Neutral Citation: [2023] UKFTT 00970 (TC)

Case Number: TC08991

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location George House, Edinburgh

Appeal reference: TC/2021/11337

VAT - whether the supply of fuel formed part of the supply of plant hire as a single composite supply or whether it was a separate supply? - separate supply - appeal allowed

Heard on: 9 and 10 May 2023
Judgment date: 2 November 2023

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER DEREK ROBERTSON

Between

GAP GROUP LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Philip Simpson, KC instructed by KPMG LLP

For the Respondents: Ben Hayhurst of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant appeals against the decision of the Respondents ("HMRC") which was intimated in a letter of 24 March 2021 that did not specify either the quantum or the appeal rights but was followed by Notices of Assessment dated 6 April 2021 in the sum of £1,440,141. Those were subsequently reduced on review on 23 September 2021 to the sum of £1,028,672. (The amended assessment issued on 4 November 2021was in the sum of £1,028,671.)

2. It was common ground that, on 17 March 2023, HMRC intimated that that was further reduced to the sum of £844,909 but there were no such assessments in the Bundle.

3. The rationale for the disputed assessments is that GAP's supply of red diesel fuel formed part of its main supply of plant hire, as a single, composite supply, and therefore required to follow the VAT liability of the supply of plant hire, which is a single standard rated supply of services.

4. The Appellant's primary argument is that its supplies of plant hire and its supplies of red diesel fuel constituted multiple supplies for VAT purposes and that these multiple supplies should be afforded their own VAT treatment. Accordingly, the Appellant contends that its supplies of plant hire should be standard rated, and its supplies of fuel should be at the reduced rate because the quantity of the supplies fell below the *de minimis* threshold set out in Note 5(c) to Item 1 of Group 1 of Schedule 7A of the Value Added Tax Act 1994 ("VATA").

5. The Appellant's alternative argument is that if it is a single supply, then the element of the single supply consisting of fuel oil attracts VAT at the reduced rate in any event. In that regard, the Appellant relies upon *Talacre Beach Caravan Sales Ltd v HMRC* C-251/05 ("Talacre") and *European Commission v France* C-94/09 ("France") for the proposition that elements of a single supply can be taxed at different rates and if there is a single supply to impose a different rate of VAT on the fuel oil would be to breach the principle of fiscal neutrality.

6. We had a hearing bundle extending to 2,461 pages, an authorities bundle extending to 29 authorities and Skeleton Arguments for both parties. We heard oral evidence from Messrs Anderson, Parr and Telfer for GAP. Officer Kay Russell's witness statement for HMRC was not challenged.

7. On 8 June 2023, HMRC furnished the Tribunal with a chronology relating to an assessment dated 17 March 2023. That chronology referenced correspondence between the parties. The Appellant was directed to lodge any observations thereon with the Tribunal by 24 July 2023. They did so on that date arguing that as the assessment did not form part of the appeal, the Tribunal was not required to provide a view on the VAT treatment of those supplies. We agree. They enclosed copies of the entirety of the relevant correspondence.

8. Whilst we note the position and the correspondence, that assessment is not in dispute in this appeal and the Appellant has confirmed that it has not been appealed. We do not propose to refer to it further.

The Relevant Procedural History

9. On 4 October 2022, there had been a Case Management Hearing in relation to HMRC's application that this appeal be sisted pending the final determination of what was alleged to be a similar appeal.

10. The Appellant's witness statements in this appeal had been filed in July 2022 but none had been filed for HMRC. The Notice of Objection for the Appellant argued that there were key factual differences between the two appeals both in terms of the business models and the

supplies of fuel. Relatively detailed argument was advanced in relation to both and the application to sist was refused.

11. Of consent, on 5 October 2022, detailed case management directions, were issued and those included provision for HMRC to lodge with the Appellant a list of questions arising from analysis of the Appellant's witness evidence and the arguments advanced at the hearing and, if that list was not challenged, for the Appellant to respond thereto.

12. HMRC posed a list of questions ("the Questions") on 21 October 2022 and the Appellant responded on 16 November 2022. On 5 December 2022, HMRC posed a number of further questions and stated in bold that "The Appellants (sic) are on notice that depending on the answers received, further questions may follow".

13. On 9 December 2022, the Appellant's agent wrote to HMRC in the following terms, namely:-

> "We have had the opportunity to consider and take instructions in relation to the document containing further HMRC questions that you shared with us on the 5th December.
>
> Please note that the Appellant will not be providing any further responses for the following reasons:
>
> (1) The Appellant has already provided full and comprehensive answers to HMRC's questions pursuant to the case management directions issued by Judge Scott on 6 October 2022 which our client was under no obligation to provide;
>
> (2) HMRC have had all the information upon which that (sic) they based their Assessment dated the 6th April 2021 for a significant period of time;
>
> (3) HMRC have had the Appellant's comprehensive witness statements and supporting evidence since July 2022;
>
> (4) HMRC will have the opportunity to cross examine the Appellant's witnesses in the usual way at the hearing.
>
> We trust that you would find this in order and we look forward to receiving HMRC's witness evidence on 16 December 2022."

14. HMRC filed Officer Russell's witness statement dated 15 December 2022.

15. In accordance with the Directions the parties have lodged with the Tribunal both a Statement of Agreed Facts and a List of Agreed Issues.

Statement of Agreed Facts

16. The Statement of Agreed Facts reads:-.

> ***"The Appellant's Fundamental Business***
>
> 2. The Appellant is a plant hire company and has been trading for [in excess of] 52 years with operations at a nationwide level. The Appellant has over 175 depots across the UK from which it supplies tool hire, plant hire, tanker services and other similar services on a business-to-business basis.
>
> 3. The Appellant is one of the largest privately owned plant hire businesses in the UK. The primary element of the Appellant's business is the hiring out of plant equipment to others. The Appellant maintains a catalogue of plant equipment which is available for hire, which includes tele-handlers, excavators, dumpers and diggers, hydraulic packs and

breakers, compaction and concreting equipment, power generation and lighting, pressure washers and power tools.

4. The Appellant hires out plant equipment to a number of different sectors including utilities and energy, transport/construction/large civil contractors, merchants and the public sector.

The Dispute between Parties

5. This dispute concerns the Appellant's supplies of plant hire during the VAT periods 06/2017 – 12/2020 and whether the Appellant's supplies of red diesel constitute separate supplies from those of plant hire.

6. The Appellant has always treated its supplies of fuel as being separate to its supplies of equipment for hire and further, that its supplies of fuel and supplies of equipment attracted different VAT rates.

7. Up until 31 December 2016 the Appellant was a registered dealer in controlled oils ("RDCO"). The Appellant was subsequently deregistered from RDCO by the Respondents on the basis that the Appellant's supplies of red diesel were under the 2,300 litre per day supply threshold and therefore, there was no requirement for the Appellant to be RDCO registered.

8. In Autumn 2019, the Respondents performed an inspection of the Appellant and further requested on 25 June 2020 that the Appellant clarify the VAT treatment applied on several supplies, including the VAT treatment of the supplies of red diesel. The Appellant responded on 31 July 2020 indicating that it had, in line with industry practice, treated its supplies of red diesel as a separate supply subject to the reduced rate of VAT.

