TC02895

Appeal number: LON/2009/00673

Value Added Tax – reduced rate – energy saving materials supplied as part of a supply of the whole or part of a domestic central heating system – whether a single supply subject to a single rate of VAT, a single supply subject to two or more different rates of VAT or two or more separate supplies subject to different rates of VAT

FIRST-TIER TRIBUNAL
TAX CHAMBER

AN CHECKER HEATING & SERVICE ENGINEERS **Appellant**

- and -

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

TRIBUNAL: JUDGE NICHOLAS PAINES QC

Sitting in public at 45 Bedford Square, London WC1 on 25 and 6 April 2013

Mr David Milne QC and Mr Charles Bradley, Counsel, instructed by McClure Naismith LLP, for the Appellant

Miss Kerry Bretherton, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The business of the Appellant, which I shall refer to as 'AN Checker', includes the installation in residential accommodation of boilers and central heating systems; the installations include components which, AN Checker contends, fall within the definition of "energy saving materials" in Note 1 to Group 2 in Schedule 7A to the Value Added Tax Act 1994. I am not asked to decide whether that is the case, but to assume it for the purpose of giving a decision in principle on the issues raised by the appeal.

2. The background to the appeal is that AN Checker has accounted for VAT on the components, and on an apportioned element of the labour charges applicable to their installation, at the reduced rate of 5% provided for by section 29A of the Act. In January 2009 HMRC conducted an audit of AN Checker's VAT returns and in February 2009 wrote to them expressing the view that, whilst the components would qualify for VAT at the reduced rate if they were installed "in their own right", where they were installed as part of a larger installation – such as of a boiler or a central heating system – the whole supply was standard-rated. HMRC subsequently raised an assessment in respect of AN Checker's accounting periods from 03/06 to 09/08.

3. AN Checker sought a review of the decision, but it was upheld. In March 2009 a notice of appeal against the assessment was lodged at the Tribunal. From May of that year until February 2012 the appeal was stayed pending a decision in another case but, following the withdrawal of the appeal in that other case, AN Checker requested that its appeal be nominated as the new lead case. By an Order of 19 April 2012 the Tribunal designated this appeal as a lead case pursuant to rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, identifying the common or related issue of fact or law between it and other related appeals as:

> "Whether the supply of the installation of energy saving materials together with services of installation of boiler and other central heating products is a single supply subject to [a] single rate of VAT or is a single supply subject to two or more different rates of VAT or, in the alternative, are two or more separate supplies subject to different rates of VAT."

4. HMRCs' case on this is, in short, that the installation of energy saving materials together with installation of a boiler or other central heating components is a single supply, in accordance with the principles set out in Case C-349/96 *Card Protection Plan* [1999] ECR I-973, [1999] STC 270 ("*CPP*") and other related cases, taxable at the standard rate. AN Checker's case relies on the CJEU's judgment in Case C-94/09 *Commission v France* [2010] ECR I-4261, [2012] STC 573 (hereafter *Commission v France (undertakers)*, to distinguish it from another *Commission v France* case) as establishing that the reduced rate provided for by s 29A and Group 2 of schedule 7A applies to those elements of the supply that are energy-saving materials, regardless of whether they are elements of a single wider supply on *CPP* principles. I have concluded, with some regret, that HMRC's case succeeds.

The legislation

5. Directive 2006/112 contains a number of provisions that allow Member States to apply reduced rates of VAT, lower than the standard rate. Article 98 allows them to do so in respect of categories of supplies of goods or services listed in Annex III to the Directive; article 102 allows them to do so in the case of supplies of natural gas, electricity or district heating and articles 110 and 113 allow them to continue to apply reduced or zero-rating in respect of supplies that received it in January 1991. Energy-saving materials are not in the latter category and I was told of controversy between the United Kingdom and the European Commission as to whether the Directive permitted a reduced rate in their case. I was not asked to consider whether their supply and/or installation falls within any of the categories in Annex III but to assume that reduced rating is available, subject to the issues I am asked to decide.

6. Section 29A(1) of the 1994 Act provides that "VAT charged on any supply that is of a description for the time being specified in Schedule 7A … shall be charged at the rate of 5 per cent." Group 2 in Schedule 7A reads, so far as material, as follows (former references to installation of energy-saving materials in buildings used for a charitable purpose having been deleted with effect from 1 August 2013):

Group 2 Installation of energy-saving materials

Item no.

