OLD SQUARE
TAX CHAMBERS

Autumn VAT Round-Up: Free Goods

Shane O'Driscoll

10 October 2024

Old Square Tax Chambers
15 Old Square, Lincoln's Inn
London WC2A 3UE

Tel*: (020) 7242 2744*

Fax*: (020) 7831 8095*

taxchambers@15oldsquare.co.uk
www.taxchambers.co.uk

Autumn VAT Round-Up: Free Goods

Shane O'Driscoll[1]

1. INTRODUCTION

1.1 This paper is concerned with when the provision of goods for no consideration can nonetheless trigger a VAT liability. It is divided into three parts.

1.1.1 General Principles when VAT would apply to the provision of free goods or goods provided without consideration;

1.1.2 The recent European Court of Justice decision of *Y KG* (C-207/23) and its implications for UK VAT law;

1.1.3 How decisions of the ECJ could be relied upon, or indeed departed from by the courts in this jurisdiction.

2. GENERAL PRINCIPLES

Deemed Supplies

2.1 Under VATA 1994, VAT is charged on anything 'treated as' a supply of goods made in the UK. The purpose of this provision is to bring within the scope of VAT, supplies:

2.1.1 that would amount to taxable supplies but for the fact that they lack some essential requirement (consideration);

2.1.2 in connection with which supplies in respect of which the person liable to account for tax is someone other than the person who makes or is deemed to make them;

2.2 The purpose of the deeming provisions is:

2.2.1 to prevent the final customer from benefiting from goods or services which have not borne VAT

2.2.2 to simplify tax accounting and administration, and

2.2.3 to combat fraud.

2.3 A supply of goods is deemed to be made if:

2.3.1 goods forming part of the assets of a business are transferred or disposed of so as no longer to form part of those assets.

2.3.2 a grant or assignment is made of any interest in, right over or licence to occupy land forming part of the assets of a business so that it no longer forms part of those assets (only if the grant or assignment is of a major interest or made otherwise than for consideration).

[1] Barrister at Old Square Tax Chambers and the Law Library, Dublin, Ireland.

2.4 These provisions are contained in VATA 1994, Sch 4, para 5(1), (4) and are derived from Directive 2006/112/EC, art 26(1), arts 16 and 18, namely that a supply of goods takes place where the assets of a business are:

2.4.1 applied for the private use of taxpayers or their staff, or

2.4.2 disposed of free of charge, or

2.4.3 applied for purposes other than those of the business

2.5 However, a deemed supply does not take place under these provisions unless the person concerned (P), or any predecessor of P, was entitled to input tax credit, or to a refund under the arrangements for businesses not registered in the UK, for all or part of the VAT on the supply, acquisition (before IP completion day[2]) or importation of the goods to or by P, or of anything comprised in them. A 'predecessor' is a person who transferred assets under a transfer of the business as a going concern to the person concerned and the reference to a predecessor includes any predecessor of the predecessor.

2.6 Where a business is registered for VAT but is now going to deregister, any goods held by the business on deregistration are treated as deemed supplies if those goods had input tax recovered on their purchase. VATA 1994, Sch 4, para 8;

2.7 A business that makes a deemed or a self-supply will have to account for output tax on the supply, so there will be output tax to put on the VAT return. This output tax will be paid to HMRC when the VAT return is submitted. Deemed supplies will only be in point if the trader has recovered input tax on the goods or services in question.

2.8 When accounting for output tax on a self-supply, input tax is available for credit. This input tax can only be recovered to the extent that the item is to be used for making taxable supplies.

2.9 If you give away goods and are entitled to recover VAT on them as input tax and you receive no payment or other consideration for them, you must account for VAT on their cost value. That is unless they can be treated as business gifts.

2.10 The following transfers or disposals are excluded from the deeming provisions[3]:

2.10.1 where there is a gift of goods made in the course or **furtherance of the business** where the cost to the donor is **not more than £50** (excluding VAT). No output tax will be due on a series of business gifts provided the total cost of gifts made to the same person does not exceed £50 in any 12-month period.

2.10.2 where there is a gift to any person of a sample of any goods.

2.11 VAT Notice 700/7[4] provides additional guidance on how to account for VAT schemes on business gifts, samples and promotions and provides numerous examples on how this operates in practice.

3. **Y KG CASE**

3.1 Finanzamt X v Y KG [Case C-207/23] 25 April 2024

[2] 31 December 2020
[3] VATA 1994, Sch 4, para 5(2)a
[4] Last updated 31 December 2020

3.2 The case concerned the preliminary ruling on the interpretation of Articles 16 and 74 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive'). The referral was made in proceedings between the company Y KG and Finanzamt X ('the tax authority') concerning the imposition of value added tax (VAT) on free-of-charge supplies of heat from the cogeneration plant connected to that company's biogas production facility to contractor A for the purpose of drying wood and to company B for the purpose of heating its asparagus fields.