9. On 24 March 2021 the Respondents notified the Appellant that it considered that the Appellant is making a single supply of plant hire, inclusive of a fuel 'top-up' charge and that the single supply ought to be subject to the standard rate of VAT. Accordingly, the Appellant had underdeclared VAT in respect of those historic periods as a result of applying the reduced rate of VAT.

10. The Respondents subsequently raised an assessment for underdeclared VAT for VAT periods 06/17 to 12/20 in the total sum of £1,440,141.00 on 6 April 2021.

11. On 23 July 2021, the Appellant wrote to HMRC and submitted a request for an independent review of the Assessment.

12. On 23 September 2021, the Respondents notified the Appellant of the results of its independent review where the Respondents upheld the Assessment, save in respect of quantum, which was reduced to £1,028,672.00 to account for an error made in the original calculations.

13. On 22 October 2021, the Appellant lodged an appeal against the Respondent's decision with the First-tier Tribunal.

14. On 28 June 2022, the Respondents notified the Appellant that it considered that the Appellant's supplies of fuel to Thames Water during VAT periods 06/2017 – 12/2020 fell outside the scope of the assessment. As a result, the Respondents indicated that the VAT assessment was to be amended to exclude those amounts and the quantum was reduced to £844,909 accordingly.

15. The Respondents provided the Appellant with a copy of the amended assessment on 16 March 2023.

16. On 17 March 2023, the Respondents issued the Appellant with a Notice of VAT assessment in respect of the Appellant's supplies to Thames Water during VAT periods 03/2019 – 12/2020. The Respondents assessed the Appellant for VAT in the sum of £86,756 on the basis that the Respondents considered that the supplies of reduced rate red diesel by the Appellant to Thames Water formed a single composite supply with the Appellant's supply of plant hire to Thames Water. As a result, the Respondents considered that the Appellant was making a single standard-rated supply of services."

List of issues

17. The List of Issues reads:

"Issue 1: Whether the supplies of plant and machinery and supplies of red diesel constitute multiple or single supplies for Value Added Tax ("VAT") purposes.

1. The Respondent asserts that the supplies of plant and machinery and red diesel constitutes a single supply which falls to be treated as standard rated for VAT purposes. The Appellant submits that the supplies of plant and machinery hire, and the supplies of red diesel, are separate supplies for VAT purposes and that the supply of red diesel should attract a reduced rate of VAT at 5%.

2. It is not in dispute that, if the supplies of red diesel are supplies separate from those of the hire of plant and machinery, the supplies of red diesel attract a reduced rate of value added tax.

Issue 2: In the event of the Appellant's supplies being a single supply, whether the element consisting of red diesel should be taxed at the reduced rate of value added tax

3. This issue depends on whether the CJEU's Judgment in Case C-251/05 *Talacre Beach Caravan Sales Ltd v Commissioners of Customs & Excise* [2006] ECR I-6269 should be applied to this matter so that, notwithstanding that the plant and machinery hire and the provision of red diesel are together a single supply, the provision of red diesel should attract the reduced rate of value added tax."

18. We observe that notwithstanding the fact that these were the Agreed Issues, in his Skeleton Argument, Mr Hayhurst stated that the first issue was:-

"Whether the Appellant's hire of plant and the supply of fuel to *initially* operate the plant should be regarded as a single composite supply or two independent supplies." (Emphasis added)

He argues that the time of supply of fuel is at the time of the hire contract, whereas Mr Simpson KC argues that it is after the customer returns the equipment without replenishing or topping up the fuel.

Further findings in fact

19. The Appellant's focus is on the hire of plant and equipment (hereinafter referred to as "plant") through its multiple divisions. The Appellant does offer some other services alongside the supplies of plant, such as tanker services, which is where the Appellant provides water to sites and empties and collects waste from effluent and septic tanks. In addition, the Appellant's customers can purchase tools and other parts, such as saw blades, from the depots.

20. The Appellant does not provide fuel management or otherwise supply filled bowsers to customers. The Appellant's drivers do not hold the relevant licences that are required to supply bowsers that have been filled with fuel. On occasion the Appellant supplies empty fuel bowsers to customers and those are then filled by a third party once they have been delivered to the customers.

21. The Appellant's marketing is product centric and primarily centred on branding and showcasing the plant that is available for hire. The Appellant's range of services are displayed on its website and it maintains a catalogue of its products which are available for customers to hire or buy. The average length of the hire period depends on the needs of the customer. Mr Parr explained that the average hire is for six weeks but it can be as little as one day or more than five years. For certain items of plant there is a minimum hire period.

22. Very few of the Appellant's customers source equipment from a single supplier. The customers frequently arrange the hire of the plant for an open-ended hire period.

23. The Appellant does hire plant to some smaller projects such as home renovations via building merchants but 95% of its business relates to large civil construction or utilities projects.

24. Some of the customers will sub-hire the plant to third parties and some customers sub-hire to other companies within their company group.

25. Broadly speaking the Appellant's customers can be divided into four groups, namely:-

(a) Approximately 150 customers who would be described as having major accounts (the "Major Account Customers").

(b) Approximately 5,850 customers who operate in only one of the seven regions in the UK served by the Appellant ("the Regional Customers").

(c) Approximately 40 customers with whom GAP would agree to operate under the customer's own terms and conditions (the "Bespoke Customers").

(d) A very small number of other customers who have specific agreements which are individually negotiated and may include the supply of fuel within the hire rate ("the Other Customers"). These customers are not included in the assessments as they pay VAT on the whole supply at the standard rate of 20%.

26. When the Appellant is first approached by a potential customer, the customer undergoes background checks. That includes looking at the customer's credit position and insurance policies and obtaining trade references. An account will then be opened and the customer is set up on the Appellant's database.

27. In advance of the hire, the Appellant then negotiates a hire rate for each individual item of plant. That does not include any additional charges for supplies such as fuel or delivery charges and other items such as, for example, gloves, manuals, safety goggles, hoses and propane.

28. The hire rate is informed by the capital cost of the plant and broadly speaking, the Appellant hires out the plant at 1% of the capital cost per week.

29. The agreed hire rates are then entered into a document which is headed "Rate Schedule" but is known as a "rate card". The rate cards all have a code, a description of what is available for hire or sale and the weekly rate for the former or the price for the latter. In some of the rate cards there is also a column for a weekly surcharge for the hire, for example inside the M25 or the North of Scotland.

30. The rate card is logged on to the Appellant's systems and matched to the customer's profile.

31. Rate cards may be subject to change periodically to reflect changes in the market and changes in the Appellant's stock. Mr Anderson explained that the Appellant endeavoured to give a degree of certainty for a year but changes were intimated to customers by way of a general mail merge.

32. At that point there is no contract and no obligation to supply to the customer. It is only when a customer issues a purchase order, by reference to the rate card, and it is accepted that there is a contract.

Major Account Customers

33. These customers would usually operate in at least two of the Appellant's geographical regions and would be accustomed to hiring from a range of companies. They are usually involved in major construction and utility projects. Broadly speaking the competitors offer similar terms but the product ranges may be different.

