Neutral Citation Number: [2021] EWCA Civ 1459

Case No: A3/2020/1416

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
Mr Justice Miles and Judge Jonathan Richards
UT/2019/0050

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 October 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BIRSS
and
SIR CHRISTOPHER FLOYD

- -

Between :

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellant**
- and -	
AMPLEAWARD LIMITED	**Respondent**

- -
- -

MS NATASHA BARNES & MR PAUL REYNOLDS (instructed by **HMRC Solicitors Office**) for the **Appellant**
MR KIERON BEAL QC (instructed by **Morrisons Solicitors LLP**) for the **Respondent**

Hearing dates : 21 and 22 July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Friday 8th October 2021.

Lord Justice Lewison:

Introduction

1. The issue on this appeal is the correct VAT treatment of supplies of alcohol involving multiple jurisdictions. The question is whether the United Kingdom can charge acquisition VAT on purchases by a UK VAT registered trader of excise goods held in a bonded warehouse in another member state of the EU in circumstances where those goods: (i) never enter the UK in the course of that transaction; and (ii) are sold on while in the bonded warehouse to a customer who is not registered for VAT in that other member state.

2. On 19 August 2016, HMRC notified Ampleaward of its assessment of tax stating that because it had not provided evidence to show that acquisition tax on the acquisitions of alcohol had been accounted for in the EU member state of destination, HMRC had assessed Ampleaward for acquisition tax of £1,308,648 for the VAT period 09/12 to 03/16. Ampleaward unsuccessfully appealed against that assessment to the FTT; but the UT allowed its appeal from the FTT.

3. The appeal both here and in the tribunals has been conducted on assumed facts which are as follows.

    i) Ampleaward is an alcohol wholesaler that has at all material times been registered for UK VAT and approved to own excise duty suspended alcoholic goods in tax warehouses in the UK.

    ii) During the period in question, Ampleaward bought alcohol from a supplier (the "Supplier") established in a member state of the EU other than the UK (the "Supplier Jurisdiction").

    iii) Ampleaward did not, however, take delivery of the alcohol in the UK. Instead, the Supplier delivered the alcohol to a bonded warehouse (with which Ampleaward had an account) located in a third EU member state (the "Delivery Jurisdiction").

    iv) The Supplier included Ampleaward's UK VAT registration number in its domestic VAT returns. That enabled the Supplier to treat the sale of the alcohol as an exempt movement of goods across an EU border for the purposes of VAT in the Supplier Jurisdiction.

    v) Ampleaward was not registered for VAT in the Delivery Jurisdiction. For reasons that are irrelevant to the appeal it did not itself account for VAT in respect of the acquisition of the alcohol in the Delivery Jurisdiction.

    vi) Ampleaward would then on-sell the alcohol to a customer (the "Customer") established in a fourth member state (the "Customer Jurisdiction"). The alcohol would be physically located in the Delivery Jurisdiction at the time of this sale and the Customer was not registered for VAT in the Delivery Jurisdiction.

vii) All of the above transactions took place at a time when the alcohol was held in duty suspense, so delivery of the alcohol pursuant to those transactions resulted in the alcohol moving from one bonded warehouse to another.

4. In short, HMRC say that the acquisition of alcohol by Ampleaward on these assumed facts was deemed to be a supply that took place in the UK because Ampleaward used its UK VAT registration number. But Ampleaward cannot take advantage of the regime encompassing alcohol kept in bonded warehouses, because the domestic legislation goes further than EU law permits. They reach that conclusion by construing the relevant domestic legislation in conformity with EU law; and, if necessary, "reading it down" to make it comply. The Upper Tribunal (Miles J and Judge Jonathan Richards) rejected that argument. They held that the domestic legislation was clear; and could not be read down in the way that HMRC proposed. Their decision is at [2020] UKUT 0170 (TCC), [2020] STC 2054.

5. I begin by setting out the legislative framework.

The European framework

6. The European framework of VAT is contained in the 2006 VAT Directive (2006/112/EEC) ("the Principal VAT Directive" or "PVD"). The general aims underpinning VAT are contained in the recitals to the PVD. I pick out some of them. Recital (4) states:

> "The attainment of the objective of establishing an internal market presupposes the application in Member States of legislation on turnover taxes that does not distort conditions of competition or hinder the free movement of goods and services. It is therefore necessary to achieve such harmonisation of legislation on turnover taxes by means of a system of value added tax (VAT), such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level."

7. Recital (5) states:

> "A VAT system achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution, as well as the supply of services."

8. Recital (7) states:

> "The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain."

9. Recital (15) states:

> "With a view to facilitating intra-Community trade in work on movable tangible property, it is appropriate to establish the tax arrangements applicable to such transactions when they are carried out for a customer who is identified for VAT purposes in a Member State other than that in which the transaction is physically carried out."

10. Recital (36) states:

> "For the benefit both of the persons liable for payment of VAT and the competent administrative authorities, the methods of applying VAT to certain supplies and intra-Community acquisitions of products subject to excise duty should be aligned with the procedures and obligations concerning the duty to declare in the case of shipment of such products to another Member State laid down in Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products"

11. Article 2(1) of the PVD defines what transactions are subject to VAT. It distinguishes between supplies of goods for consideration within the territory of a member state, the intra-Community acquisition of goods for consideration within the territory of a member state, the supply of services for consideration within the territory of a member state, and the importation of goods. Article 20 defines an "intra-Community acquisition":

> "'Intra-Community acquisition of goods' shall mean the acquisition of the right to dispose as owner of movable tangible property dispatched or transported to the person acquiring the goods, by or on behalf of the vendor or the person acquiring the goods, in a Member State other than that in which dispatch or transport of the goods began."

12. Title V Chapter 2 deals with the place of an intra-Community acquisition. Article 40 provides:

> "The place of an intra-Community acquisition of goods shall be deemed to be the place where dispatch or transport of the goods to the person acquiring them ends."

13. But Article 41 goes on to provide:

> "Without prejudice to Article 40, the place of an intra-Community acquisition of goods as referred to in Article 2(1)(b)(i) shall be deemed to be within the territory of the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition, unless the person acquiring the goods establishes that VAT has been applied to that acquisition in accordance with Article 40.

> If VAT is applied to the acquisition in accordance with the first paragraph and subsequently applied, pursuant to Article 40, to the acquisition in the Member State in which dispatch or transport of the goods ends, the taxable amount shall be reduced accordingly in the Member State which issued the VAT identification number under which the person acquiring the goods made the acquisition."

14. This has been called the "fall-back" provision. Article 42 provides:

> "The first paragraph of Article 41 shall not apply and VAT shall be deemed to have been applied to the intra-Community acquisition of goods in accordance with Article 40 where the following conditions are met:
>
> (a) the person acquiring the goods establishes that he has made the intra-Community acquisition for the purposes of a subsequent supply, within the territory of the Member State identified in accordance with Article 40, for which the person to whom the supply is made has been designated in accordance with Article 197 as liable for payment of VAT;
>
> (b) the person acquiring the goods has satisfied the obligations laid down in Article 265 relating to submission of the recapitulative statement."

15. Article 68 provides that the chargeable event occurs when the intra-Community acquisition of goods is made; and article 69 provides that the VAT becomes due on the 15th day of the following month; or (if earlier) on the issue of a VAT invoice.