1. Supplies of services of installing energy-saving materials in residential accommodation.

2. Supplies of energy-saving materials by a person who installs those materials in residential accommodation.

Notes

Meaning of "energy-saving materials"

1. For the purposes of this Group "energy-saving materials" means any of the following—

   (a) insulation for walls, floors, ceilings, roofs or lofts or for water tanks, pipes or other plumbing fittings;

   (b) draught stripping for windows and doors;

   (c) central heating system controls (including thermostatic radiator valves);

   (d) hot water system controls;

   (e) solar panels;

   (f) wind turbines;

   (g) water turbines;

(h) ground source heat pumps;

(i) air source heat pumps;

(j) micro combined heat and power units];

(k) boilers designed to be fuelled solely by wood, straw or similar vegetal matter.

The evidence

7. I was provided with a witness statement of Mr Stephen Checker, who also gave oral evidence. AN Checker was founded by Mr Checker's father, but I infer that it is Mr Checker who now runs it. I shall set out a brief summary of the relevant facts as I understand them. These are not to be treated as formal findings of fact; I was invited to deal with the issues in the case in principle, leaving it to the parties to agree, so far as necessary, what the precise result in terms of tax liability should be on the basis of further investigation of the facts by HMRC than has been so far conducted. It is not possible to decide an issue in a factual vacuum and this does seem to me to be a case in which I can conveniently decide the contested issues of principle on the basis of a general understanding of the factual background without burdening the parties with binding findings of fact which risk being incomplete or inaccurate in their detail.

8. AN Checker's business includes the installation, improvement and repair of domestic central heating installations; Mr Checker deals with the surveying and estimating of jobs. When a prospective customer makes contact with the business, an appointment is made for Mr Checker to visit the customer and prepare a quotation for the work required. Mr Checker uses a computer to prepare quotations. In order to enable the computer to calculate the VAT element of the quotation Mr Checker attributes values to those elements of the job that he considers to be taxable at the reduced rate; these are, in short, thermostatic radiator valves, central heating timers, room thermostats, other central heating system controls such as motorised valves controlled by a thermostat, and insulation.

9. In recent years AN Checker has used a piece of computer software known as the 'VAT optimiser', which is operated by a colleague of Mr Checker to whom he passes the job file. The papers for the hearing included a witness statement of Mr Kevin Treanor, whose company markets the VAT optimiser, though I was not asked to read it. I shall simply note that the VAT optimiser appears to apportion materials costs between components of an installation regarded as falling or not falling within the definition of energy-saving materials on the basis of the installer's purchase cost and to apportion labour costs between the two categories of component on the basis of the installer's labour rates and industry standard labour times. It does not matter for the purposes of my decision whether this apportionment is accurate or not; I have to decide whether apportionment is permissible in principle. It appears that the optimiser makes an apportionment even as regards the internal components of items that the installer purchases as a single unit, such as insulation material within a boiler.

10. In his oral evidence, Mr Checker said that the majority of AN Checker's domestic central heating work involved installing new boilers into existing central heating systems; he estimated that as amounting to some 75% of the business. Full installations of central heating systems account for about 20% of AN Checker's business (I assume, measured by numbers of jobs rather than value), and installations limited to energy-saving materials such as thermostatic valves or insulation account for about 5%. Mr Checker explained that Regulations introduced in 2005 had required new domestic boiler installations to be of a condensing boiler and to be accompanied by the fitting (if not already fitted) of thermostatic radiator valves to upstairs radiators, a room thermostat on the ground floor and a hot water tank thermostat. Further Regulations introduced in 2010 required thermostatic radiator valves to be fitted to ground floor radiators also, except in the room fitted with the room thermostat. A boiler replacement job therefore typically has to include the supply and fitting of a number of components falling within the definition of energy-saving materials. I was shown three sets of sample project documentation and some brochure pages relating to thermostats and controls, but it is not necessary to describe them further. The quotation and invoice supplied to the customer do not break down the VAT between the reduced and standard rate, the invoice simply stating a VAT-inclusive price.

The case-law

11. For HMRC, Miss Bretherton relies on the familiar *CPP* line of case-law, which holds that a supply comprising different elements is (in general) a single supply for VAT purposes where some of the elements are ancillary to the principal element or elements, or where the elements are so closely linked that in objective economic terms they form a single supply which it would be artificial to split. She contends that where AN Checker installs energy-saving materials along with the installation of a boiler or of a complete central heating system there is, on *CPP* principles, a single supply which goes beyond and cannot be described as a supply of energy saving materials; consequently, AN Checker's supplies are wholly taxable at the standard rate.