34. Approximately every five years these customers will put their requirements out for tender. Typically they would look to put in place a framework agreement with two or three suppliers from whom they can hire plant.

35. The Appellant submits a tender for the framework appointment and as part of that tender process submits a list of plant hire rates and other service rates, and a copy of the general Terms and Conditions following which the Appellant is scored on different criteria.

36. Once a tender has been won, the Appellant drafts an operating agreement which includes appendices that cover:-

(a) Hire charges which are calculated on the hire of plant "for a weekly basis";

(b) A delivery matrix which varies depending on the plant hired and the method of delivery;

(c) Loss and damages. At the end of the contract, any damages will be assessed and charged at a fair market rate;

(d) Agreed fuel charges which will be separately indexed on an invoice, charged by the litre and may be linked to a market index as that moves. (There are three or four Major Account Customers where the customer has negotiated for the fuel charge to be included in the hire charge rate because of their size and the operation of their purchase order systems).

37. Each account for these customers is allocated an account manager and managed from the "GAP One team" at the Appellant's headquarters. That customer therefore has set points of contact within the Appellant.

38. The Major Account Customers typically enter into such an agreement which was originally called a "Service Level Agreement" ("SLA") but was subsequently rebranded as being "The Best Practice and Trading Agreement" ("BPTA"). That addresses each of the different services that the Appellant could potentially provide to the customer, if so requested. Mr Anderson described it as being "user guidance". It clarifies the different services and rental divisions that the customer may choose to use.

39. It extends to 18 pages with 8 appendices. Appendix 1 sets out the hire rates for various plant items, albeit the customer will not necessarily hire all of the items during the lifetime of the contract, and there is an agreed rate for each item in order to cover all eventualities. Appendix 2 sets out what are described as "Commercial Terms". That includes fuel charges and payment terms together with a number of other services that could be provided such as re-forge and tower lights and road plate placement charges. Appendix 2a sets out "Customer Specific Terms" for that customer such as, for example blade sharpening and separate telemetric tracker charges.

40. There is no obligation on the customer to commission each of the service lines included in the BPTA or, indeed, any of the Appellant's services at all if they do not wish to do so.

Effectively the BPTA sets out all of the services that the Appellant may or may not provide. It ensures that the customer receives a uniform treatment regardless of which depot in the UK the customer approaches.

41. There were two examples of BPTAs for specific customers in the bundles. One was dated 2018 and one 2021 which is after the period with which we are concerned. There are no material differences between them. The 2018 example is with Ardmore Group Limited ("Ardmore") and follows precisely the 2015 template for the BPTA exhibited by Mr Anderson.

42. Paragraph 1.1 sets out a number of matters including the duration of the BPTA and specifically states:-

> "**1.1 AGREEMENT SCOPE**
> ….
> Where this agreement does not cover a specific point Our standard Terms & Conditions will apply. This agreement supersedes any conflict between this agreement and Our standard Terms & Conditions"

43. Paragraph 1.6 reads:-

> **"1.6 FUEL CHARGES**
>
> Fuel charges will be charged per the rates in Appendix 2.
>
> Subject to supplier increases and the world price for crude, any fluctuation of more than 10% in the GAP buying price will be notified to You in writing to agree a possible revised selling price."

44. Of course, Appendix 2 is the "Commercial Terms" referred to above and includes a number of items including additional charges for services provided which are outside the scope of the supply of plant. Under the heading "Fuel Charges" it specifies the prices for different types of fuel and states explicitly that:-

> "No fuel charges will be made until termination of hire and only where equipment was provided fuelled and has been returned with a less than full tank/bottle."

It states that the payment terms for invoices relating to matters in that Appendix will be 60 days net.

45. In the case of Ardmore, Appendix 2a sets out reduced charges for certain "rehired contracts".

46. At Appendix 7 the Appellant's general Terms and Conditions are included in the BPTA.

47. In terms of the disputed assessments approximately £288,000 relates to the Major Account Customers.

Regional Customers

48. The hires to the Regional Customers are brought in by regional sales teams but there are no tenders. The sales team source customers by local marketing and showcasing the available plant. The supply of fuel does not form part of that marketing.

49. Confusingly, Regional Customers also have a BPTA but it is very different to that which is provided to the Major Account Customers. Apart from the introduction and cover page, which states the duration, it is five pages long with no appendices. It is a template which is tailored for the customer.

50. In relation to fuel charges the wording is exactly the same as in the bigger BPTA. However, the payment terms for everything covered by this BPTA are 30 days net.

51. Amongst the matters covered by the BPTA are labour charges, minimum hire periods for specified products and delivery and collection charges. As far as hire charges are concerned, under the heading "CATALOGUE DISCOUNT RATE" it reads:-

> "For items not included in the netted down rates schedule GAP will offer a discount of [*] in our most recently published annual equipment catalogue except for…".

52. We have not had sight of that schedule.

53. It specifies the contact details for the GAP Area Representative since, unlike the Major Account Customers, the Regional Customers do not have an allocated account manager.

54. In setting up an account with the Appellant, as with the Major Account Customers, the customer is under no obligation to hire equipment. The Appellant negotiates the rates that should apply to that customer should they decide to hire equipment.

55. Some customers do not agree a rate card and will simply check the rate on the day which would be the standard default rate.

56. What the BPTA does is to give the customer the option to hire, or purchase, at a known cost and subject to both the Appellant's general Terms and Conditions and the conditions in the BPTA.

57. A small minority of the Regional Customers contract on the Construction Plant-Hire Association Model Conditions for the Hiring of Plant which had been in effect from July 2011 ("the CPA Conditions").

58. In terms of the disputed assessment approximately £453,000 relates to these customers.

Bespoke Customers

59. These are often public bodies or major construction companies who have more complex operations or procurement processes. The main difference in respect of these customers is usually the speed of the delivery and collection times.

60. Mr Anderson stated that a number of customers request that the Appellant signs up to their Terms and Conditions. He exhibited the contracts with four of those customers, namely a BPTA for Ardmore, a Framework Agreement with Eurovia Vinci ("Eurovia"), a Supply Agreement for Morgan Sindall Group ("MS") and a Framework Agreement for VolkerBrooks Limited ("VB").

61. However, the Ardmore BPTA is patently not Ardmore's own Terms and Conditions since it is in identical terms to the template.

62. The Eurovia agreement made no reference to fuel. Mr Simpson pointed out that the rate card for Eurovia (also known as Ringway) did include a rate for "Gas Oil Used Or Purchased" for which the code was "GOIL". Although there was no reference to it in his witness statement, in his oral evidence, Mr Anderson said that when preparing for the hearing he had noted that in a 12 month period just over £5,200 had been charged for fuel relating to £2.2 million of assets in a situation where the total hire revenue was £4.2 million. Eurovia had their own fuel.

63. As far as fuel is concerned, the MS agreement provides:-

> "**Conditions of Order**
>
> **…**

x) Initial fuel – All machines supplied to Morgan Sindall will be full of fuel at the point of delivery. Morgan Sindall will endeavour to refill machines prior to return. On return to the GAP Hire Solutions Limited Operating Depot, the fuel tank will be dipped and any shortages will be charged @ £1.05 per litre for Gas Oil. Petrol supplied at commencement of hire and shortages will be charged @ £1.65 per litre."

