJEU described the criteria to be considered in relation to a *CPP* type supply in paragraphs 41 and 42 (cases references removed):

“41 It follows from the Court’s case-law that the first criterion to be taken into consideration in this respect is the absence of a distinct purpose of the supply from the perspective of the average consumer. Thus, a supply must be regarded as ancillary to a principal supply if it does not constitute for customers an end in itself but a means of better enjoying the principal service supplied.

42 The second criterion, which in fact constitutes evidence of the first, is that account should be taken of the respective value of each of the benefits making up the economic transaction, one being minimal or even marginal in relation to the other.”

55. The third exception to the principle that every individual supply is independent is the provision that ‘closely related activities’ share the exemption of an exempt supply in order to make that exemption fully effective. This exception differs from the other two in three respects:

- (1) it is not derived from case law but is contained in the PVD;
- (2) it does not have general application but is limited to specific exempt supplies; and
- (3) it does not create a single supply from different elements.

56. The scope and nature of the third exception is determined by reference to the particular Article of the PVD in which it appears. The Advocate General in *Frenetikexito* gave the following example at paragraph 45 of her opinion:

“An example is the exemption of hospital and medical care under Article 132(1)(b) of the VAT Directive. In order to achieve the therapeutic aim, further supplies which are distinct from pure medical and hospital care may be necessary in an individual case, such as the services provided by an external laboratory. Making such supplies subject to VAT would run counter to the aim of reducing costs for the health system. The legislature therefore declares in Article 132(1)(b) of the VAT Directive that ‘closely related activities’ are also exempt alongside the care itself.”

57. The CJEU in *Frenetikexito* referred to the third exception identified by the Advocate General but did not discuss it as it was not applicable on the facts of that case.

58. At the hearing, Mr Henderson, who appeared with Mr Magee, for HMRC submitted that the supply made by Spectrum to NHSE is more readily viewed as a *Levob*-type supply rather than a *CPP*-type supply. Ms Hall, who appeared with Ms McAndrew for Spectrum, did not disagree.

59. Accordingly, it seems to me that I must approach the issue of whether Spectrum makes a single composite supply or separate supplies by identifying the essential features or characteristic elements of the transaction in question from the perspective of the average consumer, ie the typical recipient of the supply. In this case, the typical recipient of the supply is easy to identify. It is NHSE. There is no other recipient of the supply by Spectrum.

60. Ms Hall sought to persuade me that the prisoners were the consumers of Spectrum's supplies. She submitted that each element of the contractual package, although related, constituted an end in itself for the prisoners. She contended that the pharmacy services in particular had a purpose which was distinct from the provision of medical care and the other elements in the contractual package. In my view, that is not the correct analysis. While the prisoners are undoubtedly beneficiaries of the provision of medical care by Spectrum, that does not mean that they are recipients of the supply for VAT purposes. As the Supreme Court has made clear on a number of occasions, determining who makes and receives a supply is a two-stage process which starts with consideration of the contractual position and then looks at whether that is consistent with the economic and commercial reality (see *WHA Ltd v HMRC* [2013] UKSC 24, [2013] STC 943 ('*WHA*') at [27], *Secret Hotels2 Ltd v HMRC* [2014] UKSC 16, [2014] STC 937 ('*SH2*') at [35], *HMRC v Airtours Holidays Transport Ltd* [2016] UKSC 21, [2016] STC 1509 ('*Airtours*') at [47]). There is no suggestion in this case that the contractual position does not reflect the economic reality of the transactions. On the basis of the contracts and the evidence, it is clear that NHSE is the recipient of the supplies made by Spectrum.

61. Accordingly, NHSE is the average consumer from whose perspective I must view the elements of the transactions. However, I am not concerned with how NHSE subjectively views the transactions and, indeed, I had no evidence from NHSE on the point. The perspective of NHSE is to be determined according to the generally accepted view of the transactions. Viewed through that lens, I must consider whether:

- (1) the essential features or characteristic elements of the transactions in combination are to be regarded as a distinct single supply; and
- (2) whether the combination of different elements has a single economic purpose, ie is important or indispensable to NHSE for achieving the aim of the supply.