12. Since Mr Milne QC and Mr Bradley, who appear for AN Checker, accept the premise – though not the consequence – I do not need to analyse the *CPP* case-law or its application to the facts of this case in any detail. I simply record that I agree that the premise is correct; in my judgment, AN Checker's supplies of energy-saving materials along with boilers or central heating systems are, in the CJEU's terminology, complex single supplies and cannot be described as supplies 'of' installing energy-saving materials listed in Group 2, though the supplies include that.

13. It was, I imagine, widely thought in the early days of the *CPP* case-law that a single supply must receive a single VAT treatment. But that has been established not to be entirely the case. Mr Milne relied in his submissions on a line of CJEU case-law which establishes that different elements of a complex single supply may nevertheless be taxed at different rates where national law so provides.

14. The first case in the series was Case 384/01 *Commission v France* [2003] ECR I-4416, which I shall refer to as *Commission v France (gas and electricity)*. It concerned the introduction by France of a reduced rate of VAT on the standing charge element of the domestic tariffs of the (then still nationalised) suppliers of gas and electricity. Claiming to be acting under the predecessor to article 102 of the VAT Directive, France had notified the European Commission of its intention, and there had followed an inconclusive correspondence between France and the Commission on the question whether the case fell within the relevant article. The charges appear to have related to the connection to the gas or electricity network and (despite a suggestion to the contrary in paragraph 28 of the Court's judgment) not to any units of gas or electricity supplied. In the ensuing infringement proceedings the Commission relied, in addition to an argument that France had not acted in accordance with the prescribed procedure, on a contention that the charges either fell outside the article, as not relating to supplies of gas or electricity but merely to supplies of a service of connection to the networks or – if the charges did relate to supplies of gas or electricity – that they infringed the 'principle of neutrality' by applying different rates of VAT to the element of the supply remunerated by the standing charge and to the element remunerated by unit charges.

15. The Commission's action failed, the Court holding that it had not advanced an argument to substantiate the contention that the charges were not in respect of a supply of fuel and had produced no evidence to show that the principle of fiscal neutrality was infringed by "the selective application of the reduced rate of VAT to one part only of the supply of gas or electricity"; it added that

> 27 In any event, there is nothing in the text of Article 12(3)(b) of the Sixth Directive which requires that provision to be interpreted as requiring that the reduced rate can be charged only if it is applied to all supplies of natural gas and electricity. It is true that the French text of that provision uses the definite article 'aux' before the term 'fournitures', but a comparison of the different language versions, some of which do not use the definite article, argues in favour of an interpretation that a selective application of the reduced rate cannot be excluded, provided that no risk of distortion of competition exists.
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> 28 Moreover, since the reduced rate is the exception, the restriction of its application to concrete and specific aspects, such as the standing charge conferring entitlement to a minimum quantity of electricity on the account holders, is consistent with the principle that exemptions or derogations must be interpreted restrictively.
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> 29 It must therefore be concluded that the Commission has failed to demonstrate that the charging of a reduced rate solely on the standing charge conferring entitlement to a minimum supply of energy necessarily requires that the same reduced rate be charged on all other supplies of energy.

16. The Court went on to hold that the Commission's failure to take a decision to the effect that the VAT treatment distorted competition meant that it was to be deemed not to. It is to be noted that the *CPP* case-law was not referred to in the

judgment, paragraph 29 of which suggests that the Court might have regarded the supplies remunerated by the standing charges as separate supplies between the utility and the consumer. The relationship between the principle that reduced rates can be applied selectively and the *CPP* case-law was, however, discussed in two subsequent cases which make it clear that a Member State can provide for reduced or zero-rating of a part only of a single supply.

17. The first of these is Case C-251/05 *Talacre Beach Caravan Sales Ltd v Commissioners of Customs and Excise* [2006] ECR I-6269, [2006] STC 1671 concerning the zero-rate in the United Kingdom for caravans exceeding a specified size (more often referred to as 'mobile homes'). Talacre purchased and resold them together with certain contents in what had been held to be a single supply. The VAT Act, however, excluded most 'removable contents' supplied with a mobile home from the zero-rate. The Court of Appeal referred to the CJEU the question whether the fact that there was a single supply of the mobile home and the contents precluded the taxing of the contents at the standard rate, Talacre contending that different rates of tax could never be applied to elements of a single supply.