Background Facts

3.3 Y operated a plant producing biogas from biomass. The biogas produced was used in 2008 for the decentralised production of electricity and heat. The majority of the electricity generated in this way was supplied to the general electricity grid and paid for by the grid operator. The heat generated during that operation was partly reused in Y's production process.

3.4 Under a contract dated 29 November 2007, Y transferred 'free of charge' the majority of the heat so produced to contractor A so that they could dry wood in containers and, under a contract dated 29 July 2008, to company B, which used the heat to heat its asparagus fields. Both contracts specified that the amount of the payment was to be determined on an individual basis according to the economic situation of the user of the heat without that payment being specified in the contracts themselves.

3.5 During 2008, in addition to the minimum feed-in fee received from the electricity grid operator, under Paragraph 8(1) of the EEG[5], in the amount of EUR 1,054,337.85, Y also received from the electricity grid operator a rebate paid under Paragraph 8(3) of the EEG in the amount of EUR 85,070.66 in return for the supply of 6,714,247 kilowatt-hours of electricity, on the ground that it was electricity produced by cogeneration, within the meaning of Paragraph 3(4) of the Law on the maintenance, modernisation and extension of cogeneration of electricity and heat, in the 19 March 2002 version. That EUR 85,070.66 rebate was included, like the minimum fee, in the taxable amount for Y's taxable transactions, according to its VAT return.[6]

3.6 Since Y did not invoice for the heat transferred to A and B, the tax authority took the view, in the context of an on-the-spot check, that that heat was applied free of charge, for the purposes of point 3 of the first sentence of Paragraph 3(1b) of the UStG[7], for the benefit of A and B (Art. 16). In the absence of a purchase price for that heat, the tax authority calculated the taxable amount for that application on the basis of the cost price of that heat, in accordance with point 1 of the first sentence of Paragraph 10(4) of the UStG.

3.7 There was a number of appeals[8] and ultimately, both Y and the tax authority brought an appeal on a point of law before the Bundesfinanzhof (Federal Finance Court). The Federal Finance Court grappled with the issues.

The questions raised:

3.8 The Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '(1) If a taxable person makes heat from its company available to another taxable person for the latter's economic operations free of charge (in this case: allocation of heat from the cogeneration plant of an electricity provider for the benefit of an agricultural company for the purpose of heating asparagus fields), is this to be regarded as an "application by a taxable person of goods forming part

[5] German Renewable Energy Law - Erneuerbare-Energien-Gesetz
[6] Para 17 of the judgment.
[7] Umsatzsteuergesetz (Law on turnover tax; 'the UStG')
[8] See Para 19 onwards of the judgment

of his business assets" in the form of a "disposal free of charge" within the meaning of Article 16 of the VAT Directive?
Is the answer to this question dependent on whether the taxable person receiving the heat uses it for purposes that would entitle that person to a deduction of input tax?

(2) In the case of an application of goods (within the meaning of Article 16 of the VAT Directive), is the cost price within the meaning of Article 74 of the VAT Directive to be calculated solely on the basis of those costs that are subject to input tax?

(3) Does the cost price include only direct production or generation costs, or does it also include only indirectly attributable costs such as financing costs?'

3.9 In analysing the questions raised, the Court provided some guidance on Article 16:

3.9.1 As regards the objectives of the first paragraph of Article 16 of the VAT Directive and the context of that provision, it is apparent from the case-law of the Court that Article 16 of the VAT Directive seeks to ensure equal treatment between, on the one hand, a taxable person who applies goods for his own private use or for that of his staff and, on the other hand, a final consumer who acquires goods of the same type. To that end, under that provision certain transactions for which no real consideration is received by the taxable person are treated as supplies of goods effected for consideration and subject to VAT. ("Untaxed Final Consumption");

3.9.2 The only exception to this position is as set out in the second paragraph of Art. 16 ("Samples and small gifts exception");

3.10 The court analysed some prior case law on the topic (*EMI Group*, C-581/08; *Mitteldeutsche Hartstein-Industrie* C-528/19) and concluded with respect to question 1:

> "the answer to the first question is that the first paragraph of Article 16 of the VAT Directive must be interpreted as meaning that the transfer free of charge of heat produced by a taxable person to other taxable persons for the purposes of their economic activities constitutes an application, by that first taxable person, of goods forming part of his business assets in the form of a disposal free of charge, within the meaning of that provision, that is to be treated as a supply of goods for consideration, and whether or not those other taxable persons use that heat for purposes giving them a right to deduct VAT is irrelevant in that regard."

3.11 The Court dealt with the second and third questions together, namely whether Article 74 of the VAT Directive must be interpreted as meaning that the cost price, within the meaning of that provision, includes not only direct manufacturing or production costs but also indirectly attributable costs, such as financing costs, and whether only the costs subject to input VAT must be included in the calculation of that price.