64. Mr Anderson confirmed that very few items of plant used petrol. He also confirmed that fuel tanks were not dipped because, for ease of administration, both parties operated on the basis set out at paragraph 86 below.

65. Clause 28 of the agreement for VB reads:

"**Fuel, oil and grease**

Fuel, oil and grease shall, when supplied by the Hire Company, be charged at net cost or an agreed estimate of net cost, and when supplied by the Hirer, shall be of a grade or type specified by the Hire Company. The Hirer shall be solely responsible for all damages, losses, costs and expenses incurred by the Hire Company if the Hirer uses the wrong fuel, oil or grease."

66. Mr Hayhurst had previously taken Mr Anderson to the CPA Conditions. Mr Anderson agreed that this condition was very similar to the CPA Conditions and there is nothing in either in relation to topping up of fuel on termination of the contract.

67. In terms of the disputed assessments approximately £104,000 relates to these customers. Mr Anderson confirmed that these larger customers did indeed account for the smallest amount of fuel charges.

The general Terms and Conditions

68. These Terms and Conditions are printed on the back of the Despatch Notes.

69. In his witness statement Mr Parr had stated at paragraph 28 that "The only conditions are that the equipment must be returned in the same condition in which it was hired and that the equipment must be returned with the same amount of fuel as was in the tank when it was delivered or GAP must be engaged to refuel the tank."

70. At paragraph 33 he had said that "The customers understand that if they return it with less fuel, then they are choosing to ask GAP to make a supply of fuel and this will incur a charge at the end of the hire."

71. One of the Questions posed by HMRC had been to ask how those statements could be supported from the documentation.

72. The response to that Question had simply been to state "The appellant relies on the entirety of its witness evidence and contractual provisions as served on the Respondents in full".

73. Mr Anderson conceded in cross-examination that the Terms and Conditions make no mention of fuel or fuel charges albeit the BPTAs do. He frankly admitted that therefore the response to HMRC had been inaccurate insofar as it related to the contractual provisions.

74. Paragraph 14 of the 2020 Terms and Conditions (printed on 15 July 2020) states that the hirer shall "… order and pay for such consumable items as you shall require to operate and use the Equipment". Earlier versions include the same wording albeit in the December 2014 version it is to be found at paragraph 11. Clearly, that includes fuel used during the contract.

75. Mr Anderson argued that any fuel in the tank, when the item was delivered, had not been ordered by the customer. The only order was if the plant was returned with less fuel than when it had been delivered.

76. Mr Hayhurst drew attention to the reservation of title clause in various iterations of the Terms and Conditions which referred to "all goods supplied at any time"; the inference being that that included the fuel. In a similar vein he referred to the clause intimating that any "shortage" would have to be endorsed on the delivery note.

77. All of the iterations of the Terms and Conditions make it explicit that the customer is responsible for the loading and unloading of equipment when delivered (and when returned if the customer returns it).

78. Mr Anderson explained that all of the equipment has lifting points so equipment can be lifted off the transport and many of the Major Account Customers and Regional Customers have very large sites with material handling equipment. However, in practical terms, if the equipment was fuelled it was quicker and easier to both load and unload.

79. Lastly, Mr Hayhurst drew attention to paragraph 2 of the Terms and Conditions printed on 15 July 2020 where it reads:

> "Unless specifically stated otherwise, prices and rates shown in quotations, contracts, invoices, certificates and correspondence are nett exclusive of VAT, which will be payable to us as an addition to the hire charge at the rate or rates laid down from time to time by Law. We shall be entitled to adjust the rates and amount of VAT retrospectively or otherwise comply with any rulings made by HM Customs & Excise affecting any goods sold, hired or provided by us."

The implication was that that had been introduced because of the HMRC enquiry. Mr Anderson conceded that, although that wording appeared in that version, it did not appear in earlier versions. (In fact, it does). He argued that the Terms and Conditions were regularly reviewed and he did not know the reason for the introduction of that wording.

80. We will revert to that but, in relation to this appeal, we find that nothing turns on that alteration.

The CPA Conditions

81. Some of the regional customers used those conditions instead of the Appellant's conditions.

82. The only provisions relating to fuel are at clauses 23 and 28 but they do not assist. In summary, like for VB, fuel when supplied by the owner, is to be charged at net cost and if supplied by the hirer it has to be of a grade and type specified by the owner.

83. We observe that clause 23(c) simply states that fuel will be removed from bunds, storage tanks and bowsers. It does not specify that fuel should be removed from the equipment or that there should be a top up.

The hire process

84. Whilst a period for hire may have been agreed at the outset, the actual period may be very different depending on the operational needs of the customer.

85. When a customer has selected the plant to be hired, the customer has to issue a purchase order to the Appellant. Thereafter the Appellant sources the plant and arranges delivery. A Despatch Note is then raised. The system changed during the period covered by the assessment and it is now a Delivery Note. The Despatch Note was manually generated as was the

corresponding Collection Note at the end of the hire. The Delivery Note and the corresponding Return Note are generated by I-pads.

86. On the face of the Despatch Note the items being delivered are documented and under the heading "FUEL (IF REQ)" there are boxes to be ticked. That records whether the fuel tank is empty, one quarter full, half full, three quarter full or full. Those choices are deliberately chosen to make the charge for fuel, if any, on completion of the hire, as simple as possible thereby easing the administration burden. In the notes on the face of the Despatch Note it states "All machines requiring fuel will be supplied with a full tank". It also states that the "General Conditions of hire apply as printed overleaf".

87. The Delivery Note is broadly similar and has a column headed "Fuel tank level (if applicable)" and carries the same note indicating that all machines requiring fuel will be supplied with a full tank. The general conditions of hire are not annexed but the note indicates that they apply, and a copy is available on request. "Acceptance of the hire equipment will be held in (sic) implying acceptance of the said conditions".

88. Both show what has been hired and when and where the equipment will be delivered. The customer is asked to confirm, by countersigning the Note, that it has received the equipment etc.

89. The Appellant ordinarily intends to provide the plant with a full tank of fuel to enable the plant to be initially moved, delivered and operated. The tank may well not be full if, for example, the hire is requested in the middle of the night. The price for the hire is exactly the same regardless of the amount of fuel included.

90. Sometimes the customer will not be available when the delivery is made and, in that event, the driver contacts, and asks for instructions from, head office and, if so authorised, unloads and delivers the equipment.

91. Sometimes the customer collects the plant from the Appellant's depot.

92. The customer retains a copy of the Delivery Note.

93. As can be seen from the general Terms and Conditions it is the customer's responsibility to ensure that there is sufficient fuel in the tank to operate the plant during the hire period. GAP's customers are responsible for refuelling the plant at their own expense during the hire period subject to conditions such as ensuring that plant that requires diesel fuel is only fuelled with diesel/Gas oil and FAME (biodiesel) should not be used. This is often done using the customer's own on-site bowser or fuel cans. Customers have the option of using third party suppliers to refuel the plant during the course of the hire.