16. Title IX Chapter 10 contains special provisions dealing with goods in bonded warehouses. Article 155 provides:

> "Without prejudice to other Community tax provisions, Member States may, after consulting the VAT Committee, take special measures designed to exempt all or some of the transactions referred to in this Section, provided that those measures are not aimed at final use or consumption and that the amount of VAT due on cessation of the arrangements or situations referred to in this Section corresponds to the amount of tax which would have been due had each of those transactions been taxed within their territory."

17. By article 157 (1) (b) those transactions include:

> "the supply of goods which are intended to be placed, within their territory, under warehousing arrangements other than customs warehousing."

18. Article 162 provides:

> "Where Member States exercise the option provided for in this Section, they shall take the measures necessary to ensure that the intra-Community acquisition of goods intended to be placed under one of the arrangements or in one of the situations referred to in …Article 157(1)(b) … is covered by the same provisions as the supply of goods carried out within their territory under the same conditions."

19. The expression "warehouses other than customs warehouses" is defined by article 154. In relation to products subject to excise duty it means the places defined as "tax warehouses" in article 4 (b) of Directive 92/12/EC ("the Excise Directive"). That definition reads:

> "a place where goods subject to excise duty are produced, processed, held, received or dispatched under duty-suspension arrangements by an authorized warehousekeeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located"

20. It follows that the option to exempt applies only to warehouses in which excise goods are held under duty suspension arrangements. I will refer to such warehouses as "bonded warehouses".

21. Article 160 of the PVD provides:

> "1. Member States may exempt the following transactions:
>
> (a) …
>
> (b) the supply of goods or services carried out in the locations referred to in Article 157(1)(b)…, where one of the situations specified in Article 157(1)(b)…still applies within their territory."

22. Title X of the PVD deals with deductions. Article 167 provides:

> "A right of deduction shall arise at the time the deductible tax becomes chargeable."

23. Article 168 provides:

> "In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:

> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;
>
> (b) …
>
> (c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i)…"

24. Article 169 provides (so far as relevant):

> "In addition to the deduction referred to in Article 168, the taxable person shall be entitled to deduct the VAT referred to therein in so far as the goods and services are used for the purposes of the following:
>
> (a) …
>
> (b) transactions which are exempt pursuant to… Article 157(1)(b)…;"

The domestic legislation

25. The PVD is implemented in this jurisdiction by the Value Added Tax Act 1994 ("VATA") and regulations made under it. It has been amended in the light of the UK's departure from the EU by the Taxation (Cross Border Trade) Act 2018; but the relevant provisions are those that were in force before that time. Section 11 (1) provided:

> "… references in this Act to the acquisition of goods from another member State shall be construed as references to any acquisition of goods in pursuance of a transaction in relation to which the following conditions are satisfied, that is to say—
>
> (a) the transaction is a supply of goods (including anything treated for the purposes of this Act as a supply of goods); and
>
> (b) the transaction involves the removal of the goods from another member State;
>
> and references in this Act, in relation to such an acquisition, to the supplier shall be construed accordingly."

26. Section 13 dealt with the place of acquisition:

> "(1) This section shall apply (subject to sections 18 and 18B) for determining for the purposes of this Act whether goods acquired from another member State are acquired in the United Kingdom.
>
> (2) The goods shall be treated as acquired in the United Kingdom if they are acquired in pursuance of a transaction which involves their removal to the United Kingdom and does not involve their removal from the United Kingdom, and (subject to

the following provisions of this section) shall otherwise be treated as acquired outside the United Kingdom.

(3) Subject to subsection (4) below, the goods shall be treated as acquired in the United Kingdom if they are acquired by a person who, for the purposes of their acquisition, makes use of a number assigned to him for the purposes of VAT in the United Kingdom.

(4) Subsection (3) above shall not require any goods to be treated as acquired in the United Kingdom where it is established, in accordance with regulations made by the Commissioners for the purposes of this section that VAT—

(a) has been paid in another member State on the acquisition of those goods; and

(b) fell to be paid by virtue of provisions of the law of that member State corresponding, in relation to that member State, to the provision made by subsection (2) above.

(5) The Commissioners may by regulations make provision for the purposes of this section—

(a) for the circumstances in which a person is to be treated as having been assigned a number for the purposes of VAT in the United Kingdom;

(b) for the circumstances in which a person is to be treated as having made use of such a number for the purposes of the acquisition of any goods; and

(c) for the refund, in prescribed circumstances, of VAT paid in the United Kingdom on acquisitions of goods in relation to which the conditions specified in subsection (4)(a) and (b) above are satisfied."

27. No regulations were made under section 13 (3) or section 13 (5).

28. Section 18 dealt with goods in bonded warehouses. It provided:

"(2) Subsection (3) below applies where—

(a) any dutiable goods are acquired from another member State; or

(b) any person makes a supply of—

(i) any dutiable goods which were produced or manufactured in the United Kingdom or acquired from another member State; or

(ii) any goods comprising a mixture of goods falling within sub-paragraph (i) above and other goods.

(3) Where this subsection applies and the material time for the acquisition or supply mentioned in subsection (2) above is while the goods in question are subject to a warehousing regime and before the duty point, that acquisition or supply shall be treated for the purposes of this Act as taking place outside the United Kingdom if the material time for any subsequent supply of those goods is also while the goods are subject to the warehousing regime and before the duty point.

(4) Where the material time for any acquisition or supply of any goods in relation to which subsection (3) above applies is while the goods are subject to a warehousing regime and before the duty point but the acquisition or supply nevertheless falls, for the purposes of this Act, to be treated as taking place in the United Kingdom—

(a) that acquisition or supply shall be treated for the purposes of this Act as taking place at the earlier of the following times, that is to say, the time when the goods are removed from the warehousing regime and the duty point; and

(b) in the case of a supply, any VAT payable on the supply shall be paid (subject to any regulations under subsection (5) below)—

(i) at the time when the supply is treated as taking place under paragraph (a) above; and

(ii) by the person by whom the goods are so removed or, as the case may be, together with the duty or agricultural levy, by the person who is required to pay the duty or levy.

…

(6) In this section—

"dutiable goods" means any goods which are subject—

(a) to a duty of excise; or

(b) in accordance with any provision for the time being having effect for transitional purposes in connection with the accession of any State to the European Union, to any EU customs duty or agricultural levy of the European Union;

"the duty point" , in relation to any goods, means—

(a) in the case of goods which are subject to a duty of excise, the time when the requirement to pay the duty on those goods takes effect; and

(b) in the case of goods which are not so subject, the time when any Community customs debt in respect of duty on the entry of the goods into the territory of the European Union would be incurred or, as the case may be, the corresponding time in relation to any such duty or levy as is mentioned in paragraph (b) of the definition of dutiable goods;

"material time" —

(a) in relation to any acquisition or supply the time of which is determined in accordance with regulations under section 6(14) or 12(3), means such time as may be prescribed for the purpose of this section by those regulations;

(b) in relation to any other acquisition, means the time of the event which, in relation to the acquisition, is the first relevant event for the purposes of taxing it; and

(c) in relation to any other supply, means the time when the supply would be treated as taking place in accordance with subsection (2) of section 6 if paragraph (c) of that subsection were omitted;

"warehouse" means any warehouse where goods may be stored in any member State without payment of any one or more of the following, that is to say—

(a) EU customs duty;

(b) any agricultural levy of the European Union;

(c) VAT on the importation of the goods into any member State;

(d) any duty of excise or any duty which is equivalent in another member State to a duty of excise.