3.12 Article 74 states in broad terms that where a taxable person disposes of goods forming part of their business assets the taxable amount shall be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the disposal takes place. Article 74 is a derogation from the general rule in Art. 73[9]. Therefore, in the absence of a purchase price, the taxable amount becomes the "cost price".

3.13 The Court held that it is for the tax authority to determine the cost price in the light of all the relevant factors and that determination involves a detailed examination of the value elements that indicate that price, which must be determined at the time the application was made. The court went on to state that "*it should be noted that it is in no way apparent from the wording of Article 74 of the VAT Directive that the cost price should be based*

[9] *Marinov*, C-142/12

solely on the direct manufacturing or production costs or on the costs which have been subject to input VAT" and also commented that Article 79 does not exclude indirect costs. The court went on to conclude that:

> 58. [...] it must be held that that cost price should be as close as possible to the purchase price and include, consequently, both direct production and manufacturing costs and indirect costs such as financing costs, whether or not those costs have been subject to input VAT.
>
> 59. In the light of all the foregoing considerations, the answer to the second and third questions is that Article 74 of the VAT Directive must be interpreted as meaning that the cost price, within the meaning of that provision, includes not only direct manufacturing or production costs but also indirectly attributable costs, such as financing costs, whether or not those costs have been subject to input VAT.

3.14 In summary, the Court ruled:

> 1. The first paragraph of Article 16 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax
>
> must be interpreted as meaning that the transfer free of charge of heat produced by a taxable person to other taxable persons for the purposes of their economic activities constitutes an application, by that first taxable person, of goods forming part of his business assets in the form of a disposal free of charge, within the meaning of that provision, that is to be treated as a supply of goods for consideration, and whether or not those other taxable persons use that heat for purposes giving them a right to deduct value added tax is irrelevant in that regard.
>
> 2. Article 74 of Directive 2006/112
>
> must be interpreted as meaning that the cost price, within the meaning of that provision, includes not only direct manufacturing or production costs but also indirectly attributable costs, such as financing costs, whether or not those costs have been subject to input value added tax.

3.15 The judgment clarifies that supplies of goods free of charge are subject to VAT, regardless of the recipient's tax status (unless they fall under the exceptions for low-value gifts and samples). It also explains that the taxable amount is based on the cost price of the goods, which includes both direct and indirect costs which are subject to VAT. This is clearly a very broad interpretation of 'costs' which may be problematic on a number of fronts which in turn begs the question whether one ought to argue for or against its adoption into UK VAT law post-Brexit.

3.16 On a practical note, the taxpayer has to account for VAT on goods donated to another taxable business. A simple, nominal charge (plus VAT) for the goods could have avoided this issue, allowing the recipient business to recover the VAT and avoid the deemed supply rules.

4. ROLE OF POST-TRANSITION CJEU DECISIONS IN INTERPRETATION

4.1 The UK ceased to be an EU Member State on 31 January 2020. On this date the UK entered an implementation period (IP), during which it continued to be treated as a Member State for many purposes and remained bound by EU law. The IP ended at 11 pm on 31 December 2020. On that date, a body of EU-derived rights and legislation, known as retained EU law (REUL), was converted into domestic UK law. The primary objective of REUL was to provide legal continuity and certainty at the end of the transition period.

4.2 On 1 January 2024, REUL that remained in force after the end of 2023 was re-categorised as assimilated law. That re-categorisation reflects a change in its status and treatment under UK law, in that assimilated law is generally to be interpreted according to ordinary domestic law and principles. From 1 January 2024, REUL is assimilated into domestic law by virtue of the fact it is generally stripped of EU-derived interpretive effects (e.g. supremacy of EU law, directly effective rights, and general principles previously retained under EU(W)A 2018). However, a bespoke approach has been introduced in relation to VAT and excise law, which continue to be interpreted by drawing on certain types of REUL rights and principles that applied generally before the transition to assimilated law.

4.2.1 On 29 June 2023 the Retained EU Law (Revocation and Reform) Bill 2023 received Royal Assent ('REUL Act'). Under the REUL Act, REUL which had not been revoked by the end of 2023 became "assimilated law". Unlike REUL, assimilated law is not interpreted in line with EU principles of interpretation; these were removed from domestic law by the REUL Act with effect from 1 January 2024.