94. If the customer is present, the Appellant's employee who makes the delivery will agree with the customer how much fuel was in the tank by reference to the plant's fuel gauge. The amount of fuel is noted on the Despatch Note whether or not the customer is present. A full tank of fuel for plant can be between 5 litres for a small compactor plate or other tool, to 560 litres for the largest plant hire item which is a 17 litre tele-handler (similar to a forklift or mini crane).

95. The Appellant ordinarily delivers the plant to its customer. When the plant is delivered to the customer either the delivery operator or the customer will mark on the Delivery Note whether or not there is fuel included and what is included. They aim to have a full fuel tank but they obviously use the fuel to move the equipment when not on hire. When the plant is collected at the end of the hire period, again the fuel tank is checked and the Collection Note annotated appropriately.

96. Throughout the hire period, the customer will be invoiced on a monthly basis for the hire of the plant alone. Any additional costs incurred for other services, for example, delivery costs and fuel will be charged as and when there is a supply of that additional service. For example, the Appellant usually delivers the plant to the customer and as a result, the delivery cost will be invoiced on the first invoice which is raised after the date of the delivery of the plant. These additional services will be separately itemised on each invoice and the rate of VAT associated with that supply, separately identified.

97. The Appellant's administration processes the Collection Note and then emails the customer indicating whether there would be a charge for fuel and/or damage to the plant.

98. The customer then either amends the purchase order or raises a new purchase order to reflect that.

99. The Appellant then issues an invoice for the fuel.

100. Mr Anderson spoke to a contract with a customer where we had the Delivery Note which extended to four pages including photographs of the plant. The delivery was to a farmyard at 15.22 on 30 October 2019, the customer was not present and the fuel tank was full. The Return Note extended was also four pages long including photographs of the plant. The plant was collected on 1 November 2019 at 11.12, the customer was not present and the tank was three quarters full.

101. The invoice for the fuel was dated 30 November 2019, stated that the invoice period was 1 November 2019 and was for 18 litres of fuel at £0.95 per litre. The invoice refers to a purchase order number. The description on the invoice was "Item No – GOIL" and the "Model Description" was "Gas Oil Used Or Purchased". As we have noted in relation to Eurovia that is the same code and description as was included in that customer's rate card. Clearly, it is a standard description and we can see it in many other invoices and rate cards. In the rate cards it is in the category headed "Sales".

102. The invoice for a fuel charge is not necessarily linked to the specific item of plant, so if a customer returns multiple items of plant at the same time there may be only one charge for fuel. The Appellant does not then reconcile the fuel charges with the individual items of plant because the Appellant measures fuel sales simply on a revenue basis not by reference to individual hires. There is a reference to the contract number but a customer may have 20 items of plant only one or two of which require fuel.

Revenue and management systems

103. The Appellant's management systems have never recorded either the percentage of customers who require a fuel top up or the number of items of plant for which a top up was requested. Some of the plant requires fuel to operate and some does not. Mr Parr told us that approximately 14,000 items of plant required fuel but most of the customers had fuel management contracts in place which supplied them with cheaper fuel.

104. The Appellant does not encourage customers to buy fuel from them and charges a margin so that it is significantly more expensive than other sources of fuel. Typically it would be smaller companies who incur a fuel charge, not least because those would be smaller jobs where there is no on-site fuel and it is a matter of convenience.

105. Mr Parr also explained that fuel was not their business so they had no process or systems for those metrics.

106. Mr Telfer explained that the Appellant's revenue is split into two, being "Hire revenue" and "Total revenue". Hire revenue is simply the total of the hire charges. Total revenue includes repairs, transport and delivery charges and sales including fuel charges.

107. In the case management hearing in relation to the application to sist, the argument on business models raised a number of issues including an assertion at paragraph 22 in the Notice of Objection for the Appellant that:

> "… many of the Appellant's customers never engage the Appellant to supply fuel at all. Between April and September 2021, for example, only 14% of the Appellant's customers chose to refuel the equipment with the Appellant. The other 86% chose to refuel with third party fuel suppliers or via their own bowsers."

108. In this hearing Mr Anderson explained that at least 14% of customers will have had a fuel charge but that percentage did not reflect how many items of plant would have been involved or how often they were charged; it might have been one item of plant and one charge or multiple items on one invoice or many invoices. Mr Telfer confirmed that if 30 items of plant were hired and only one incurred a hire charge it would not be possible to interrogate the management information to identify the item of plant. Further their systems did not enable drilling down to capture fuel information by contract.

109. The very clear evidence for the Appellant was that no customer had ever queried the fuel charges regardless of the terms of the contractual documentation.

The Notice of Objection

110. Paragraph 22 in the Notice of Objection was a contentious issue.

111. In the Questions, HMRC had referred to it, pointing out that at paragraph 16 of Mr Telfer's witness statement, he had said that 57% of the Appellant's total hire revenue was generated from plant items which did not require fuel to operate. They therefore asked:

(a) whether the 14% calculation included plant or other items that did not require fuel,

(b) whether in the period subject to assessment, in relation to the 43% of the items that did require fuel to operate, and were hired with fuel at the outset, what percentage were refuelled, and

(c) how did that break down between the customer groups.

112. Before turning to the response, we observe that in a footnote to paragraph 16 of his witness statement, Mr Telfer had explained that:

> "GAP's management accounts had been used to calculate the 57%. Not all of GAP's equipment requires diesel in order to be operated. The 57% reflects the hire revenue that is generated from equipment that does not require red diesel and is stated as a fraction of the hire revenue generated from GAP's total supplies of equipment. For the years under assessment, the percentage of the hire revenue generated from equipment that does not require fuel to operate would have been consistently between 53% and 57%".

113. The response from the Appellant in relation to the 14% was that "The Notice of Objection was served prior to the finalisation of the Appellant's witness evidence. The 14% figure does not form part of the Appellant's evidence. The Appellant's witness evidence clearly sets out the Appellant's position in respect of its supplies and the Appellant relies on its witness evidence as served.".

114. Mr Hayhurst put it to Mr Telfer that the quotation about 14% referred to a period which was after the years of assessment. The response was that the business had not changed in the interim. It was put to him that it had changed in that the Appellant had been charging VAT at 20% during that period. Mr Telfer correctly pointed out that that made no difference because the VAT was neutral as all contracts were business to business.

115. In his witness statement Mr Telfer had said at paragraph 37 that:

"Our equipment hire revenue for our financial year to April 2021 to March 2022 was £185 million and we only charged fuel to a value of £2.69 million which is 1.5% of the total revenue. The total fuel revenue was 1.3% in the prior year and between 1.2% and 1.6% in financial years March 2017 to March 2020 (which is the period of the assessment). The percentages calculated are derived by taking the revenue charged to customers for red diesel and dividing it by the amount of hire revenue generated. Hire revenue is the revenue we generated from hiring out our equipment to customers and makes up 80% of the revenue we generate as a whole. When you compare the total fuel costs to the total hire costs the fuel costs amount to a very small percentage of GAP's total revenue."

116. HMRC had posed a Question referencing that paragraph and asked whether those percentages included plant that did not require fuel and, if so, what the percentage of total fuel revenues was as a percentage of plant hire that did require fuel.