The above points are determinative if they are established on the evidence.

62. In relation to those decisive points, evidence that the customer cannot obtain the elements of the transaction separately but can only purchase them together as a group supports a conclusion that the transaction is a single, indivisible supply. The fact that the customer could choose to take elements of a transaction separately, even if they take them together, suggests that there are separate supplies of the different elements. The existence of a single charge and a single invoice for the transaction indicates that there is a single supply of all the elements included in the price or invoice whereas separate pricing and/or invoicing suggests that the elements in the transaction are divisible into separate supplies. I must bear in mind that these matters are not necessarily determinative. For example, a single price may be a matter of accounting convention or convenience and not necessarily an indication of a single supply. An

apparent ability to choose which elements to take may not be consistent with separate supplies if, in reality, all the elements are essential for the customer to achieve their aim in entering into the transaction.

63. I must consider how the supplies received by NHSE from Spectrum are generally understood. Ms Hardcastle's evidence was that, from the NHSE Commissioner's perspective, it is important that the different elements of the prison healthcare service work smoothly together so that there are no gaps in provision. Commissioners also wish to ensure that they only have to engage with a single provider even though, behind the scenes, different providers may provide discrete elements of the service. It seems to me that the essential features or characteristic elements of the supplies by Spectrum to NHSE under NHS Standard Contracts are the provision of services relating to health and social care of prisoners. What NHSE wants and what Spectrum is contractually obliged to deliver is an integrated primary healthcare or health and social care service in the relevant prison or prisons that is equivalent to that provided by the NHS in the general community. The different elements all fall within the description of "primary healthcare" or "integrated health and social care" and those are terms that are well understood and used generally.

64. The individual elements specified in the contracts all share the same aim or purpose of enabling a healthcare service to be provided in the prisons. They are all linked to each other in that they are all necessary or important to NHSE if it is to achieve its aim of providing healthcare in prisons equivalent to that available in the general community.

65. Spectrum supplies the healthcare services in relation to the various prisons to NHSE under separate contracts relating to each prison or group of prisons. The healthcare services are provided as a package. NHSE cannot alter the contractual package, eg by refusing to take some services or receiving others, without amending or ending the particular contract.

66. In each case, the consideration is a single amount for each year of the contract which is apportioned and paid in monthly instalment without any adjustment for the elements actually supplied during the month.

67. I conclude that what NHSE receives from Spectrum under each contract is what would generally be regarded as a single supply of primary healthcare or health and social care in the specified prison or prisons. I consider that, from the point of view of NHSE, it would be artificial to split that supply into separate supplies of the individual elements that comprise the integrated healthcare or health and social care service.

68. I do not consider that the ability of Spectrum to sub-contract the provision of parts of the healthcare service undermines my conclusion that Spectrum is making a single supply. As far as NHSE is concerned, the primary responsibility for providing the sub-contracted element remains with Spectrum as part of its obligation to provide an integrated primary healthcare or health and social care service in the relevant prison or prisons.

69. As I have concluded that Spectrum makes a single composite supply of primary healthcare or health and social care, it is not necessary for me to consider HMRC's alternative case that Spectrum is making separate "departmental" supplies based on the relevant service specifications in each NHS Standard Contract. Had it been necessary to do so then I would have concluded that there was no reason, having concluded that Spectrum made multiple supplies, to combine the separate supplies of drugs and contraceptives into a Pharmacy and Medicines Management service and a Sexual Health service. That seems to me to be no more than an attempt to apply a generic or high-level description to supplies of drugs and prophylactics in an attempt to alter the VAT treatment of the underlying supplies.

## VAT CLASSIFICATION AND TREATMENT OF THE SINGLE SUPPLY

70. I must now consider how the single composite supply of primary healthcare or health and social care should be classified and treated for VAT purposes. As I have already described in [3] and [4] above, both parties accept that if Spectrum makes a single composite supply then that supply is exempt as a supply of medical care. However, the parties disagree over whether the supply is exempt under Article 132(1)(b) PVD (implemented in the UK by Item 4 of Group 7 of Schedule 9 VATA) or Article 132(1)(c) PVD (implemented in the UK by Item 1 of Group 7 of Schedule 9 VATA).