4.2.2 However, specifically in the context of VAT (and excise) legislation, after the end of 2023, some of the original EUWA provisions continue to be relevant, despite the amendments and repeals made to them by the REUL Act. The Explanatory note of FA 2024 which introduced the changes stated:

> 1. This measure clarifies how value added tax (VAT) and excise legislation should be interpreted in the light of changes made by the Retained EU Law (Revocation and Reform) Act 2023 (REULA 2023). It sits alongside amendments made by REULA 2023 to the European Withdrawal Act 2018 (EUWA 2018).
> 2. REULA 2023 ends the supremacy and special status afforded to retained European Union law (REUL) in the United Kingdom (UK). In relation to VAT and excise, this measure confirms that it will no longer be possible for any part of any UK Act of Parliament or subordinate legislation to be quashed or disapplied on the basis it was incompatible with EU law. It also ensures that the rule known as the principle of consistent interpretation continues to apply so UK VAT and excise legislation continues to be interpreted as Parliament intended, drawing on rights and principles that currently apply in interpreting UK law.
> 3. This legislation ensures the stability of the VAT and excise regimes and provides legal certainty for business following the changes in REULA 2023 taking effect. It mitigates the risk of re-litigating settled interpretation of UK law, protecting billions of pounds of Exchequer revenue - VAT and excise duty (on alcohol, tobacco and hydrocarbon oil) raise over £200 billion of revenue per year.

4.3 FA 2024 Section 28 sets out how the EUWA and the amendments made to it by the REUL Act apply for the purpose of interpreting enactments relating to VAT or any duty of excise (VAT and excise law). It is treated as having come into force on 1 January 2024, and provides that:

4.3.1 Section 4 of the EUWA continues to have effect for the purpose of interpreting VAT and excise law, despite the repeal of section 4 by section 2 of the REUL Act. However, Articles 110 and 111 of the Treaty on the Functioning of the European Union (which relate to internal taxation on products) do not apply to the interpretation of VAT and excise law.

4.3.2 Section 5(1) to 5(3) of the EUWA, as it applied before amendment by the REUL Act, continues to have effect for the purpose of interpreting VAT and excise law. The replacement section 5(A1) to 5(A3) of the EUWA (which was inserted by section 3 of the REUL Act) only has effect in relation to VAT and excise law so far as it relates to the disapplication or quashing of any enactment for incompatibility with retained EU law. The principle of consistent interpretation remains applicable when interpreting VAT and excise law passed or made before the end of the transition period.

4.3.3 Retained general principles of EU law continue to be relevant for the interpretation of VAT and excise law, despite the provision made by section 4 of the REUL Act.

4.4 HMRC provided a policy paper on the interpretation of VAT law post January 2024[10] which states:

> The Retained EU Law (Revocation and Reform) Act removes the supremacy of EU law. However, to make sure there's stability, it was made clear when it was introduced, that a bespoke solution would be introduced for the VAT and excise regimes. The bespoke solution, section 28, Finance Act 2024, outlines how VAT and excise legislation should be interpreted in light of the Retained EU Law (Revocation and Reform) Act.
>
> Both the Retained EU Law (Revocation and Reform) Act and the bespoke solution took effect on 1 January 2024.
>
> HMRC policy for VAT and excise is unchanged. Section 28, Finance Act 2024 means that UK VAT and excise legislation will continue to be interpreted in the same way as it was before 1 January 2024. Drawing on rights and principles that have always applied for interpreting UK law, including the principle of abuse. This means, principle of consistent interpretation (sometimes known as the 'Marleasing' principle) continues to apply in interpreting VAT and excise legislation.
>
> However, businesses will no longer be able to rely on the 'direct effect' of EU law. It will no longer be possible for any part of UK legislation to be quashed or disapplied on the basis that it's incompatible with EU law, as UK law is now supreme. This does not lead to any changes in HMRC policy.
> [...]
>
> The amendments to the European Union (Withdrawal) Act 2018 made by section 6 of the Retained EU Law (Revocation and Reform) Act 2023 will apply to VAT and excise legislation as they do more generally. This includes the rules that the courts must apply in interpreting legislation, including the application of case law.

4.5 With the changes brought in by the REUL Act and FA 2024, there are significant changes to the rules of priority and interpretation which leave the meaning of some UK law (including Acts of Parliament) unclear and uncertain until ultimately resolved by the courts under the new rules.

4.6 However, specifically in the event that a taxpayer wished to challenge the second limb of *Y KG* on the "cost price" , then European Union (Withdrawal) Act 2018, section 6 would suggest that there is more opportunity to argue against the interpretation adopted by the CJEU although the judgment would no doubt be persuasive.

Shane O'Driscoll

Old Square Tax Chambers
15 Old Square
Lincoln's Inn
London
WC2A 3UE

10 October 2024

[10] Revenue and Customs Brief 4 (2024): Interpretation of VAT and excise law from 1 January 2024

Directive 2006/112/EC, art 16

Article 16

The application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible.

However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration.

Directive 2006/112/EC, art 18

Article 18

Member States may treat each of the following transactions as a supply of goods for consideration:

(a) the application by a taxable person for the purposes of his business of goods produced, constructed, extracted, processed, purchased or imported in the course of such business, where the VAT on such goods, had they been acquired from another taxable person, would not be wholly deductible;

(b) the application of goods by a taxable person for the purposes of a non-taxable area of activity, where the VAT on such goods became wholly or partly deductible upon their acquisition or upon their application in accordance with point (a);

(c) with the exception of the cases referred to in Article 19, the retention of goods by a taxable person, or by his successors, when he ceases to carry out a taxable economic activity, where the VAT on such goods became wholly or partly deductible upon their acquisition or upon their application in accordance with point (a).