(7) References in this section to goods being subject to a warehousing regime is a reference to goods being kept in a warehouse or being transported between warehouses (whether in the same or different member States) without the payment in a member State of any duty, levy or VAT; and references to the removal of goods from a warehousing regime shall be construed accordingly."

The duty point

29. Recital (36) of the PVD contemplates the advantage of aligning the methods of applying VAT and the controls over the holding movement and monitoring of excise goods. This

is both for the benefit of traders and also for the benefit of tax authorities. VATA follows that lead. Sections 18 (3) and (4) of VATA refer more than once to the "duty point". This is a cross-reference to the legal regime governing goods subject to excise duty (such as alcohol) kept in bonded warehouses. The legal framework at EU level is contained in the Excise Directive; and was implemented in the UK by the Excise Duty (Holding, Movement and Duty Point) Regulations 2010.

30. The general arrangements for products sold subject to excise duty and on the holding, movement and monitoring of duty suspended products were laid down by the Excise Directive. Article 1 indicates that the object of the Directive is to lay down arrangements for excise duties; but also recognises that member states may also levy VAT on excise goods. Article 4 contains a number of definitions, including "authorised warehousekeeper", "tax warehouse", "suspension arrangement", "registered trader" and "non-registered trader". The phrase "suspension arrangement" is defined as "a tax arrangement applied to the production, processing, holding and movement of products, excise duty being suspended".

31. Article 7 provides that excise duty becomes chargeable at the time and in the member state of release for consumption. It then goes on to elaborate on the meaning of that phrase. Excise goods are released for consumption when there is a departure (including an irregular departure) from a duty suspension arrangement. This is reflected in the domestic regulations. Regulation 5 of the 2010 Regulations provides that there is an excise duty point at the time when excise goods are released for consumption in the UK. Regulation 6 (1) describes when goods are released for consumption:

> "Excise goods are released for consumption in the United Kingdom at the time when the goods—
>
> (a) leave a duty suspension arrangement;
>
> (b) are held outside a duty suspension arrangement and . . . excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
>
> (c) are produced outside a duty suspension arrangement; or
>
> (d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement."

32. Regulation 7 expands on regulation 6 (1) (a). Goods leave a duty suspension arrangement if, for example, there is an irregularity in the course of movement of goods under a duty suspension arrangement; or if there is a contravention or failure to comply with any requirement relating to the duty suspension arrangement.

33. There are tight controls on what is or is not a " duty suspension arrangement"; and controls on how excise goods may be moved from one bonded warehouse to another within a duty suspension arrangement. Article 16 deals with the authorisation to open and operate a tax warehouse. An authorised warehouse keeper must satisfy a number of conditions, including providing a guarantee to cover the potential loss of excise duty. Article 18 requires the provision of a guarantee to cover the risks inherent in a

movement under duty suspension. When any suspended duty movement takes place article 21 provides that it must take place under cover of an electronic administrative document. This is uploaded on to a central computer system known as the ECMS and verified by the competent authorities in the member state of dispatch. Once verified, the dispatch is given a unique reference code. The electronic administrative document must also be forwarded to the competent authorities in the member state of destination. Article 24 then provides for the verification of the arrival of the goods at their destination.

34. Thus the effect of section 18 (3) of VATA is that while excise goods are moving under duty suspension arrangements, neither VAT nor excise duty is payable. The mechanism for achieving that result is by treating the acquisition and supply as taking place outside the UK. The link between the duty point and the payment of VAT is also contained in regulation 41 (1) of the VAT Regulations 1995 which provides:

> "(1) Where in respect of—
>
> (a) any supply by a taxable person of dutiable goods, or
>
> (b) an acquisition by any person from another member State of dutiable goods,
>
> the time of supply or acquisition, as the case may be, precedes the duty point in relation to those goods, the VAT in respect of that supply or acquisition shall be accounted for and paid, and any question as to the inclusion of any duty in the value of the supply or acquisition shall be determined, by reference to the duty point or by reference to such later time as the Commissioners may allow."

The right of appeal to this court

35. The right of appeal to this court from a decision of the Upper Tribunal arises under section 13 of the Tribunal Courts and Enforcement Act 2007. An appeal is limited by section 13 (1) to "any point of law arising from a decision made by the Upper Tribunal other than an excluded decision". There has been considerable discussion of the question whether section 13 (1) deprives this court of jurisdiction to consider a point of law that was not taken in the UT. In *Sapkota v Secretary of State for the Home Department* [2011] EWCA Civ 1320, [2012] Imm AR 254 Aikens LJ said at [110]:

> "If the decision of the UT has not considered a particular point of law because it was not raised or argued before the UT, it is difficult to envisage a point of law "*…arising from…*" the decision made by the Upper Tribunal. I would say, generally speaking, that such a point of law does not arise from a decision of the UT at all; it only arises for the first time in the Court of Appeal."

36. But in *Miskovic v Secretary of State for Work and Pensions* [2011] EWCA Civ 16, [2011] 2 CMLR 20 this court took a more relaxed view. Elias LJ said at [69]:

> "… an appellate court which has jurisdiction to hear appeals on points of law has jurisdiction to hear fresh points of law *not argued below*, although it will be extremely reluctant to exercise its discretion in favour of doing so if this involves finding further facts. … I agree with Sedley LJ that a binding rule forbidding an appellate court to entertain a new ground could work real injustice, particularly in an area where arguments are frequently advanced by litigants in person, and in my judgment it would need very clear statutory language to achieve that result." (Emphasis added)

37. Moore-Bick LJ said at [134]:

> "In my view the expression "any point of law arising from a decision made by the Upper Tribunal" is to be interpreted as including a dispute about the correct application of any principle of law on which the tribunal's decision depends. That is sufficient to found the court's jurisdiction to entertain the argument, but it does not follow that the court should routinely exercise its discretion in favour of doing so. On the contrary, the court should, in my view, be slow to allow a party to alter its case at such a late stage and should rarely, if ever, do so in a case where all facts potentially relevant to the correct determination of the new point have not been found by the tribunal below, or where to entertain the point would for some other reason be unfair to the other party."

38. On the basis of *Miskovic*, I accept that this court's jurisdiction to entertain a new point is not automatically barred by 13 (1) of the Tribunal Courts and Enforcement Act 2007.

39. In the ordinary way, an appeal court thus has jurisdiction to permit a new point to be taken on appeal even if it was not taken in the court below. There is a line of cases that gives support to this view: *Pittalis v Grant* [1989] QB 605, *Singh v Dass* [2019] EWCA Civ 360 and *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146. In the last of these cases Snowden J, sitting in this court, reviewed earlier authority and concluded at [26]:

> "These authorities show that there is no general rule that a case needs to be "exceptional" before *a new point* will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken." (Emphasis added)

40. He pointed out that there is a spectrum of cases, and that in a case where the new point is a point of law:

> "it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime."

41. Wherever a case lies on the spectrum, a decision to allow a new point to be taken is still a question of discretion for the appeal court. The substantive decision of this court in *Notting Hill* was that the intermediate appeal court was entitled to exercise the discretion in the way that it did. As Millett LJ said in *Jaggard v Sawyer* [1995] 1 WLR 269, 288 (in a very different context):

> "Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently."

42. Where the point goes either to the illegality of a contract to be enforced; or to the court's jurisdiction to make the order under appeal, an appeal court is all the more likely to give permission for the new points to be argued: see *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29 at [150] to [154].