117. In the answer to that Question he had said that the percentage was 1.7%. HMRC had then asked how he had arrived at that figure as they believed that the equipment hire was £185 million including items that did not require fuel to operate so therefore if 43% related to plant that did not require fuel then £79.55 million related to that 43%. HMRC therefore calculated that if the fuel receipts were £2.69 million the percentage should be 3.4%.

118. In oral evidence Mr Telfer confirmed that it should have been 3.4%. We agree.

119. In Closing Submissions, Mr Simpson conceded that the 14% figure was unreliable.

120. The simple facts are that there were charges for fuel but it is a very small part of the Appellant's business and the percentage of customers who purchase fuel is not capable of being readily identified from the management information.

The Law

121. Section 29A Value Added Tax Act 1994 ("VATA") provides that a supply of a description specified in Schedule 7A VATA shall be charged at the rate of 5%.

122. Item 1 of Group 7 of Schedule 7A VATA provides that the following supply shall be charged at the reduced rate of VAT, namely:-

"Supplies for qualifying use –

(a) Coal, coke or other solid substances held out for sale as fuel;

(b) Coal gas, water gas, producer gas or similar gases;

(c) Petroleum gases, or other gaseous hydro-carbons, whether in a gaseous or liquid state;

(d) Fuel oil, gas oil and kerosene; or

(e) Electricity heat or air conditioning".

123. Note 3 to Item 1 of Group 1 of Schedule 7A VATA provides insofar as relevant:-

"In this Group 'qualifying use' means –

(a) Domestic use".

124. Note 5 to Item 1 of Group 1 of Schedule 7A VATA provides insofar as relevant:-

"For the purposes of this Group the following supplies are always for domestic use –

…

(f) A supply of not more than 2,300 litres of fuel oil, gas oil or kerosene."

125. Both parties relied on the Upper Tribunal decision in *The Honourable Society of Middle Temple v HMRC* [2013] STC 250 (TCC) ("Middle Temple") and, under the heading "Principles derived from CJEU cases", at paragraph 60 the Upper Tribunal set out those principles as follows:

> "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."

Discussion

126. Mr Hayhurst is correct in saying that the Appellant bore the burden of proof to challenge the assessments. The issue for the Tribunal is whether that has been done successfully.

Issue 1

127. When Mr Simpson, in his Closing Submissions, had asked the Tribunal to find that the witnesses had all been credible, Mr Hayhurst intimated that he intended to challenge that. That came as a surprise to Mr Simpson since it had not been put to the witnesses that they had not been truthful.

128. At the outset of his Closing Submissions, Mr Hayhurst argued that the evidence of all three of the Appellant's witnesses had been inconsistent and unreliable and that they had advocated their case instead of presenting accurate and realistic evidence of the facts.

129. Mr Hayhurst's approach was to say that he did not challenge their credibility on the basis that they were lying. He argued that the combination of explanations given in oral evidence, instead of by way of amended witness statements or answers to the Questions, when taken together with inconsistences, meant that little weight should be given to their evidence. He went as far as stating that HMRC had been prejudiced because the evidence about the BPTAs was rather like pulling a "rabbit out of a hat".

130. In a few respects, Mr Hayhurst has a point in saying that there were inconsistencies. A particularly difficult, and unfortunate, area is indeed the question of the BPTAs. At paragraph 51 of his witness statement, when referring to the Major Accounts Customers, Mr Anderson had exhibited six BPTAs. In fact two were for Regional Customers and that only became clear in the Hearing. As Mr Hayhurst pointed out, when drafting their respective Skeleton Arguments, both Mr Simpson and he had proceeded on the basis of the witness statement and therefore understood that Regional Customers did not have BPTAs and their hires were subject to the general Terms and Conditions. However, we observe that in their request for a review of the decision, KPMG had stated that customers entered into a BPTA and HMRC's review conclusion decision referenced that. It was only the witness statement that confused the position.

131. Furthermore, as we have found, the BPTAs did incorporate the general Terms and Conditions to the extent that they were not in conflict with the BPTAs. Given the minimalist detail in those BPTAs for the Regional Customers, we find that the reality is that the only material consequence of that lack of clarity in the witness statement is that it only became clear in the hearing that the majority of the Appellant's customers were made aware in writing that if they did not fill the tanks before return of the plant they would incur a cost.

132. We use the words "in writing" because we accept the evidence from all of the witnesses that it is industry practice, just as it is for car hire, for example at airports, to have the option of returning the plant with or without fuel. As an aside the application for the sist supports that view.

133. As can be seen, there is no mention of fuel in either the general Terms and Conditions or the CPA Conditions and it is clear that the Bespoke Customers, such as Eurovia do not demur in paying fuel charges although their contract makes no mention of any fuel charge. We accept that it is a well understood custom and practice in the industry

134. We are a specialist Tribunal and Mr Anderson is the Managing Director of a large company. We were not wholly surprised that his witness statement was not entirely accurate in relation to the detail of the contracts; that is a matter for procurement or some similar department. Further, he made it clear that he had done further research in preparation for giving evidence; hence, for example, his ability to tell the Tribunal the details of Eurovia's fuel payments.

135. There was nothing to be gained for the Appellant in not having identified the correct position at an earlier stage and indeed it would have been to the Appellant's advantage (and would have assisted Mr Simpson!).

136. Mr Anderson readily apologised as did Mr Telfer in relation to his arithmetical mistake. We find that these were simply errors.

137. Whilst it was undoubtedly irritating for HMRC we do not find that they were significantly prejudiced.

138. The witness statements were detailed and there were extensive exhibits. It is apparent from the correspondence with HMRC that the Appellant had co-operated with HMRC during the enquiry. The onus of proof has always been on the Appellant which has been professionally advised throughout. Therefore, although no doubt HMRC would have wished further answers to the Questions, we do not accept the suggestion that the witnesses had deliberately withheld information.

139. Lastly, in that regard, Mr Hayhurst put it to Mr Anderson that the Appellant had failed to provide adequate evidence as to the number of customers who had purchased fuel and, of course, the 14% in the Notice of Objection fed into that.

140. Mr Hayhurst used the issues around the 14% to support his arguments that HMRC had had a "complete inability" to test the assertion that it was only a minority of customers who purchased fuel. Certainly the 14% was referenced in examination-in-chief of Mr Anderson but only because he explained why he had said at paragraph 31 in his witness statement that only a small percentage of the Appellant's customers asked the Appellant to refuel the equipment at the end of the hire.

141. In our view, his explanation was wholly credible and it was that the Appellant measured fuel on a revenue basis but it was not always recorded against specific plant. We accepted the explanation that they did not require, and therefore did not hold, that type of management information because the customers were only interested in the hire charge. The fuel charge is not a negotiable point because the contract is just for the hire of the plant.

142. The Appellant resiled from that percentage on 16 November 2022. We accept, and have found as fact, that the Appellant's management information was neither designed to produce the information sought by HMRC and nor was it capable of doing so. The fact is that the provision of fuel was a very small part of the Appellant's business and for their management purposes as incidental as the provision of, for example, manuals or gloves. "GOIL" was available on the rate card as were all other sale items but they were not separately identified in the management information.