71. Spectrum takes the view that if there is a single supply then it is the supply of services consisting in the provision of medical care by registered doctors, nurses etc and exempt under Item 1, Group 7, Schedule 9 VATA which implements Article 132(1)(c) PVD in the UK. Spectrum contends that the significance of the distinction is that supplies of drugs and contraceptive products (save for minor provisions of drugs which are strictly necessary at the time when the care is provided) may be excluded from a single composite supply of medical care under Item 1 and are taxable whereas they are not included in the exempt supply if Spectrum supplies care or medical treatment under Item 4.

72. HMRC's principal submission on this point is that Spectrum's supplies are exempt under Article 132(1)(b) and Item 4 of Group 7. That provision exempts medical care and closely related activities undertaken by a duly recognised establishment of a similar nature to hospitals and centres for medical treatment or diagnosis under social conditions comparable with those applicable to bodies governed by public law.

### Legislation on medical care exemption

73. I start by looking at the relevant provisions of the PVD and VATA. Article 132(1) PVD materially provides as follows:

“Exemptions for certain activities in the public interest

Article 132

1. Member States shall exempt the following transactions:

...

(b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;

(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned; ...”

74. The exemption in Article 132(1)(b) is subject to Article 134 PVD which provides:

“The supply of goods or services shall not be granted exemption, as provided for in points (b), (g), (h), (i), (l), (m) and (n) of Article 132(1), in the following cases:

(a) where the supply is not essential to the transactions exempted;

(b) where the basic purpose of the supply is to obtain additional income for the body in question through transactions which are in direct competition with those of commercial enterprises subject to VAT.”

75. The two limbs of Article 134 are alternative, not cumulative (see Case C-495/12 *HMRC v Bridport and West Dorset Golf Club Limited* [2014] STC 663 at [23]). It follows that the exemption for hospital and medical care and closely related activities under Article 132(1)(b)

does not apply to supplies of goods and services which come within either of the two cases in Article 134.

76. There was a significant degree of consensus between the parties as to the approach to be taken when interpreting Article 132.

77. It was common ground that, in both Article 132(1)(b) and (c), ‘medical care’ has the same meaning. In both provisions ‘medical care’ means or includes “services that have as their aim the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders” (see C-366/12 *Finanzamt Dortmund-West v Klinikum Dortmund gGmbH* (‘*Klinikum*’) at [29]).

78. Both parties agreed that, for the purposes of Article 132(1)(b), Spectrum is not a “body governed by public law”, which is an autonomous EU law concept, and the prisons in this case are not hospitals. It was also common ground that the fact that the UK has a discretion under Article 132(1)(b) PVD in relation to either “duly recognised establishment” or “under social conditions comparable with those applicable to bodies governed by public law” does not permit the UK to expand the scope of the exemption beyond the limits set by the PVD.

79. The key distinguishing feature between Article 132(1)(b) and (c) is the place where the service is provided and not the nature of that service. In C-76/99 *European Commission v France* (“*EC v France*”) and C-106/05 *LuP GmbH v Finanzamt Bochum-Mitte* (‘*LuP*’) at [22] the CJEU said:

“[Article 132(1)(b)] exempts services encompassing a range of medical care in establishments pursuing social purposes such as the protection of human health, whereas letter (c) of the same provision exempts services provided outside hospitals, be they provided at the service provider's private residence, the patient's residence or at any other location.”

80. Another distinguishing feature between Article 132(1)(b) and (c) is that the exemption under Article 132(1)(b) extends to activities closely related to medical care carried out by certain bodies whereas under Article 132(1)(c) the exemption is restricted to medical care provided by certain persons.

81. It was common ground that exemptions should be strictly but not narrowly interpreted. That is because they represent an exception to the general rule that VAT is levied at the standard rate on all supplies of goods and services in the course of business. However, the terms used to specify an exemption must be given the meaning which they can fairly and properly bear in the context of the exemption (see Chadwick LJ in *Expert Witness Institute v CCE* [2001] STC 42 (‘*EWI CoA*’) at [16] to [19]). That is the approach that I shall take in interpreting and applying the relevant exemptions in Article 132(1) PVD and the provisions of the VATA to which I now turn.