43. In the cases in which this court has permitted a new point to be taken on appeal, it is possible to discern a number of features which are more or less persuasive: the fact that the point went to illegality or to the jurisdiction of the court; the fact that the party seeking to take the new point was unrepresented below; the fact that proceedings below were summary or perfunctory. None of these features is present in this case. On the other hand, the potential cost to the public purse of a decision reached on the wrong legal basis has also been held to be a relevant consideration: *Test Claimants in the FII Group Litigation v HMRC* [2020] UKSC 47, [2020] 3 WLR 1369 at [99]. In the end, the task for the court is to make an evaluation of what justice requires: *Test Claimants* at [100].

44. These cases, however, all concern appeals where the point in issue was sought to be raised for the first time. This is not such a case. The point that HMRC wish to argue in this court (Ground 1) is that the definition of "warehousing regime" in section 18 (7) requires "without the payment in a member State of any duty, levy or VAT" to be read conjunctively, with the consequence that it only applies where there is no liability to pay any duty, no liability to pay any levy and no liability to pay any VAT. That point, however, *was* argued in the FTT (see [2019] UKFTT 715 (TC), [2019] SFTD 442 at [40] to [41] and was rejected at [43]); but was not argued in the UT. Under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 a respondent may provide a written response to a notice of appeal. Rule 24 (3) provides that such a notice must state (among other things):

> "the grounds on which the respondent relies, including (in the case of an appeal against the decision of another tribunal) any

> grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal;"

45. HMRC did serve a response under rule 24. It identified two central issues in the appeal. Paragraph 8 of the response referred to this argument; and stated correctly that the FTT had rejected it. Paragraph 10 stated that HMRC wished to rely on all the arguments advanced before the FTT and that they would be "set out in HMRC's Skeleton Argument in the usual way". Paragraph 11 also made a passing reference to the point. But when HMRC served its skeleton argument for the appeal to the UT, this argument had disappeared. Nor was it argued at the hearing before the UT. It was for that reason that the UT, while recognising that it was an important point of principle, refused permission to appeal. As it said in its decision on the permission application:

> "In these circumstances, in the absence of any indication to the contrary, the Upper Tribunal proceeded on the basis that HMRC were not taking any points as to the scope of the definition of "warehousing regime" set out in s 18 (7) of VATA. The Grounds do not explain (or even acknowledge) this change of stance. We do not consider that it is reasonably arguable that the Upper Tribunal erred by failing to accept an argument that was not put before it…"

46. *Notting Hill Finance* and the line of cases to which it referred were not concerned with a case in which a point had been taken at first instance but dropped on the first appeal. That situation is referred to in the decision of the Privy Council in *Ahamath v Umma* [1931] AC 799. In that case, giving the advice of the Board, Lord Blanesborough said:

> "It must only be under very exceptional circumstances that an issue dropped in the intermediate Court of appeal, and for that reason not dealt with or referred to by that Court, can be revived before this Board."

47. HMRC's skeleton argument in this court concentrated on the importance of the point, and the assertion that it is a pure point of law; both of which may well be true. But what was strikingly absent, despite the UT's observations in refusing permission to appeal, was any explanation why the point was not argued before the UT and why HMRC have now decided to change tack. This is not, therefore, a case in which a point of law has occurred to a party for the first time; still less one that goes to the jurisdiction of the UT to make the decision that it did. HMRC must have been well aware of the point and must be taken, for whatever reason, to have decided to abandon it in the appeal to the UT. Although Ms Barnes, for HMRC, argued that Ampleaward would suffer no prejudice if we were to allow the point to be revived, it was not clear that was in fact the case.

48. In my judgment it would have been unfair to Ampleaward to permit HMRC to revive a point on which it fought and lost in the FTT; and apparently abandoned in the UT. Ampleaward was reasonably entitled to conclude that that point had been definitively dealt with. If (as HMRC assert) it is an important point on which many other cases depend, then one of those cases may be the suitable vehicle for testing the point.

49. Having heard argument we decided to refuse HMRC permission to revive this argument; and consequently refused permission to appeal on this ground.

The warehousing regime under domestic law

50. The basic ability to charge VAT on an intra-Community acquisition arises under VATA section 10. Section 10 (1) provides that VAT is charged on an intra-Community acquisition if "the acquisition is a taxable acquisition and takes place in the United Kingdom". If, therefore, the acquisition does not take place in the UK, HMRC has no power to tax it. Section 13 (3) of VATA provides that an acquisition of goods is deemed to take place in the UK (and hence subject to UK VAT) if they are acquired by a person who uses his UK VAT number for the purposes of the acquisition. It is this provision upon which HMRC rely in seeking to assess Ampleaward to VAT. But section 13 (1) states that "This section shall apply (subject to sections 18 and 18B)".

51. It follows that, on ordinary principles of statutory interpretation, section 13 (3) (which is part of "this section") is trumped by or subordinated to section 18. Section 18 (3) provides that if the acquisition or supply takes place while the goods are subject to a warehousing regime and before the duty point, then the acquisition is treated as taking place outside the UK, if any subsequent supply of the goods takes place while they are still subject to the warehousing regime and before the duty point. In short, this enables goods to be moved from one bonded warehouse to another without liability to VAT. Thus a supply under a duty suspension arrangement of excise goods held in a bonded warehouse in, say, Manchester is treated as taking place outside the UK.

52. Section 18 (6) defines "warehouse" as:

> "any warehouse where goods may be stored in *any member State* without payment of any one or more of the following…"

53. The definition of "warehousing regime" in section 18 (7) adopts the same definition of "warehouse". It follows, applying ordinary principles of statutory interpretation, that the same fiscal results follow whether the warehouse is in the UK or in a different member state.

54. Having refused permission to appeal on Ground 1, I do not understand HMRC now to dispute that. But they say that, applying the *Marleasing* principle, section 18 of VATA must be read down in order to conform with the UK's obligation under the PVD.

The PVD

55. The starting point for HMRC's argument is articles 155 and 157 (1) (b) of the PVD. The first of these gave the UK the option to exempt certain supplies and acquisitions from VAT. The second described the kinds of transaction encompassed within the option:

> "the supply of goods which are intended to be placed, *within their territory*, under warehousing arrangements other than customs warehousing"

56. Article 157 (1) (b) applies to supplies of goods. But an intra-Community acquisition is not a supply of goods. Article 162, however, requires a member state which exercises

the option to exempt *supplies of goods* to ensure that *intra-Community acquisition of goods* intended to be placed under the arrangements referred to in article 157 (1) (b) are "covered by the same provisions as the supply of goods carried out within their territory". Article 160 also permits a member state to exempt supplies of goods or services "carried out in the locations" referred to in article 157 (1) (b). That, too, emphasises the location of the bonded warehouse in question.

57. Accordingly, although article 155 and 157 (1) (b) entitled the UK to exempt the supply of goods intended to be placed within a bonded warehouse in the UK, it did not permit the UK to exempt a supply of goods intended to be placed in a bonded warehouse in, say, the Netherlands. Article 162 requires the same treatment of intra-Community acquisitions of goods. But that, too, is limited to goods placed within the geographical territory of that member state.

58. Although article 41 contains a deeming provision which deems the acquisition to have taken place within the UK, the purpose of that deeming provision is strictly limited. Article 41 creates a parallel and self-contained system for taxing intra-Community acquisitions.