143. Whilst it would be technically possible to manually reconcile the records to identify what customer paid which fuel charges in respect of particular plant, that would indeed be a massive task as Mr Anderson said. That would be quite disproportionate. The percentage of 3.4% identified by HMRC on the basis of the figures produced by Mr Telfer and agreed by him is adequate.

144. We found the three witnesses for the Appellant to be credible and straightforward.

145. We do not accept that the three witnesses were advocating their case. Mr Hayhurst cited as an example, that in his Skeleton Argument at paragraph 19 xi he had stated that:-

> "The Appellant's plant items are required to be fuelled in advance for hire so that they can be moved to be made available to customers. More significantly, a customer cannot operate a plant item at the outset of a hire without this fuel."

and all three witnesses had said in oral evidence that all items of plant are capable of being lifted off the transport when delivered.

146. He argued that that was an improbable and implausible argument and it had been a coordinated response to his Skeleton Argument.

147. It is not that straightforward and we do not accept that.

148. Firstly the context matters. In examination in chief, Mr Anderson confirmed that he had said in his witness statement that customers expect plant to be delivered with a full tank as it allowed for a "simple charging process". Customers understood that if the plant was returned without a full tank they would pay an uplifted price for a supply of fuel when the plant was returned. It was industry practice. He said that that was identified in most of the contracts with Major Account Customers and Regional Customers. It was.

149. Secondly, the proposition put to him in cross-examination had been that it was necessary or essential to have fuel in the plant when it was delivered so that it could be removed from the transport. We accept that it is accurate to say that it is not necessary to have fuel included because the items could theoretically be lifted off the transport.

150. Mr Anderson made it explicit that it was not necessary to have fuel but in practical terms, customers did want fuel in order to take the plant off the lorry under its own power. That was the reason for providing the fuel.

151. Mr Hayhurst put it to Mr Parr that fuel was an essential item on delivery. Mr Parr said that it was not essential but it was certainly more convenient and all of their competitors did so; that was the reason for providing the fuel.

152. Mr Hayhurst also put it to Mr Telfer that it was essential and his response was that although the plant could be lifted it would be included for the reasons he had set out in his witness statement.

153. In summary, we find that the witnesses fairly and accurately answered the questions that were put to them on that issue.

154. Certainly, they did all state that they thought that separate supplies of fuel were made and that was industry practice. Unlike the fuel on uplift, the fuel on delivery was not in the rate card and the customer knew that the hire rate did not include fuel; that was industry policy. That was a statement of what they considered the position to be. To a limited extent that is opinion evidence and therefore carries no weight since they are witnesses of fact but we did not find that their evidence was traduced by that.

155. Mr Hayhurst placed considerable emphasis on the detailed provisions, or lack of provisions, about fuel in the various contractual documents. We have noted and have referred to those. He placed particular reliance on the footnote in the Despatch Note (see paragraph 86 above) and argued that that when read with, for example, the provision about any "shortage" (see paragraph 76 above) that meant that the customer would have understood that there was a supply at the point of hire.

156. We will discuss the timing of the supply later but it was clear to us that customers, such as Eurovia, did pay fuel charges even although there appeared to be no contractual obligation to do so. Neither the Appellant nor MS expected that the fuel tanks would be dipped on return of the plant notwithstanding the terms of the contract. On the balance of probability the rate would not necessarily be the £1.05 stipulated in the contract as the rate card will have been amended over the years.

157. In summary, we find that the commercial and economic reality is that, on the balance of probability, like, for example, the majority of car hire, mobile phone and broadband contracts, the customers will have only been interested in the rates for the hire and little, if any, attention will have been paid to the small print in the contractual provisions.

158. In terms of inconsistencies, Mr Hayhurst made much of the fact that in the 2020 Terms and Conditions under the heading "2. Basis of charging/payment" the final sentence read:-

> "We shall be entitled to adjust the rates and amount of VAT retrospectively or otherwise to comply with any rulings made by HM Customs & Excise affecting any goods sold, hired or provided by us."

In fact it was actually in a number of the versions.

159. He argued that that was an inconsistency because of the terms of a letter dated 27 July 2021 where KPMG wrote to HMRC pointing out that if HMRC were correct in its analysis that VAT should be incurred on the supplies of red diesel at the standard rate, then that VAT would ordinarily be recovered from the customers. However, due to the nature of their business the appellant was only able to recover from its customers the amount of VAT charged on the invoice at the time that the supply was made. They stated:-

> "This is in line with standard industry practice and customer expectations and GAP would otherwise lose customers if GAP sought to recover additional VAT after the date of the supply".

They argued that on that basis therefore, to avoid a substantial commercial disadvantage, GAP had chosen to align its VAT invoicing on its ongoing supplies, whilst the dispute with HMRC continued, to accord with HMRC's thinking. It was stated that that was under protest and for clear commercial reasons to protect their future position.

160. We do not find that to be at all inconsistent. It would be prudent to include such a provision in the contractual arrangements but from a commercial perspective in a competitive market, we find that it would be entirely sensible that the Appellant would not wish to revert to customers and ask for payments which had not been stipulated in invoices.

161. In summary, whilst undoubtedly there were some inconsistencies in the evidence, and that is by no means unusual, we are not persuaded that the witness evidence offered by the Appellant was unreliable and should be given little weight.

162. Turning now to the substantive issue as to the timing of the supply of fuel. There is a certain attractive simplicity in the argument by Mr Hayhurst that where the Appellant provides a full tank of fuel at the outset and invoices for any difference at the end of the hire, then the supply should be treated as being made at the beginning. However, that is perhaps deceptively simple.

163. The argument by HMRC was that the plant was unusable without fuel. That is true but many of the Appellant's customers who were charged for fuel, including Eurovia, had their own fuel or third party suppliers.

164. We find that, when delivering the plant the Appellant certainly does not know what is going to happen. It is common ground that if the plant is delivered with a full tank, as was the case in the example we have cited at paragraph 100 and returned with only three quarters of a tank of fuel there is a supply of only one quarter of a tank of fuel. That could not have been identified at the beginning of the hire.

165. The choice as to whether or not there is a supply of fuel, and the quantity, is entirely at the instance of the customer. Where there has been a sub-hire (see paragraph 24 above) it may not even be the customer's choice.

166. Certainly the customer does know at the outset of the hire that it is possible to obtain fuel and that there will be a charge for that. However, the purchase order that the customer raises at the end of the hire will be based on the rate specified for GOIL in the rate card at that time. As we have indicated at paragraph 31 above the rates in the rate cards are subject to change in the course of the hire. Similarly, as the quotation at paragraph 43 above makes clear, the rate for fuel in the BPTA was also subject to change. Mr Anderson confirmed that the charge was at the applicable rate when the hire had terminated.

167. We have quoted paragraph 60 of *Middle Temple* and we agree that that is the centre of the first issue in this appeal. For ease of reference we refer to the key principles by the sub-paragraph numbers that precede them in paragraph 60.

168. Principles (2), (5) and (6) are our starting point. The essential features or characteristic elements of the transaction undertaken by any customer of the Appellant, the typical customer here, are that they wish to hire plant whether it be for a long or short period. As a matter of convenience they would wish that plant to be supplied with at least some fuel in it so that it can be removed from the transport. For those customers who have their own bowsers or fuel management, the quantity of fuel might be irrelevant. We would expect that there would be varying attitudes as to the amount that is required at the point of delivery.