82. The medical services exemption in Article 132(1)(b) is implemented in the UK by section 31(1) VATA in conjunction with Group 7 of Schedule 9 to VATA. Section 31(1) states:

“A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9.”

83. Item 1 of Group 7 of Schedule 9 VATA implements Article 132(1)(c) and provides that the following are exempt:

“The supply of services consisting in the provision of medical care by a person registered or enrolled in any of the following—

(a) the register of medical practitioners;



(b) either of the registers of ophthalmic opticians or the register of dispensing opticians kept under the Opticians Act 1989 or either of the lists kept under section 9 of that Act of bodies corporate carrying on business as ophthalmic opticians or as dispensing opticians;

(c) the register kept under the Health Professions Order 2001;

(ca) the register of osteopaths maintained in accordance with the provisions of the Osteopaths Act 1993;

(cb) the register of chiropractors maintained in accordance with the provisions of the Chiropractors Act 1994;

(d) the register of qualified nurses, midwives and nursing associates maintained under Article 5 of the Nursing and Midwifery Order 2001.”

84. Item 4 of Group 7 of Schedule 9 VATA implements Article 132(1)(b) and Article 134 and exempts:

“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.”

85. Note 8 to Group 7 VATA defines “state-regulated” as follows:

“In this Group “state-regulated” means approved, licensed, registered or exempted from registration by any Minister or other authority pursuant to a provision of a public general Act, other than a provision that is capable of being brought into effect at different times in relation to different local authority areas. Here “Act” means—

(a) an Act of Parliament;

(b) an Act of the Scottish Parliament;

(c) an Act of the Northern Ireland Assembly;

(d) an Order in Council under Schedule 1 to the Northern Ireland Act 1974;

(e) a Measure of the Northern Ireland Assembly established under section 1 of the Northern Ireland Assembly Act 1973;

(f) an Order in Council under section 1(3) of the Northern Ireland (Temporary Provisions) Act 1972;

(g) an Act of the Parliament of Northern Ireland.”

86. It was also common ground that the words of the VATA must be construed in accordance with their ordinary English meaning, subject to: (i) being given a conforming interpretation in accordance with the *Marleasing* principle (see Case C-106/89 *Marleasing v Comercial Internacional de Alimentación* at [8] and [13]) and (ii) disapplying any features of the domestic legislation which are not susceptible to such a conforming interpretation and operate against Spectrum.

### **Approach to classification**

87. Having considered the legislation, I must now decide whether the single supply of primary healthcare or health and social care by Spectrum is exempt under Article 132(b) and Item 4 of Group 7, Schedule 9 VATA or under Article 132(c) and Item 1 of Group 7.

88. I will first identify whether the predominant element of the composite supply (see Case C-18/12 *Mesto Zamberk v Finančni reditelvsti* [2014] STC 1703 (*‘Mesto’*) at [29] et seq) is:

(1) the provision of medical care by registered doctors, nurses etc; or

(2) medical care undertaken by a duly recognised establishment of a similar nature to hospitals and centres for medical treatment or diagnosis under social conditions comparable with those applicable to bodies governed by public law which are exempt under Article 132(1)(b).

89. To do so, I need to consider what is meant by “duly recognised establishment of a similar nature to hospitals and centres for medical treatment or diagnosis” and supplies of medical care “under social conditions comparable with those applicable to bodies governed by public law”.

90. HMRC’s initial position was that the prisons were state-regulated institutions (which is undoubtedly correct) but Mr Henderson rightly did not press that in the hearing as he accepted that the prisons were not undertaking the medical care.

91. Mr Henderson submitted that Spectrum is a state-regulated institution. To support this, Mr Henderson relied on the Oxford English Dictionary (‘OED’) definition of “institution”. The dictionary definition shows that it is a word that is capable of bearing several disparate meanings. The most relevant meaning for the purposes of this case is:

“An establishment, organization, or association, instituted for the promotion of some object, esp. one of public or general utility, religious, charitable, educational, etc., e.g. a church, school, college, hospital, asylum, reformatory, mission, or the like ...”