59. At the outset of the appeal, I understood Ms Barnes to have argued that if HMRC asserted a right to tax an intra-Community acquisition which was deemed to have taken place within the UK, then it would *not* apply UK VAT law. Instead it would apply the VAT law of the member state in which the acquisition actually took place, determined in accordance with article 40 (i.e. at the end of the supply chain). But in the course of discussion she substantially modified that position. If, for instance, the UK charged a higher rate of VAT than the other member state, then she said that HMRC would charge VAT on the acquisition at the higher (UK) rate. Likewise, if a transaction was zero-rated in UK VAT law, then HMRC would not levy VAT. Thus, she submitted, the UK will always be enforcing its own VAT law.

60. Whether the bonded warehouse exemption applies is a question of interpretation of the scope of articles 157 and 162. What article 41 does not do is expand the scope of the exemption permitted by those articles.

61. The UT accepted this argument. At [46] they held:

> "In our judgment, the natural reading of the words supports HMRC's interpretation. Article 157(1)(b) applies only to goods placed, within the territory of a specific member state, under warehousing arrangements. Therefore, when art 162 speaks of the 'arrangements referred to in Article 157(1)(b)', there is a clear inference that it is concerned with the arrangements to which art 157(1)(b) applies, namely warehousing arrangements within a specific member state's territory. The contrary interpretation would mean that, despite the clear cross-reference to art 157(1)(b), art 162 is concerned with a wider category of arrangement than that dealt with in art 157(1)(b)."

62. Mr Beal QC, on behalf of Ampleaward, challenges this conclusion. He submits that HMRC cannot, on the one hand, say that the acquisition took place within the territory of the UK for the purpose of raising an assessment to VAT; while on the other

maintaining that the acquisition took place outside the territory of the UK for the purpose of limiting the scope of the exemption. If the UK decided to exercise its option to exempt a particular transaction within the UK, it had to afford the same exemption to transactions taking place in other member states, at least in so far as they would otherwise be taxable in the UK. Not to do so would amount to unlawful discrimination, and risk double taxation. Equality of treatment is expressly required by article 162.

63. This is not an easy point. We no longer have the luxury of asking the CJEU for help (see European Union (Withdrawal) Act 2018 section 6 (1) (b)); so we must decide it for ourselves.

64. The key to Mr Beal's argument is article 41. The CJEU has considered the predecessor of article 41 in earlier cases. In *Staatssecretaris van Financiën v X; Staatssecretaris van Financiën v Facet Trading BV* (Joined cases C-536/08 and C-539/08) ("*Facet*") [2010] STC 1707 at [35] the court set out the twin aims of article 41:

> "first, to ensure that the intra-Community acquisition in question is subject to tax and, secondly, to prevent double taxation in respect of the same acquisition."

65. In *Staatssecretaris van Financiën v Geelen* (Case C-568/17) the court considered a different provision which prescribed the place of supply. At [23] the court said:

> "The object of those provisions is to avoid, first, conflicts of jurisdiction, which may result in double taxation, and, secondly, non-taxation."

66. They repeated the point at [51], referring to:

> "the objective pursued by Article 9 of the Sixth Directive, which, as pointed out in paragraph 23 above, is to lay down a conflict of laws rule to avoid the risk of double taxation or non-taxation, and facilitates the implementation of the conflict of laws rule laid down in Article 9(2)(c) of the Sixth Directive, in that it serves the interests of simplicity of administration — of the rules on the place of supply of services — as regards the rules governing the collection of taxes"

67. Use of a UK VAT registration number has the consequence that the intra-Community acquisition of goods is *deemed* to take place within the territory of the UK. But article 41 does not prescribe the consequences which flow from that deeming provision. Mr Beal argues that the deeming provision must be consistently applied throughout the PVD. It follows that where article 162 refers to intra-Community acquisitions intended to be placed under the arrangements in article 157, it includes not only the placing of goods within the geographical territory of the UK as it exists in international law, but also territory which article 41 deems to be the territory of the UK. HMRC rely on the deeming provision in order to justify its ability to tax a transaction which did not take place physically within the geographical territory of the UK. If it does so, it must apply the entirety of its VAT regime to that transaction. That is the logical conclusion of the deeming provision. Accordingly, if the UK deems transactions which are not within its geographical territory to be within its fiscal territory, it must treat both kinds of

transaction in the same way. Any other conclusion, he says, would raise the possibility of discrimination as between member states, and also the possibility of double taxation. The general principle of equal treatment requires that similar situations are not treated differently unless differentiation is objectively justified: *Marks & Spencer plc v HMRC* [2008] ECR I-2283, [2008] EU:C:2008:211 at [51].

68. Although the UT did consider article 41, they did not find that it shed much light on the proper interpretation of articles 157 and 162. They said at [54]:

> "We say this because arts 155 to 162 are concerned with an optional power of member states to confer exemption from VAT whereas art 41 is an aspect of the rules governing place of supply. We do not consider it obvious that the rules on place of supply necessarily shed much light on the scope of member states' optional power to exempt particular transactions. Of course we accept that the PVD is intended to lay down a coherent and rational scheme for the imposition of VAT throughout the EU. However, in circumstances where the rules on place of supply are complicated and involve various exceptions and amplifications (including the fallback provisions of art 41) and the option to exempt in arts 155 to 162 may, or may not, be exercised by different member states, it is perhaps unsurprising that anomalies could arise from the interaction of the provisions."

69. Mr Beal says that this is not an answer to his point. First, Ampleaward does not object to differences in VAT treatment by the UK on the one hand, and other member states on the other. What it objects to is the differential treatment by the UK of supplies of goods taking place within its fiscal jurisdiction on the one hand, and intra-Community acquisitions taking place within that same fiscal jurisdiction on the other. Second, the particular manner in which the UK has implemented articles 157 and 162 of the PVD is through the mechanism of altering the rules about the place of supply. So there is a clear link between the two. The effect of the UT's interpretation of the PVD is that a UK-registered trader carrying out transactions consisting of intra-Community acquisitions of goods physically delivered to UK warehouses is treated differently from the same trader whose transactions take place within bonded warehouses in other member states. There is an exemption from VAT for the acquisition of excise goods if they are stored or moved in duty suspense within the geographical territory of the UK; but not if they are stored or moved in duty suspense in a warehouse outside that territory. That would tend to inhibit the free movement of goods.

70. HMRC's main justification for their interpretation of the PVD, and hence differential treatment of transactions in goods in bonded warehouses physically located within and outside the geographical territory of the UK, was the need to preclude the avoidance of VAT. Mr Beal says that although that is one of the objectives underpinning article 41, it is not the only one. In the case of goods which are freely marketable (e.g. phone cards or computer chips) there is force in the point. But the point is considerably weaker in the case of excise goods held under duty suspension arrangements, whose movement is closely monitored by the tax authorities in the member states in which the goods are physically located, even acknowledging that the authorities responsible for the

collection of excise duty may not be the same authorities that are responsible for the collection of VAT.

71. Mr Beal also pointed to the anomalous situation of the UK, in effect, levying VAT on a transaction that ought to have attracted tax in a different state. As a general rule domestic courts either cannot or will not enforce foreign revenue laws: see Dicey, Morris & Collins on Conflict of Laws (15th ed) rule 3. Moreover, there is no mechanism within the PVD by which VAT levied by one member state under article 41, which ought to have attracted VAT in a different member state under article 40, can be remitted by the collecting member state to the member state in which that VAT ought to have been charged.