169. Clearly the supplies of the plant and the fuel are linked. The issue for us is to decide whether they are so closely linked as to be found to be a single economic supply.

170. HMRC relied on the VAT and Duties Tribunal case of *Showtry Ltd* Decision No. 10028 where it was held that the provision of fuel was an integral part of the overall supply of the tractors. In *Showtry Ltd,* where the customer did not have its own fuel supplies, the fuel was supplied throughout the contract. That is certainly not the case in this instance. Furthermore, there was a different price for hire with and without fuel and from the beginning of the contract.

171. At the point of deciding to hire the plant, the customer is aware that they can opt to have the fuel tank refilled by the Appellant when they return the plant. They are also aware that that is an optional extra for which an additional consideration must be paid. It is clear from the rate cards that the costs of the plant hire and the supply of fuel are separately identified. On that basis Principle (1) comes into play which supports a finding of independent supplies, albeit that is not in itself decisive.

172. The customer has a genuine economic choice as to whether or not to have the fuel provided by the Appellant. They have a realistic and practical alternative of supplying their own fuel when returning the plant.

173. We find that the economic reality is that customers who decide not to return the plant with fuel, or enough fuel, have made an economic decision for their own convenience. HMRC argue that the customer's choice was fettered by the conditions relating to both FAME and Clause 28 of the CPA conditions and the VB conditions. We are not persuaded by that argument. If the customers did not comply with those conditions the likelihood is that the plant would be damaged! They would then incur yet further charges and almost certainly much greater than the cost if using appropriate fuel.

174. Principle (10) is therefore relevant. Again it is not decisive, but in our view, there is certainly a genuine freedom to choose. That again supports a finding that there are independent supplies.

175. We also consider it very relevant that the customer's decision is actually made only once the hire has been completed. HMRC have not attempted to argue that there should be a charge for a full tank of fuel when the plant is delivered. HMRC argued that the charge for the cost of refuelling the tank to its pre-hire level was simply a mechanism by which the Appellant calculated how much fuel, which had been supplied at the outset of the hire, had been consumed by the customer.

176. Whilst we understand that, it is equally relevant to say that it is the cost of choosing not to refuel.

177. In his Skeleton Argument Mr Hayhurst argued that:

> "The customer could reduce the amount it owed GAP under the contract by returning the plant refuelled with alterative (sic) compensatory fuel. …the customer has no choice about whether they are supplied with fuel at the outset as this always happens, there was simply an ability to reduce having to pay for the ancillary fuel service by returning the plant fully refuelled"

178. We do not agree. Certainly the customer is always supplied with fuel at the outset but no sum of money is due to the Appellant at any stage until, and unless, the customer decides not to refuel and then issues a purchase order. That is the point when the issue of a consideration being payable for a supply of fuel arises. The provisions about the cost of refuelling, where they exist in the documents, are really suspensive in that they do not come into effect unless and until the customer decides not to fill the fuel tank to the original level, whatever that might have been.

179. When looking at Principle (9) the issue is what the customer's aim in paying for the fuel might be. It cannot be a means of better enjoyment of the principal service which is the hire because that is already finished. The aim is the convenience of not having to fill the tank with fuel. We are not persuaded by HMRC's argument that the supply of fuel was of no use without the plant and that the customer derived no benefit from the plant without having acquired the fuel.

180. Certainly the fuel was used to unload the plant but we also observe that it will have been used by the Appellant to manoeuvre within the depot and to load the plant prior to delivery.

181. In regard to Principle (11), HMRC argue that the fact that separate invoicing occurred could not have altered the economic reality that there was a single supply of the plant and fuel at the outset. We disagree on the basis that at the outset neither the Appellant nor the customer knew whether there would ultimately be a supply of fuel. The invoice can only be triggered when the customer makes the choice not to refuel and issues a purchase order. The separate invoicing does reflect the interests of the parties.

182. We were not persuaded by HMRC's argument that it had not been established that the vast majority of the Appellant's customers would not have known that they could reduce the fuel cost by refuelling the plant prior to return. Quite apart from the fact that we have accepted that it was industry custom and practice, the BPTAs for the Major Account Customers and the Regional Customers make that absolutely explicit and that comprises almost all of the Appellant's customer base.

183. In summary, we find that the fuel was acquired at the point that the customer chose, for whatever reason, not to refill the tank. The typical customer who chose not to refuel had the unfettered freedom to make that choice. In the words of the Court at paragraph 61 of *Middle Temple:*

"In our view, the CJEU cases show that where there is genuine contractual freedom to obtain a service from a third party and, consequently, a separately identified charge is made for the service, this supports the existence of several independent supplies rather than a composite single supply."

184. Accordingly, the answer to Agreed Issue 1 is that there were multiple supplies.

Issue 2

185. If we are wrong in finding that there are multiple supplies then we must consider the Appellant's arguments based on *Talacre* and *France.* Mr Simpson relied on paragraph 24 of *Talacre* but there is no need to rehearse that here. HMRC argue that *Talacre* can be distinguished on its facts and certainly it can but nor is that relevant.

186. We were not referred to *Stadion Amsterdam CV v Staatssecretaris van Financiën* Case C-463/16 where the Court reviewed the authorities and, in particular at paragraph 17, both *Talacre* and *France*.

187. Paragraph 17 reads:

"The referring court finds it conceivable that the judgments of 6 July 2006, *Talacre Beach Caravan Sales* (C-251/05, EU:C:2006:451), and of 6 May 2010, *Commission* v *France* (C-94/09), might be interpreted as meaning that, where it is possible to distinguish a concrete and specific element within a single supply, to which the reduced rate of VAT would be applied if it were supplied separately, that reduced rate of VAT would therefore apply to that identified concrete and specific element of the supply, to the exclusion of the other aspects of that supply. A selective application of the reduced rate of VAT to a single component of a single supply would nevertheless be subject to the condition that there should be no resulting distortion of competition between the suppliers of services or of the functioning of the VAT system. In concrete terms, it must be ensured that the price of that concrete and specific element of the supply can be determined and that that price reflects the actual value of that element, so as to exclude an artificial increase in the price allocated to that element.

188. At paragraph 36 the Court went on to decide that:

"36 In the light of all the foregoing, the answer to the question referred to is that the Sixth Directive must be interpreted as meaning that a single supply, such as that at issue in the main proceedings, comprised of two distinct elements, one principal, the other ancillary, which, if they were supplied separately, would be subject to different rates of VAT, must be taxed solely at the rate of VAT applicable to that single supply, that rate being determined according to the principal element, even if the price of each element forming the full price paid by a consumer in order to be able to receive that supply can be identified."

189. Accordingly, the answer to Agreed Issue 2 is quite simply "No". The Appellant's alternative ground of appeal therefore falls to be dismissed.

DECISION

190. We find that the Appellant's supplies of plant and supplies of red diesel constitute multiple supplies for VAT purposes. Accordingly the appeal is allowed.

Right to apply for permission to appeal

191. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 02nd NOVEMBER 2023