Directive 2006/112/EC, art 26(1)

Article 26

1. Each of the following transactions shall be treated as a supply of services for consideration:

   (a) the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible;

   (b) the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business.

2. Member States may derogate from paragraph 1, provided that such derogation does not lead to distortion of competition.

Directive 2006/112/EC, art 74

Article 74

Where a taxable person applies or disposes of goods forming part of his business assets, or where goods are retained by a taxable person, or by his successors, when his taxable economic activity ceases, as referred to in Articles 16 and 18, the taxable amount shall be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time when the application, disposal or retention takes place.

Directive 2006/112/EC, art 79

Article 79

The taxable amount shall not include the following factors:

(a) price reductions by way of discount for early payment;

(b) price discounts and rebates granted to the customer and obtained by him at the time of the supply;

(c) amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on
behalf of the customer, and entered in his books in a suspense account.

The taxable person must furnish proof of the actual amount of the expenditure referred to in point (c) of the first paragraph and may not deduct any VAT which may have been charged.

The Treaty On The Functioning Of The European Union

Article 110 (ex Article 90 TEC)

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Article 111 (ex Article 91 TEC)

Where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly.

Value Added Tax Act 1994
1994 CHAPTER 23
Value Added Tax Act 1994

Orange Tax Handbook 2024-25 > Value Added Tax > VAT Statutes > Value Added Tax Act 1994

SCHEDULE 4

MATTERS TO BE TREATED AS SUPPLY OF GOODS OR SERVICES

Section 5

1—

(1) Any transfer of the whole property in goods is a supply of goods; but, subject to sub-paragraph (2) below, the transfer—

(*a*) of any undivided share of the property, or

(*b*) of the possession of goods,

is a supply of services.

(2) If the possession of goods is transferred—

(*a*) under an agreement for the sale of the goods, or

(*b*) under agreements which expressly contemplate that the property also will pass at some time in the future (determined by, or ascertainable from, the agreements but in any case not later than when the goods are fully paid for),

it is then in either case a supply of the goods.

2

…[1]

3

The supply of any form of power, heat, refrigeration [or other cooling,][1] or ventilation is a supply of goods.

4

The grant, assignment or surrender of a major interest in land is a supply of goods.

5—

(1) Subject to sub-paragraph (2) below, where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, that is a supply by him of goods.

(2) Sub-paragraph (1) above does not apply where the transfer or disposal is—

[(*a*) a business gift the cost of which, together with the cost of any other business gifts made to the same person in the same year, was not more than £50;][6]

[(*b*) the provision to a person, otherwise than for a consideration, of a sample of goods.][9]

[(2ZA) In sub-paragraph (2) above—

"business gift" means a gift of goods that is made in the course or furtherance of the business in question;

"cost", in relation to a gift of goods, means the cost to the donor of acquiring or, as the case may be, producing the goods;

"the same year", in relation to a gift, means any period of twelve months that includes the day on which the gift is made.][7]

[(2A) For the purposes of determining the cost to the donor of acquiring or producing goods of which he has made a gift, where—

(*a*) the acquisition by the donor of the goods, or anything comprised in the goods, was by means of a transfer of a business, or a part of a business, as a going concern,

(*b*) the assets transferred by that transfer included those goods or that thing, and

(*c*) the transfer of those assets is one falling by virtue of an order under section 5(3) (or under an enactment re-enacted in section 5(3)) to be treated as neither a supply of goods nor a supply of services,

the donor and his predecessor or, as the case may be, all of his predecessors shall be treated as if they were the same person.][4]

(3) …[9]

(4) Where by or under the directions of a person carrying on a business goods held or used for the purposes of the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose of the business, whether or not for a consideration, that is a supply of services.

[(4A) Sub-paragraph (4) does not apply (despite paragraph 9(1)) to—

(*a*) any interest in land,

(*b*) any building or part of a building,

(*c*) any civil engineering work or part of such a work,

(*d*) any goods incorporated or to be incorporated in a building or civil engineering work (whether by being installed as fixtures or fittings or otherwise),

(*e*) any ship, boat or other vessel, or

(*f*) any aircraft.][8]

(5) Neither sub-paragraph (1) nor [sub-paragraph (4) above][1] shall require anything which a person carrying on a business does otherwise than for a consideration in relation to any goods to be treated as a supply except in a case where that person [or any of his predecessors is a person who (disregarding this paragraph) has or will become][3] entitled—

[(*a*) under sections 25 and 26, to credit for the whole or any part of the VAT on the supply …[10] or importation of those goods or of anything comprised in them; or

(*b*) under a scheme embodied in regulations made under section 39, to a repayment of VAT on the supply or importation of those goods or of anything comprised in them.][5]