72. So far as the potential for double taxation is concerned, Mr Beal illustrated this with an example. Imagine a transaction involving a UK VAT registered trader (trader number 1) using a Netherlands bonded warehouse, but acquiring goods using its UK VAT registration number. The acquisition from another member state (say of Chianti from Italy) leads to acquisition VAT. But the Netherlands domestic legal regime allows that VAT to be deferred while the excise goods remain in bond. There is a further supply in bond to a Netherlands trader (trader number 2), who makes a supply of the goods under the duty suspense regime to a wholesale customer in the UK (trader number 3). There is then a standard rated supply of the goods out of the UK bond into the UK retail market for final consumption. The excise duty point would arise in the UK, upon the release of the excise goods from the UK bonded warehouse. At that point, UK excise duty is chargeable and UK acquisition VAT would also become chargeable under Regulation 41 of the VAT Regulations 1995. But HMRC say that they can also charge trader number 1 for acquisition tax because trader number 1 has not paid VAT in the Netherlands. HMRC would thus impose UK VAT twice on the same transaction.

73. I do not consider that this example is well-founded. If HMRC assessed trader number 1 for VAT on the acquisition of goods placed in bond in the Netherlands, it seems to me that that trader could demonstrate to HMRC that "VAT [had] been applied to that acquisition in accordance with Article 40" by showing that no VAT was in fact due. That is how Judge Mosedale in the FTT interpreted article 41 (see [56]); and I consider that she was right to do so. Accordingly, trader 1 would be entitled to a refund of any VAT paid to HMRC in respect of the acquisition under the second paragraph of article 41. What would be affected, however, is trader 1's cash flow.

74. Mr Beal's argument was very persuasively advanced; and for much of the appeal I was attracted to it. But in the course of her outstandingly able reply, Ms Barnes persuaded me that it was incorrect. The question, at root, is the scope of the deeming provision in article 41. As a matter of domestic statutory interpretation, the scope of a deeming provision is governed, not (or at least not necessarily) by its literal meaning pushed to its logical conclusion; but by the purpose for which the deeming is introduced: see, for example *Fowler v HMRC* [2020] UKSC 22, [2020] 1 WLR 2227 at [27]. The emphasis on purposive as opposed to literal interpretation is, if anything even more pronounced in EU law. As Ms Barnes emphasised, the starting point is to consider the extent of the exemption that the UK was permitted to create. That depends on the interpretation of articles 157 (1) (b) and 162. Article 157 (1) (b) was clearly limited to bonded warehouses within the geographical territory of the UK. All that article 162 did was to require the UK to afford the same exemption to intra-Community acquisitions in respect of goods to be placed in bonded warehouses within the UK. Article 160 likewise

concentrates on the "location of" the warehouse. The location of the bonded warehouse can only mean its physical location.

75. Although article 41 was indeed a deeming provision, all that it did was to deem the place of acquisition to be in the UK. It did not deem the bonded warehouse in which the goods were actually stored to be in the UK, when in reality it was not. The purpose underlying article 41 was to give the UK competence to tax; its purpose was not to extend the scope of the exemption permitted under article 157 (1) (b) or 162. Where the UK has the competence to tax under article 41 it applies its own VAT law, rather than some deemed extended version of it. In so far as there is any differential treatment it is objectively justified because of the location of the warehouse in question and the UK's decision to exercise the limited option to exempt transactions in bond within its own geographical territory.

76. It is true that in the case of excise goods held in duty suspension arrangements there are extensive controls over and monitoring of storage and movement. But that does not eliminate the possibility of VAT avoidance. For that purpose article 41 acts as both carrot and stick. The carrot is the encouragement to traders to register in member states in which they carry out transactions in bond; and to account for VAT in the state in question. The stick is the interruption in cash flow for such time as it takes the trader to establish that VAT has been properly applied to the transaction in question.

77. Accordingly, I accept HMRC's interpretation of the PVD. It follows in my judgment that, applying ordinary domestic principles of domestic statutory interpretation, the exemption contained in section 18 of VATA goes further than the PVD permitted.

Can the domestic legislation be read down?

78. Can the domestic legislation be read down so as to conform with the PVD? The problem is an acute one. Section 18 (3) of VATA clearly treats Ampleaward's acquisition as having taken place outside the UK; but that result comes about because the UK has gone further than the PVD permitted. Where the CJEU rules that the UK has incorrectly transposed a EU Directive into domestic statutory law, the UK's usual response is to amend the statute so as to conform with EU law. But under normal circumstances the change in the law is not retrospective.

79. When, for example, the CJEU ruled on the permissible extent of the exemption for postal services in 2009 (*R (TNT Post UK Ltd) v HMRC* (Case C-357/07), [2009] 3 CMLR 752) it became clear that VATA Schedule 9 created too wide an exemption. Parliament's response was to alter VATA to conform with the court's ruling. It did so by section 22 of the Finance (No 3) Act 2010; but that amendment only applied to supplies made on or after 31 January 2011.

80. The principle (usually referred to as the *Marleasing* principle) is not in doubt. *HMRC v IDT Card Services Ireland* [2006] EWCA Civ 29, [2006] 1 STC 1252 concerned the mismatch between the VAT treatment of phone cards in the UK and Ireland. Ireland imposed VAT on the supply of the phonecards and avoided double taxation by providing that no further VAT was due when access to the telecommunication services was obtained. The UK imposed VAT not on the supply of the card but on the supply of the service when the card was redeemed. In effect, this was achieved by paragraph 3 (2) of Schedule 10A of VATA, which disregarded consideration for the card, except to

the extent that it exceeded the face value of the card. But paragraph 3 (3) provided that paragraph 3 (2) did not apply if any of the persons from whom goods or services were obtained by the use of the card failed to account for any of "the VAT due on the supply of those goods or services" to the person using it.

81. IDT sold phone cards in the UK which were redeemed by accessing telephone services in Ireland. On the face of it, therefore, the supply escaped VAT in both jurisdictions. No VAT was "due" in the UK on supply of the cards; and no VAT was "due" in Ireland on their redemption. At [95] Arden LJ identified the general principles underpinning EU VAT law. They were "avoidance of non-taxation, avoidance of double taxation and the prevention of the distortion of competition". It followed, she said, that:

> "one of the objectives of the Directive is to prevent situations arising in which a taxable supply escapes taxation because it is not caught by the legislation of member states. I therefore reject Mr Lasok's submission that VAT is simply a territorial tax and if one member state fails to impose VAT that cannot result in the imposition of VAT by another member state: as I see it, it is a necessary corollary of the principle of non-taxation, as this case shows, that this can occur."

82. She went onto hold that the potential escape from liability to VAT both in the UK and in Ireland did contravene these principles; and that the domestic legislation could be interpreted so as to bring it into conformity with EU law. She concluded at [114] that:

> "… the appropriate interpretation is to read in words to widen the disapplication in para 3(3) of the disregard in para 3(2) so that the disapplication applies where the disregard would result in the non-taxation, contrary to the objectives of the Sixth Directive specified in para [95] above, of a taxable supply of goods or services in the United Kingdom."