18. The Court's contrary conclusion was heavily influenced by the Note to the relevant Group in Schedule 8 to the Act explicitly excluding removable contents from the zero-rate. It held that to extend zero-rating to contents by virtue of their inclusion in a single supply would extend the zero-rate beyond the scope it had had in 1991, contrary to what is now article 110; whilst it followed from the *CPP* case-law that "a single supply is, as a rule, subject to a single rate of VAT", the case-law did not "preclude some elements of that supply from being taxed separately where only such taxation complies with the conditions imposed by [article 110] on the application of exemptions with refund of the tax paid".

19. On the face of it, the reasoning in *Talacre* is limited to cases of tax rates that are permitted to the extent that they existed in 1991. That feature is absent, however from the two cases that followed. In Case C-442/05 *Finanzamt Oschatz v Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien* [2008] ECR I-1817], [2009] STC 1, the Zweckverband was a municipal water and sewerage undertaking which charged a fee for connecting a consumer to its water main. Germany had a reduced rate of VAT on the supply of water, pursuant to what is now article 98, but the tax authority took the view – similar to that of the Commission in *Commission v France (gas and electricity)* – that laying the mains connection was not the same as supplying water. The Bundesfinanzhof asked the CJEU whether laying a mains connection formed part of the supply of water within the meaning of the predecessors to Annexes I (activities of bodies governed by public law that are in any event taxable) and III (supplies that may be reduced-rated under article 98) to the Directive.

20. The Court held that the mains connection did form part of the supply of water for the purposes of both annexes, on the ground that the mains connection was essential in order for the water to be supplied. Unlike the Advocate General, it did not specifically apply *CPP* reasoning or hold that the mains connection was ancillary to the supply of the water. In the context of what is now Annex III the Court added

(perhaps unnecessarily, since the German reduced rate appears to have applied to supplies of water generally) that

> 41 .... there is nothing in the text of Article 12(3)(a) of the Sixth Directive which requires that provision to be interpreted as meaning that the reduced rate can be charged only if it is applied to all aspects of the water supplies covered by Annex H to that directive, so that a selective application of the reduced rate cannot be excluded provided that no risk of distortion of competition results (see, by analogy, Case C-384/01 *Commission* v *France* [2003] ECR I-4395, paragraph 27).
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> 42 The introduction and maintenance of reduced rates of VAT lower than the standard rate fixed in Article 12(3)(a) of the Sixth Directive are permissible only if they do not infringe the principle of fiscal neutrality, inherent in the common system of VAT, which precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, Case C-481/98 *Commission* v *France* [2001] ECR I-3369, paragraphs 21 and 22, and Case C-109/02 *Commission* v *Germany* [2003] ECR I-12691, paragraph 20).
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> 43 Accordingly, subject to compliance with the principle of fiscal neutrality inherent in the common system of VAT, Member States may apply a reduced rate of VAT to concrete and specific aspects of water supplies covered by Category 2 of Annex H of the Sixth Directive, such as mains connections.

21. In *Commission v France (undertakers)* France had applied a reduced rate, pursuant to what is now article 98, to certain supplies by undertakers. Whereas annex III to the Directive and its predecessor in the Sixth Directive permitted the application of a reduced rate to the "supply of services by undertakers ... and the supply of goods related thereto", the French reduced rate was limited, principally, to "the transportation of the body, before and after it has been placed in the coffin" in specially equipped vehicles. Referring to the *CPP* case-law, the Commission contended that this was contrary to the Directive on the express ground that "all the supplies of services and of goods by undertakers to the families of deceased persons constitute, for the purposes of VAT, a single complex transaction which must, consequently be subject to a single rate of tax", whereas the French legislation artificially split the transaction, contrary to that case-law. In response, France relied on *Commission v France (gas and electricity)* and *Zweckverband.*

22. Agreeing with France, the Court rehearsed its case-law to the effect that reduced rates under what is now article 98 can be applied selectively to concrete and specific aspects of a category of supply listed in annexe III provided that the principle of fiscal neutrality is complied with. It added that, in doing so, they did not need to apply the *CPP* criteria in order to determine whether a single supply was in issue. Accordingly it was "not necessary to examine whether, as the Commission maintains, the supply of services by undertakers must be regarded as a single transaction from the point of view of the expectations of a typical consumer. On the other hand it is necessary to

ascertain whether the transportation of a body by vehicle ... constitutes a concrete and specific aspect of that category or supply, as set out in Annex III, point 16, to Directive 2006/112 and, if so, to examine whether or no the application of that rate undermines the principle of fiscal neutrality". It held that the transportation of the body was a concrete and specific aspect of an undertaker's supply and that the Commission had not shown that the principle of fiscal neutrality was infringed. Accordingly, "the French legislation making the transportation of a body by vehicle subject to a reduced rate of VAT fulfils the conditions required by relevant European Union legislation".