[(5A) In relation to any goods or anything comprised in any goods, a person is the predecessor of another for the purposes of this paragraph if—

(*a*) that other person is a person to whom he has transferred assets of his business by a transfer of that business, or a part of it, as a going concern;

(*b*) those assets consisted of or included those goods or that thing; and (*c*) the transfer of the assets is one falling by virtue of an order under section 5(3) (or under an enactment re-enacted in section 5(3)) to be treated as neither a supply of goods nor a supply of services;

and references in this paragraph to a person's predecessors include references to the predecessors of his predecessors through any number of transfers.][4]

(6) Anything which is a supply of goods or services by virtue of sub-paragraph (1) or (4) above is to be treated as made in the course or furtherance of the business (if it would not otherwise be so treated); and in the case of a business carried on by an individual—

(*a*) sub-paragraph (1) above applies to any transfer or disposition of goods in favour of himself personally; and

(*b*) [sub-paragraph (4) above][1] applies to goods used, or made available for use, by himself personally.

[(7) The Treasury may by order substitute for the sum for the time being specified in sub-paragraph (2)(*a*) above such sum, not being less than £10, as they think fit.][2]

6—

(1) Where, in a case not falling within paragraph 5(1) above, goods forming part of the assets of any business—

(a) are removed from any member State by or under the directions of the person carrying on the business; and

(b) are so removed in the course or furtherance of that business for the purpose of being taken to a place in a member State other than that from which they are removed,

then, whether or not the removal is or is connected with a transaction for a consideration, that is a supply of goods by that person.

(2) Sub-paragraph (1) above does not apply—

(a) to the removal of goods from any member State in the course of their removal from one part of that member State to another part of the same member State; or

(b) to goods which have been removed from a place outside the member States for entry into the territory of the European Union and are removed from a member State before the time when any EU customs debt in respect of any EU customs duty on their entry into that territory would be incurred.

[(3) Sub-paragraph (1) above is subject to paragraph 2 of Schedule 4B (call-off stock arrangements).][1, 2]

7

Where in the case of a business carried on by a taxable person goods forming part of the assets of the business are, under any power exercisable by another person, sold by the other in or towards satisfaction of a debt owed by the taxable person, they shall be deemed to be supplied by the taxable person in the course or furtherance of his business.

8—

(1) Where a person ceases to be a taxable person, any goods then forming part of the assets of a business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless—

(*a*) the business is transferred as a going concern to another taxable person; or

(*b*) the business is carried on by another person who, under regulations made under section 46(4), is treated as a taxable person; or

(*c*) the VAT on the deemed supply would not be more than [£1,000][1].

(2) This paragraph does not apply to any goods in the case of which the taxable person can show to the satisfaction of the Commissioners—

(*a*) that no credit for input tax has been allowed to him in respect of the supply of the goods [or their importation into the United Kingdom][3];

(*b*) that the goods did not become his as part of the assets of a business[, or part of a business,][2] which was transferred to him as a going concern by another taxable person; and

(*c*) that he has not obtained relief in respect of the goods under section 4 of the Finance Act 1973.

(3) This paragraph does not apply where a person ceases to be a taxable person in consequence of having been certified under section 54.

(4) The Treasury may by order increase or further increase the sum specified in sub-paragraph (1)(*c*) above.

9—

(1) Subject to sub-paragraphs (2) and (3) below, paragraphs 5 to 8 above have effect in relation to land forming part of the assets of, or held or used for the purposes of, a business as if it were goods forming part of the assets of, or held or used for the purposes of, a business.

(2) In the application of those paragraphs by virtue of sub-paragraph (1) above, references to transfer, disposition or sale shall have effect as references to the grant or assignment of any interest in, right over or licence to occupy the land concerned.

(3) Except in relation to—

(*a*) the grant or assignment of a major interest; or

(*b*) a grant or assignment otherwise than for a consideration,

in the application of paragraph 5(1) above by virtue of sub-paragraph (1) above the reference to a supply of goods shall have effect as a reference to a supply of services.

[(4) In this paragraph “grant” includes surrender.][1]

Relevant German Law (translated) – Extract from the judgment in Y KG page 4 onwards

German law
11. Paragraph 3(1b) of the Umsatzsteuergesetz (Law on turnover tax; 'the UStG') provides:
'The following shall be treated as a supply of goods for consideration:

1. the application by an undertaking of goods forming part of its business assets for purposes other than those of its business;
2. the free-of-charge transfer of goods by an undertaking to its staff for its private use, except for small gifts;
3. any other free-of-charge transfer of goods except for gifts of small value and the giving of samples for business purposes. The treatment of those goods as goods for consideration is subject to the condition that the input VAT paid on the goods or their component parts was deductible in whole or in part.'