83. The scope of the principle of interpretation was set out by Sir Andrew Morritt C in *Vodafone 2 v HMRC* [2009] EWCA Civ 446, [2010] Ch 77 (subsequently approved by the Supreme Court in *Robertson v Swift* [2014] UKSC 50, [2014] 1 WLR 3438). Omitting references to authority, they are as follows:

> "[37] …In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far reaching. In particular: (a) it is not constrained by conventional rules of construction …(b) it does not require ambiguity in the legislative language… (c) it is not an exercise in semantics or linguistics … (d) it permits departure from the strict and literal application of the words which the legislature has elected to use…; (e) it permits the implication of words necessary to comply with Community law obligations … and (f) the precise form of the words to be implied does not matter… '.
>
> [38] … The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should

> "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed"."

84. In *Vodafone 2* domestic legislation applied to foreign controlled companies (a "CFC") i.e. companies resident outside the UK subject to a lower rate of tax in the territory in which they were resident; but controlled by UK residents. Where the legislation applied, HMRC was entitled to apportion the profits of such a company to all those who were interested in the CFC, whether resident in the United Kingdom or not. There were exceptions to that power, summarised as extending to those CFCs that pursued (a) an acceptable distribution policy, (b) engaged in exempt activities, (c) satisfied a public quotation condition, (d) made profits of less than £50,000 or (e) were resident in a territory specified in regulations to be made by HMRC subject to any conditions HMRC might specify. A further exception provided that the right to apportion did not arise if any reduction in UK tax was minimal; or the company's existence was not motivated by tax avoidance. The CJEU held that in order to comply with EU law, the legislation had to be restricted to wholly artificial arrangements. The question for the domestic courts was whether the domestic legislation could be interpreted to have that effect; or, whether on the contrary it had to be disapplied. HMRC's argument was that it was possible, as a matter of interpretation, to introduce a further exception in respect of a CFC if it was, in an accounting period, actually established in another member state of the EEA and carried on genuine economic activities there. This court agreed. Sir Andrew Morritt C said at [44]:

> "To my mind the extension of the exceptions to the CFC legislation for which counsel for HMRC contends is as permissible as either of those which found favour in *Ghaidan's* case [2004] 2 AC 557 or the *IDT Card Services case* [2006] STC 1252. It does not alter the impact on other CFCs which are not excepted by any other exception. Certainly it provides an additional exception but, as counsel for HMRC submitted, the grain or thrust of the legislation recognises that the wide net cast by section 747(3) is intended to be narrowed by section 748. Further the terms of various exceptions were not intended to be either mutually exclusive or immutable as the ability to amend the conditions contained in various parts of Schedule 25 and the terms of paragraph (e) show. For my part I would reject this objection to the conforming interpretation put forward by counsel for HMRC."

85. In that case, therefore, it was the taxpayer that benefitted from the conforming interpretation.

86. There are, however, limits to the *Marleasing* principle. It is clear, as a matter of EU law, that a directive addressed to a member state does not create enforceable rights between citizens *inter se*. This was explained by the ECJ in *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* (Case 152/84) [1986] QB 401:

> "46. It is necessary to recall that, according to a long line of decisions of the court, in particular its judgment in *Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53,

> wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual *against the state* where that state fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly.
>
> …
>
> 48. With regard to the argument that a directive may not be relied upon against an individual, it must be emphasised that according to article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to "each member state to which it is addressed." It follows *that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.* It must therefore be examined whether, in this case, the health authority must be regarded as having acted as an individual." (Emphasis added)

87. The conclusion that the House of Lords drew from *Marshall* in *Duke v GEC Reliance Ltd* [1988] AC 618 was, in the words of Lord Templeman, that:

> "Section 2(4) of the European Communities Act 1972 does not in my opinion enable or constrain a British court to distort the meaning of a British statute in order to enforce against an individual a Community directive which has no direct effect between individuals."

88. The Supreme Court very recently approved that case in the context of the limits of the *Marleasing* principle: *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs* [2021] UKSC 31 at [143].

89. In *Faccini Dori v Recreb Srl* (Case C-91/92), [1995] All ER (EC) 1 the court returned to that question. Explaining the rationale of *Marshall* it said:

> "[22] It need merely be noted here that, as is clear from the judgment in *Marshall*, the case law on the possibility of relying on directives against State entities is based on the fact that under Article 189 a directive is binding only in relation to "each Member State to which it is addressed" . That case law seeks to prevent "the State from taking advantage of its own failure to comply with Community law" .
>
> [23] It would be unacceptable if a State, when required by the Community legislature to adopt certain rules intended to govern the State's relations—or those of State entities—with individuals and to confer certain rights on individuals, were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights. Thus the Court has

> recognised that certain provisions of directives on conclusion of public works contracts and of directives on harmonisation of turnover taxes may be relied on against the State (or State entities)."

90. Mr Beal argues that by seeking to rely on the PVD in the face of a clear domestic statute, HMRC (as an emanation of the state) is seeking to take advantage of its own failure to comply with EU law. Had domestic law been clear on the point, Ampleaward (and others in similar positions) might have arranged their affairs differently.

91. In *Criminal proceedings against Arcaro* (Case C-168/95), [1997] All ER (EC) 82 Sig Arcaro was prosecuted under Italian law for discharges of cadmium into surface waters without authorisation. He argued that under Italian law he was not required to obtain authorisation. The magistrate held that that was the case under Italian law, but that Italian law did not conform with EU directives. The relevant questions referred to the CJEU were whether the prosecution could rely on the directive; and whether there was a procedure by which domestic provisions conflicting with the directive could be eliminated from national legislation. Applying the *Marshall* line of cases, the CJEU held that a public authority was not entitled to rely on the directive against an individual. From one perspective that is what HMRC is attempting to do in the present case, albeit under the guise of a conforming interpretation.

92. Another of the questions referred in *Arcaro* was whether there was a procedure by which domestic provisions conflicting with the directive could be eliminated from national legislation. At [41] the court set out the *Marleasing* principle. It continued:

> "[42] However, that obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions...
>
> [43] The reply to the third question must therefore be that there is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a provision of a directive which has not been transposed where that provision may not be relied upon before the national court."

93. Although the question arose in the context of criminal proceedings, the court's answer to the question (repeated in the same terms in the *dispositif*) was not so limited. Of equal interest is Advocate General Elmer's discussion of the limits of *Marleasing* in the same case. He said:

> "[39] In that case law the court has made it clear that the aforesaid rule of interpretation is to be applied 'so far as possible' in order to interpret provisions of national law in accordance

> with Community law. That rule of interpretation cannot however be applied so as to undertake an actual redrafting of the provisions of national law. That would be tantamount to introducing the direct effect of provisions of a directive imposing obligations on individuals by the back door and contrary to art 189 of the Treaty.
>
> [40] In other words, if the wording of the national rule allows of several interpretations, the national court must apply, from amongst the various interpretations, the one which will bring the provision of national law into harmony with Community law. If on the other hand the wording of the law leaves no room for interpretation because for example the law clearly says A, the rule of interpretation cannot be used contrary to the wording of the law so as to say B, even though B (but not A) is in accordance with Community law."

94. The CJEU returned to the limits of *Marleasing* in case C-268/06 *Impact v Minister for Agriculture and Food* [2008] 2 CMLR 47 at [100]:

> "However, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*."

95. The expression "*contra legem*" means "against the law". In the context of the *Marleasing* principle, the content of that phrase was explained by Advocate General Bot in *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen* (Case C-441/14), [2016] 3 CMLR 27 at [68]:

> "The Latin expression '*contra legem*' literally means 'against the law'. A *contra legem* interpretation must, to my mind, be understood as being an interpretation that contradicts the very wording of the national provision at issue. In other words, a national court is confronted by the obstacle of *contra legem* interpretation when the clear, unequivocal wording of a provision of national law appears to be irreconcilable with the wording of a directive. The Court has acknowledged that *contra legem* interpretation represents a limit on the obligation of consistent interpretation, since it cannot require national courts to exercise their interpretative competence to such a point that they substitute for the legislative authority."