23. Finally as regards CJEU case-law, Case C-117/11 *Purple Parking v HMRC* (Order of 19 January 2012) was a case in the *CPP* line of authority which discussed the *Commission v France* line of authority (as I shall call the other CJEU cases that I have reviewed). The taxpayer provided off-airport parking with transport between the car park and the airport terminal by bus. It contended (perhaps ambitiously, given that the zero-rating legislation contains a Note, similar to that in issue in *Talacre*, excluding such transport from the zero-rate), that its supplies of transport should be zero-rated and that the Note infringed fiscal neutrality; HMRC had ruled that the taxpayer made a single supply of parking, to which the transport was ancillary. The Upper Tribunal referred to the CJEU a series of questions on the application of the *CPP* principles to the case and a further question (which the Court did not answer) as to whether the Note in the legislation infringed fiscal neutrality. In particular, the Tribunal asked the Court how it should take into account in the *CPP* analysis the principle of fiscal neutrality and Court's conclusion regarding that principle in *Commission v France (undertakers)*.

24. As regards the *CPP* issues, the Court found that the taxpayer made "a complex single supply in which the parking element is predominant". As regards the significance of fiscal neutrality in the analysis, it said that it was for the national court to decide whether supplies that were taxed differently were similar, but pointed out that treatment of services as forming part of a single supply "necessarily leads to tax treatment different from that that those services would have received if they had been supplied separately" and that "Accordingly, a complex supply of services consisting of several elements is not automatically similar to the supply of those elements separately". Turning to *Commission v France (undertakers)*, the Court said

> 40 Furthermore, as regards the importance of the judgment in Case C-94/09 *Commission* v *France*, referred to in the second question, it follows from paragraphs 25 to 29 and 31 to 34 of that judgment that it concerns the possibility for a Member State to apply, in a selective manner, on the basis of general and objective criteria, a reduced rate of VAT to certain aspects of a category of supplies that is listed in the Sixth Directive and, accordingly, concerns a different question from that raised by the first and second questions referred for a preliminary ruling. Indeed, the sole purpose of the latter is whether two services constitute, in the light of the specific circumstances of their supply at issue in the main proceedings, a single supply.

25. The Privy Council followed the *Commission v France* line of authority in *Director General, Mauritius Revenue Authority v Central Water Authority* [2013] UKPC 4 concerning the Mauritian VAT Act 1998 which is modelled on the United Kingdom Act and thus indirectly on the Directive; section 4(5) of the Act partially enacts the *CPP* principles, providing that a supply of goods which is incidental to a supply of services is part of the supply of services, and *vice versa*. The issue concerned the recoverability of the Water Authority's input VAT incurred in respect of purchasing water meters and commissioning infrastructure works during a period when the Act provided that "the renting out of a meter and the carrying out of infrastructure works" by the Authority were exempt from VAT. The Privy Council held it to be irrelevant whether providing meters and piping was merely an element in a (non-exempt) supply of water, holding that their separate VAT treatment (as exempt) was in accordance with *Commission v France (undertakers)*. Accordingly the input VAT was not recoverable.

26. I was taken to two cases in the First-tier Tribunal in which taxpayers had argued, in reliance on this line of case-law, that a particular element of a supply fell to be taxed at the reduced rate. In *Colaingrove Ltd v HMRC* [2012] UKFTT 116 (TC) the Tribunal (Judge John Walters QC and Mr John Robinson) accepted a submission that the reduced rate of VAT applied to electricity or gas provided (in return for a separate charge) to occupants of holiday caravans and chalets notwithstanding that the electricity or gas was an element in a complex single supply of serviced holiday accommodation. They directed themselves that it was open to the national legislature, on the basis of the *Commission v France* case-law, to legislate for reduced-rate taxation of an element in a wider supply and held that the provisions of the Act legislation applying a reduced rate to supplies of electricity and gas had by necessary implication done so; this part of their decision turned on the particular wording of Group 1 and some of the Notes to it. An appeal is pending against their decision. In *WS Morrison Supermarkets Ltd v HMRC* [2012] UKFTT 366 (TC) the Tribunal (Judge Jonathan Cannon and Miss Susan Stott) rejected an argument that the reduced rate for fuel fell to be applied to the charcoal in a disposable barbecue; their decision was upheld by a decision of Vos J in the Upper Tribunal, released after I heard argument in this case, to which I refer below.