12 Paragraph 10(4) of the UStG is worded as follows:
'The taxable amount shall be assessed as follows:

1. in the case of a transfer of goods within the meaning of Paragraph 1a(2) and Paragraph 3(1a), or in the case of supplies within the meaning of Paragraph 3(1b), on the basis of the purchase price plus incidental expenses relating to the goods or goods of the same type, or where there is no purchase price according to the cost price at the time of the transaction;

…'
13. Paragraph 8 of the Erneuerbare-Energien-Gesetz, in the version of 7 November 2006(BGBl. 2006 I, p. 2550) (Law on renewable energy; 'the EEG'), states:
'1. For electricity generated in plants with an output of up to and including 20 megawatts and using exclusively biomass within the meaning of the legal measure referred to in subparagraph 7, the remuneration shall amount to …
…
3. The minimum remuneration referred to in the first sentence of subparagraph 1 shall be increased by EUR 0.02 per kilowatt-hour in so far as it is electricity within the meaning of Paragraph 3(4) of the [Gesetz für die Erhaltung, die Modernisierung und den Ausbau der Kraft-Wärme-Kopplung (Kraft-Wärme-Kopplungsgesetz) (Law on the maintenance, modernisation and extension of cogeneration of electricity and heat), in the 19 March 2002version (BGBl. 2002 I, p. 1092),] and supporting documentation … is submitted to the system operator. In the case of mass-produced cogeneration plants with an output of up to and including 2 megawatts, manufacturer documentation indicating the thermal and electrical output thereof as well as the [combined heat and power (CHP)] coefficient may be provided in place of the documentation referred to in the first sentence.'

14 Paragraph 3(4) of the Law on the maintenance, modernisation and extension of cogeneration of electricity and heat, in the 19 March 2002 version, provides:
'Electricity produced from cogeneration is the arithmetic product of useful heat and the CHP coefficient of the cogeneration plant. In the case of cogeneration plants that do not have a system for the extraction of waste heat, the entire net electricity output shall be regarded as electricity generated through cogeneration.'

European Union (Withdrawal) Act 2018 (EUWA)

6 Interpretation of assimilated law

(1) A court or tribunal—

(a) is not bound by any principles laid down, or any decisions made, on or after IP completion day by the European Court, and

(b) cannot refer any matter to the European Court on or after IP completion day.

(2) Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.

(3) Any question as to the validity, meaning or effect of any assimilated law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it—

(a) in accordance with any assimilated case law . . ., and

(b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences.

(4) But—

(a) the Supreme Court is not bound by any assimilated EU case law,

(b) the High Court of Justiciary is not bound by any assimilated EU case law when—

(i) sitting as a court of appeal . . ., or

(ii) sitting on a reference under section 123(1) of the Criminal Procedure (Scotland) Act 1995,

(except, when sitting as a court of appeal in relation to a compatibility issue or devolution issue, so far as there is relevant domestic case law which modifies or applies the assimilated EU case law and is binding on the court);

(ba) a relevant appeal court is not bound by any assimilated EU case law (except so far as there is relevant domestic case law which modifies or applies the assimilated EU case law and is binding on the relevant appeal court), and

(c) no court or tribunal is bound by any assimilated domestic case law that it would not otherwise be bound by.

and see also subsection (5ZA) below and sections 6A to 6C.

(5) In deciding whether to depart from any assimilated EU case law by virtue of subsection (4)(a), (b) or (ba), the higher court concerned must (among other things) have regard to—

(a) the fact that decisions of a foreign court are not (unless otherwise provided) binding;

(b) any changes of circumstances which are relevant to the assimilated EU case law;

(c) the extent to which the assimilated EU case law restricts the proper development of domestic law.

(5ZA) A higher court may depart from its own assimilated domestic case law if it considers it right to do so having regard (among other things) to—

(a) the extent to which the assimilated domestic case law is determined or influenced by assimilated EU case law from which the court has departed or would depart;

(b) any changes of circumstances which are relevant to the assimilated domestic case law;

(c) the extent to which the assimilated domestic case law restricts the proper development of domestic law.

(6) Subsection (3) does not prevent the validity, meaning or effect of any assimilated law which has been modified on or after IP completion day from being decided as provided for in that subsection if doing so is consistent with the intention of the modifications.

(6A) Subsections (1) to (6) are subject to relevant separation agreement law (for which see section 7C).

(6B) In this section—

"compatibility issue" has the meaning given by section 288ZA(2) of the Criminal Procedure (Scotland) Act 1995;

"devolution issue" has the meaning given by paragraph 1 of Schedule 6 to the Scotland Act 1998;

"relevant appeal court" means—

(a) the Court Martial Appeal Court,

(b) the Court of Appeal in England and Wales,

(c) the Inner House of the Court of Session,

(d) the court for hearing appeals under section 57(1)(b) of the Representation of the People Act 1983,

(e) the Lands Valuation Appeal Court, or

(f) the Court of Appeal in Northern Ireland;

"relevant domestic case law" means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect on or after IP completion day.