96. He distinguished, in this connection, between national law laid down by case law on the one hand, and law enacted by the legislature on the other. He seems to me to have taken the view that to contradict "the very wording" of national legislation would amount to an interpretation *contra legem*. The court drew that distinction at [34]:

> "Accordingly, the national court cannot validly claim in the main proceedings that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with EU law."

97. If a proposed interpretation of national law goes beyond that limit, then the national court may be required to disapply the offending provision: *Dansk Industri* at [37].

Application to this case

98. In the present case HMRC do not suggest that any national provision in VATA should be disapplied. But they suggest three ways in which VATA could be read so as to confirm with their interpretation of the PVD:

    i) First, by reading into section 18(3) words that restrict its application to warehousing regimes within the geographical territory of the UK; or

    ii) Second, by reading the criteria defining '*warehousing regime*' in section 18(7) conjunctively, even if the court were to decide that they would be read disjunctively under English law alone; or

    iii) Third, by limiting the scope of the parenthesis in s.13(1) VATA – "(subject to sections 18 and 18B)" to s.13(2) VATA.

99. It must not be forgotten that the *Marleasing* principle is a principle of *interpretation*. A court is not entitled to cross the boundary into amending legislation enacted by Parliament: see *Football Association Premier League Ltd v QC Leisure* [2012] EWCA Civ 1708, [2013] Bus LR 866. That is all the more so where there may be several ways in which legislation may be made compliant, which involve policy choices which a court is ill-equipped to make: *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [33] per Lord Nicholls. The position is even more complicated in the present case, because almost all of the provisions of VATA in contention have been repealed or substantially amended by the Taxation (Cross Border Trade) Act 2018; but only with effect from 31 December 2020.

100. As I have said, the definition of "warehouse" in section 18 of VATA is:

> "any warehouse where goods may be stored in any member State without payment of any one or more of the following …"

101. The words "in any member state" are clear and unambiguous. In addition, sections 18 (3) and 18 (4) of VATA provide that the trigger for the payment of VAT where goods are kept in duty suspension arrangements is the duty point at which excise duty becomes due. That is reflected in regulation 41 of the VAT Regulations, as well as in recital (36) of the PVD. In the light of recital (36), it was clearly a legitimate policy choice for the UK to devise a system which intertwined VAT and excise duty where goods are stored and moved in duty suspension. There are, no doubt pros and cons in such a system; and that particular policy choice does not exist in the case of a member state which has not chosen to avail itself of the option to exempt transactions in bonded excise goods. How such states deal with liability to pay VAT on transactions in such goods we do not

know. None of the transactions to which Ampleaward was a party has yet triggered a duty point; because all of them have taken place under duty suspension arrangements. It would therefore be necessary to sever (or at least modify) the linkage between the duty point and the trigger for liability to pay VAT. HMRC have not suggested how that might be done. Regulation 41 of the VAT Regulations would, it seems, also have to be disapplied or substantially modified in order to create a time at which VAT became chargeable; although HMRC did not suggest how that might be done or what would take its place.

102. It would also be necessary to consider how to assess the consideration for the supply which is brought into account for VAT. In the normal case VAT is payable on the consideration for the goods which is inclusive of excise duty. Whether Parliament would have chosen to do that in a case in which excise duty is not payable and may never become payable (at least by the trader in question) is an open question.

103. Indeed, Parliament's response might even have been to abandon the optional exemption completely.

104. Section 13 (3) of VATA was designed to give effect to the first paragraph of article 41. But VATA and the regulations made under it did not contain any mechanism by which a trader whose intra-Community acquisition was to be treated by article 41 as having taken place in the UK was entitled to a refund of VAT under the second paragraph of that article once he established that VAT has been correctly applied. It is true that section 13 (5) contained a power to make regulations, but that power has never been exercised (and has since been repealed). So the *Marleasing* interpretation would have to extend to that, too.

105. In my judgment these questions amount to serious obstacles to the application of a conforming interpretation of section 18 (3) of VATA in order to arrive at the result that HMRC wish to achieve.

106. HMRC's first suggestion is, in effect, to replace "any member state" with "the United Kingdom". I do not consider that the *Marleasing* principle entitles a court to adopt an interpretation which is in direct contradiction to the words that Parliament has used. Moreover, section 18 (7) specifically contemplates a "warehousing regime" as including movements between warehouses in different member states. In Advocate Elmer's words, this suggestion invites us to read "A" as "B". HMRC's first suggestion would, in my judgment, be *contra legem*. I note, however, that this amendment has in fact been made by Parliament (see Taxation (Cross Border Trade) Act 2018 Schedule 8 para 16 (6) (d); but only with effect from 31 December 2020). The suggested conforming construction would have retrospective effect, although Parliament has expressly decided that it should not.

107. HMRC's second suggestion is a repetition of the ground on which the UT refused permission to appeal and which, for procedural reasons, we also refused permission to appeal. In my judgment that argument is not, therefore, open to HMRC. But even if the argument were open, I do not consider that it is a good one. First, it would generate an incoherent conflict between the definition of "warehouse" and the definition of "warehousing regime". Second, it would restrict the application of section 18 to a case in which no duty levy or VAT of any kind is payable. The ramifications of such interpretation across a wide range of goods (other than alcohol) which would be

excluded from the ambit of section 18 by that interpretation were not explored; and I do not consider that a court should adopt such a radical reinterpretation of clear statutory language without a full appreciation of what consequences such an interpretation would entail. It may well be that, as Mr Beal argued, such an interpretation would restrict the scope of section 18 to movements under special customs procedures under section VII of the Union Customs Code. On the face of it that would seriously reduce the scope of the exemption which the UK was both permitted to and intended to create.

108. HMRC's third suggestion is to restrict the scope of the parenthesis to section 13 (2). Under this suggestion, section 13 (3) (which applies where a UK VAT registration is used for the purpose of an intra-Community acquisition) would no longer be subject to section 18. This suggestion is not one which was raised in either tribunal; and how it would work was not explained to us. In the first place, if section 13 (3) was no longer subject to section 18, there would be a conflict between section 13 (3) (which would treat the acquisitions as taking place in the UK) and section 18 (3) (which would treat the acquisitions in this case as taking place outside the UK). So on its own, this suggestion does not resolve the problem. HMRC did not explain how this conflict should be resolved. Second, sections 18 (3) and (4) deal not only with the place of acquisition but also the time of acquisition. Third, the suggestion leaves unresolved the linkage between liability to pay VAT and the duty point; which, as I have said, involves policy choices to be made. In addition, of course, it would have required the making of regulations under section 13 (5).

109. In my judgment, although the UK has incorrectly widened the permissible scope of the exemption, the *Marleasing* principle does not allow that error to be corrected. Any necessary change would have to have been made by legislation.

A right to deduct?

110. This was not a question that the UT thought it necessary to consider because of its decision that the *Marleasing* principle did not allow the domestic legislation to be read down.

111. I have reached the same conclusion.

Result

112. I would dismiss the appeal.

Lord Justice Birss:

113. I agree.

Sir Christopher Floyd:

114. I also agree.