92. Mr Henderson also submitted that Spectrum is state regulated because it is registered under the CQC as required by section 10(1) of the Health and Social Care Act 2008.

93. It is clear that the term “state-regulated institution” in Item 4 of Group 7 must be read conformably with “bodies governed by public law or duly recognised establishments of a similar nature [to hospitals and centres for medical treatment or diagnosis undertaking medical care under social conditions comparable with those applicable to bodies governed by public law]” in Article 132(1)(b).

94. Both parties made submissions at the hearing based on the opinion of the Advocate General (Hogan) in Case C-228/20 *I GmbH v Finanzamt H* (*I GmbH*). While I was preparing this decision, Spectrum alerted me to the decision of the CJEU in *I GmbH* which had been released. Both parties stated that they did not wish to make any further submissions following the CJEU’s decision. It is, however, helpful to follow the CJEU’s analysis of the two cumulative conditions that must be satisfied for hospital and medical care and closely related activities offered by an entity other than a body governed by public law to be eligible for exemption from VAT. At [37] and [38] of the decision, the CJEU stated:

“37. ... The first condition relates to the services supplied and requires that they be undertaken under social conditions comparable with those applicable to bodies governed by public law ...

38. The second condition relates to the status of the establishment supplying those services and requires the operator to be a hospital, a centre for medical treatment or diagnosis or another duly recognised establishment of a similar nature.”

95. The CJEU in *I GmbH* held that when determining whether medical care supplied by a similar establishment is provided under social conditions comparable with those applicable to bodies governed by public law, the national court should take into consideration a number of matters including regulatory conditions, applicable performance indicators, costs and how fees are calculated and who bears them. It seems to me that the CJEU’s ruling on the issue of the comparability of social conditions is specific to the facts of *I GmbH* which concerned a private hospital. That is not the same as the situation in this case where Spectrum provides primary

healthcare services to NHSE to ensure that prisoners receive the same healthcare as they would if they were in the community. I consider that Spectrum is clearly supplying medical care under social conditions comparable with those applicable to bodies governed by public law because it is supplying the services to NHSE under standard NHS Contracts which are drafted to ensure that healthcare is provided in ways that are as similar as possible to the healthcare available from the NHS to persons in the wider community.

96. The CJEU in [48] of *I GmbH* clarified that the condition that ‘other establishments’ that are of a similar nature to hospitals and centres for medical treatment or diagnosis must be duly recognised applies to all the establishments mentioned in Article 132(1)(b). It seems to me that it is not enough merely to be recognised by the state and that the ‘other establishments’, ie Spectrum, must be duly recognised in the same way as and as equivalent to hospitals and centres for medical treatment or diagnosis. Ms Hall submitted that regulation by the CQC is not enough for Article 132(1)(b). I agree.

97. I do not accept that Spectrum is a duly recognised establishment of a similar nature to a hospital or centre for medical treatment or diagnosis. It seems to me from *I GmbH* and the wording of the provision itself that the term “establishment” in Article 132(1)(b) must be read as a reference to a physical building or structure and not an organization or association as envisaged by the OED definition. Accordingly, that must be the meaning given to the word “institution” in Item 4 of and note 8 to Group 7 of Schedule 9 VATA. That interpretation of the word is consistent with notes (5A) and (5I) to Group 12 of Schedule 8 VATA which clearly envisage an institution as being a place or premises, such as a hospital or nursing home, which a person attends or in which they reside. This means that, as the Advocate General in *I GmbH* observed in paragraph 56 of his opinion, “duly recognised” in Article 132(1)(b) means being considered by the Member State to be a hospital, centre for medical treatment, centre for diagnosis or other establishment of a similar nature.