(7) In this Act—

"assimilated case law" means—

(a) assimilated domestic case law, and

(b) assimilated EU case law;

"assimilated domestic case law" means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect immediately before IP completion day and so far as they—

(a) relate to anything to which section 2 or 3 applies, and

(b) are not excluded by section 5 or Schedule 1,

(as those principles and decisions are modified by or under this Act or by other domestic law from time to time);

"assimilated EU case law" means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day and so far as they—

(a) relate to anything to which section 2 or 3 applies, and

(b) are not excluded by section 5 or Schedule 1,

(as those principles and decisions are modified by or under this Act or by other domestic law from time to time);]

"assimilated law" means anything which, on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2 or 3 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time);

"higher court" means—

(a) the Supreme Court,

(b) the High Court of Justiciary when sitting as mentioned in subsection (4)(b)(i) or (ii), or

(c) a relevant appeal court;

7C Interpretation of relevant separation agreement law

(1) Any question as to the validity, meaning or effect of any relevant separation agreement law is to be decided, so far as they are applicable—

(a) in accordance with the withdrawal agreement, the EEA EFTA separation agreement and the Swiss citizens' rights agreement, and

(b) having regard (among other things) to the desirability of ensuring that, where one of those agreements makes provision which corresponds to provision made by another of those agreements, the effect of relevant separation agreement law in relation to the matters dealt with by the corresponding provision in each agreement is consistent.

(2) See (among other things)—

(a) Article 4 of the withdrawal agreement (methods and principles relating to the effect, the implementation and the application of the agreement),

(b) Articles 158 and 160 of the withdrawal agreement (jurisdiction of the European Court in relation to Part 2 and certain provisions of Part 5 of the agreement),

(c) Articles 12 and 13 of the Protocol on Ireland/Northern Ireland in the withdrawal agreement (implementation, application, supervision and enforcement of the Protocol and common provisions),

(d) Article 4 of the EEA EFTA separation agreement (methods and principles relating to the effect, the implementation and the application of the agreement), and

(e) Article 4 of the Swiss citizens' rights agreement (methods and principles relating to the effect, the implementation and the application of the agreement).

(3) In this Act "relevant separation agreement law" means—

(a) any of the following provisions or anything which is domestic law by virtue of any of them—

(i) section 7A, 7B, 8B or 8C or Part 1B or 1C of Schedule 2 or this section, or

(ii) Part 3, or section 20, of the European Union (Withdrawal Agreement) Act 2020 (citizens' rights and financial provision), or

(b) anything not falling within paragraph (a) so far as it is domestic law for the purposes of, or otherwise within the scope of—

(i) the withdrawal agreement (other than Part 4 of that agreement),

(ii) the EEA EFTA separation agreement, or

(iii) the Swiss citizens' rights agreement,

as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time.

Finance Act 2024

28 Interpretation of VAT and excise law

(1) This section makes provision about how—

(a) the European Union (Withdrawal) Act 2018 ("EUWA 2018"), and

(b) the amendments made to that Act by the Retained EU Law (Revocation and Reform) Act 2023 ("REULA 2023"),

are to apply for the purpose of interpreting enactments relating to value added tax or any duty of excise ("VAT and excise law").

(2) Section 4 of EUWA 2018 (retained EU rights, powers, liabilities etc) continues to have effect (despite the provision made by section 2 of REULA 2023) for the purpose of interpreting VAT and excise law subject to the following exception.

(3) The exception is that Articles 110 and 111 of the Treaty on the Functioning of the European Union (which relate to internal taxation on products) have no effect for that purpose.

(4) Section 5(A1) to (A3) of EUWA 2018 (which are inserted by section 3 of REULA 2023 and which abolish the supremacy of EU law) have effect in relation to VAT and excise law as they have effect in relation to other domestic enactments but only so far as they relate to the disapplication or quashing of any enactment as a result of EU law (and, accordingly, the superseded provisions continue to have effect for the purpose of interpreting VAT and excise law).

(5) Retained general principles of EU law—

(a) continue to be relevant (despite the provision made by section 4 of REULA 2023) for the purpose of interpreting VAT and excise law in the same way, and to the same extent, as they were relevant for that purpose before the coming into force of that section, but

(b) otherwise have effect for that purpose subject to the provision made by that Act (including, in particular, the amendments made by section 6 of that Act (role of courts)).

(6) In this section—

(a) the reference to any duty of excise is to be read in accordance with section 49 of TCTA 2018,

(b) the reference to the superseded provisions is a reference to section 5(1) to (3) of EUWA 2018 as those subsections had effect immediately before the passing of REULA 2023, and

(c) the reference to retained general principles of EU law is to be read in accordance with EUWA 2018 as that Act had effect immediately before the passing of REULA 2023.

(7) This section needs to be read with sections 42 and 47 of TCTA 2018 (which make other provision about EU law relating to VAT and excise law and which continue to have effect for the purpose mentioned in subsection (1) above).

(8) This section is treated as having come into force on 1 January 2024.