98. I do not accept that regulation by the CQC confers the status of a hospital or centre for medical treatment or diagnosis on Spectrum. As the note on CQC regulation helpfully produced by HMRC showed, the CQC regulates activities (eg personal care, treatment of disease, disorder or injury, family planning services and diagnostic and screening procedures) not establishments or institutions. Spectrum is also regulated by the Office of the Regulator of Community Interest Companies. However, that regulation is as a CIC and not as a hospital or centre for medical treatment or diagnosis.

99. For those reasons, I find that Spectrum does not make supplies of medical care under Article 132(b) and Item 4 of Group 7. As it was agreed that Spectrum makes supplies of medical care and the only other provision relating to medical care is Article 132(c), it follows that Spectrum makes supplies of the provision of medical care under Article 132(c) and Item 1 of Group 7. The fact that Spectrum is a CIC and not a member of the medical or paramedical professions providing the medical care does not prevent Spectrum’s supplies from falling within the exemption. The exemption under Article 132(1)(c) applies to supplies of the provision of medical care by the relevant professionals and does not require the supplier to be medically qualified. Spectrum makes supplies of the provision of medical care by the doctors, nurses etc whom it employs.

100. The conclusion that Spectrum makes supplies of the provision of medical care by doctors, nurses etc seems to me to be consistent with the facts found in this case, namely that Spectrum provides NHSE with a package of primary care services provided in prisons that are equivalent to the services available to patients in the general community. Primary care services provided by medical professionals in the community (if they are supplies for VAT purposes) undoubtedly fall within Article 132(c) and Item 1 of Group 7.

## **Treatment of provision of drugs and contraceptive products**

101. As I have found that Spectrum does not make supplies of medical care under Article 132(b) and Item 4 of Group 7, I do not need to consider whether any closely related goods or services, not being medical care, are essential to such care or are intended to produce additional income for Spectrum in competition with commercial businesses subject to VAT and thus excluded from the exemption by Article 134. That is not, however, the end of the matter.

102. Ms Hall submitted that, unlike Article 132(1)(b), Article 132(1)(c) only exempts supplies of the provision of medical care. She contended that medical care in Article 132(1)(c) does not include drugs or contraceptive products which are physically and economically dissociable from the medical care. She said that only the minor provision of goods which are strictly necessary at the time when the care is provided can fall within the exemption. Ms Hall relied on C-353/85 *European Commission v United Kingdom* ('*EC v UK*') which she submitted was authority for the proposition that the provision of drugs which are not strictly necessary at the time that the medical care is provided and are physically and economically dissociable from the care are excluded from the exemption in Article 132(1)(c).

103. Mrs Hall also relied on the decision of the CJEU in *Klinikum* at [35] – [37] which she contended showed that, in order to be exempt under Article 132(1)(c), drugs and other items must be provided as part of a therapeutic continuum in the sense that they are essential at the time the care is provided and do not involve a series of individually distinct activities and steps. Ms Hall contended that the drugs dispensed by the pharmacists in this appeal are not provided as an integral part of the medical care provided by GPs or nurses because they are disassociated from the care in terms of eg time, physical location and personnel. Far from being part of a therapeutic continuum, the drugs dispensed by pharmacists are provided as part of a series of individually distinct activities and steps. The medical professionals play no direct part in the dispensing process. Further, while the drugs are dispensed for the personal use of the patients, neither the medical professionals nor the prison can insist that the patients personally administer them. She submitted that the fact that NHSE asked Spectrum to provide the services is irrelevant. Spectrum contended that, if no longer treated as part of a supply of medical care, the supply of drugs is zero rated under item 1 of Group 12, Schedule 8 VATA and the supply of contraceptive products is subject to reduced-rate VAT under Item 1, Group 8, Schedule 7A VATA.

104. HMRC's case was that there is nothing in the case law or legislation that requires or allows elements of an exempt single supply to be treated separately on the basis that they would be taxed differently, eg at the zero or reduced rate, if they were supplied separately.

105. In my view, both *EC v UK*, which concerned the supply of spectacles by opticians who prescribed them, and *Klinikum*, which concerned the supply of anti-cancer drugs by a hospital, can be distinguished from the facts in this case and, correctly viewed, do not support Spectrum's submissions on this issue.

106. The decision in *EC v UK* pre-dates the CJEU's decisions on principal and ancillary supplies in *CPP* and single composite supplies in *Levob*. There is no discussion of whether the opticians prescribing the lenses necessary for the patient and also supplying the corrective spectacles were making a single supply in the terms discussed by the CJEU in later cases such as *Frenetikexito*. The Advocate General (Sharpston) in *Klinikum* appears to have considered that, notwithstanding *EC v UK*, it is still possible to apply a single supply analysis based on those later cases. In [42] of her opinion, she described the *Levob* and *CCP* single supplies as a variant of the *EC v UK* strictly necessary and not physically and economically dissociable supply.

107. The issue in *Klinikum* was not whether the drugs prescribed by doctors employed by Klinikum Dortmund to work in the hospital and used for in-patient hospital and medical care on the hospital premises were exempt. It was not disputed that, in those circumstances, Klinikum Dortmund made exempt supplies of the drugs as part of its provision of medical care in the hospital (see *Klinikum* at [19]). The issue was whether the supply of the drugs by Klinikum Dortmund was exempt when they were prescribed by doctors working in the hospital in an independent capacity and providing outpatient treatment.

108. The distinction between this case and *Klinikum* (and the factual basis of the decision in the latter) is made clear by the Advocate General at [48] – [49]:

“48. ... the patient receives more than one supply: medical care from the doctor and healthcare staff; drugs from the hospital pharmacy.

49. Where separate supplies are made by separate persons, it seems inevitable that those supplies cannot ‘form, objectively, a single, indivisible economic supply, which it would be artificial to split’ or be ‘physically and economically dissociable’. They may be (indeed, it appears that they are) ‘closely related’ and such a close relationship will qualify a supply of drugs to be exempted when the related provision of medical care is exempted under art 13A(1)(b) of the Sixth Directive, but not when it is exempted under art 13A(1)(c). In that regard, the separation between the person supplying the drugs and the person providing the medical care must in my view preclude the two from being regarded together as a single supply, regardless of the fact that neither supply can serve any useful purpose without the other ...”

109. At [36] of its judgment in *Klinikum*, the CJEU specifically approved the Advocate General’s analysis:

“... As the Advocate General noted at points 48 and 49 of her opinion, the patient appears to receive more than one supply, namely, first, the medical care from the doctor and healthcare staff, and second, drugs from the hospital pharmacy managed by KD, which prevents their being considered indissociable, physically and economically.”

110. In *Klinikum*, the patients received more than one supply: medical care from the doctor working in an independent capacity; drugs from the hospital pharmacy operated by Klinikum Dortmund. By contrast, in this case, Spectrum provides the services of the medical professionals and the drugs and contraceptive products that they prescribe as part of a single composite supply of medical care which is exempt under Article 132(1)(c).

111. The CJEU in *EC v UK* and *Klinikum* did not decide that supplies of drugs or goods, other than minor supplies strictly necessary for and not physically and economically dissociable from medical care, could never be elements in a single supply of medical care. In *EC v UK* and *Klinikum*, the CJEU held that minor supplies of goods which are strictly necessary at the time when the medical care is provided and which are physically and economically indissociable from the supplies by the medical and paramedical professionals can fall within the exemption for medical care under Article 132(1)(c) even when those minor supplies are made by third parties who do not themselves provide the primary medical care.

#### **DISPOSITION**

112. For the reasons set out above, Spectrum’s appeal is dismissed.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

113. 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.

114. The Tribunal sent the parties a draft of this decision on 22 July 2022 to enable them to notify the Tribunal of any clerical mistakes, slips or omissions so that they could be corrected before the decision was finalised and published. In their response on 29 July, the representatives applied for the period for submitting the notice of appeal to be extended by 21 days to take account of various holiday and other commitments over the summer period which would prevent Spectrum and its representatives being able to submit any application for permission to appeal within the 56 day period referred to in [113] above. In all the circumstances, I extend the date for submitting an application to 14 October 2022.

**JUDGE GREG SINFIELD  
CHAMBER PRESIDENT**

**Release date: 01 AUGUST 2022**