27. Vos J held that the *Commission v France* line of case-law only comes into play where national legislation seeks to restrict the application of a reduced rate of VAT by legislating to the effect that it will apply to a lesser extent than the Directive would have permitted. That case-law holds that the national legislation will be compatible with the Directive if it applies the reduced rate to a 'concrete and specific' aspect of the supply. If so, it does not matter that the whole supply would have been regarded as a single supply by the application of a *CPP* analysis. On the other hand, the First-tier Tribunal had been right to regard the *CPP* case-law as being concerned with defining the nature of transactions for VAT purposes and *Commission v France (undertakers)* as being concerned with the power of Member States to identify specific aspects of what would otherwise be a single supply and treat them as falling inside or outside an exemption or reduced rate. The Tribunal was also right to conclude that the legislation did not 'carve out' the charcoal element of the supply of a disposable barbecue so as to subject it to a reduced rate. It was "precisely because

the domestic statute did not identify 'charcoal as part of disposable barbecues' as being worthy of a reduced rate that they do not attract one".

Decision

28. Mr Milne accepted that an installation of a boiler or a central heating system by AN Checker was a single supply, but contended that it was subject to taxation at mixed rates: the standard rate insofar as it did not comprise energy-saving materials and the reduced rate insofar as it did. His primary case was that the only questions to be answered by the tribunal were those posed by *Commission v France (undertakers)*: whether the energy-saving materials were a 'concrete and specific aspect' of the installation and whether taxation of them at the reduced rate was liable to distort competition. He submitted that the energy-saving materials were a concrete and specific aspect of the installation in the sense in which those words were used by the CJEU, and I agree. He pointed out, accurately, that HMRC had not advanced any argument to the effect that taxation of them at the reduced rate would distort competition. Mr Milne's primary case took it for granted that, if taxation of the energy-saving materials within a wider installation was compatible with *Commission v France (undertakers)*, then that was how the legislation fell to be applied; in response to the suggestion that there might be an issue of statutory interpretation as to whether Parliament intended the reduced rate for energy-saving materials to apply to their provision as an element of a wider supply, Mr Milne backed up his primary argument with submissions, based on the statutory history of the reduced rate for energy-saving materials, to the effect that Parliament did so intend.

29. For HMRC Miss Bretherton submitted that Parliament's intention in enacting Group 2 in Schedule 7A was purely to apply a reduced rate to a self-standing supply of installation of the listed materials; nothing in the legislation suggested that it applied when energy-saving materials formed part of a larger supply taxable at the standard rate. The *Commission v France* line of case-law, she submitted, was purely concerned with the power of a Member State to apply the reduced rate selectively, and was not a departure from the general principle that a transaction must not be artificially split; when it came to determining the taxation of any particular transaction, application of the *CPP* principles remained mandatory.

30. In my judgment that submission is too extreme; it would lead to the Member State's power to apply a reduced rate selectively being frustrated at the level of day-to-day application of the tax. If applied to the legislation at issue in *Commission v France (undertakers)*, for example, it would make the reduced rate for transportation of the body unavailable in practice in any case where – as is common in Britain and, the judgment tells one, France – transport of the body of the deceased is provided as an element in a wider supply of funeral services. Applying Miss Bretherton's approach would lead to the conclusion that such a supply was in *CPP* terms a single supply of funeral services and thus ineligible for the reduced rate which was confined to supplies that were, in *CPP* terms, supplies of transport of the body. In oral submissions, Miss Bretherton accepted that, if the legislator has legislated that a reduced rate shall apply to an element of a wider supply, the taxpayer is entitled to be taxed accordingly.

31. As Vos J pointed out in *Morrison*, the *Commission v France* line of case-law is concerned with the power of Member States to apply a reduced rate to a lesser extent than is permitted or envisaged by the Directive. The cases establish that a Member State can do so, subject to fiscal neutrality and the need to identify a concrete and specific aspect of the category of supplies in question. *Commission v France (undertakers)* further establishes that a Member State can do this even if the consequence is the taxation at different rates of different elements of a single supply by a taxable person to his customer.

32. All the CJEU cases were ones in which, at first sight at least, the wider supplies that were likely to be made were supplies that could, compatibly with the Directive, have been taxed entirely at the reduced rate. The present appeal, by contrast, is not concerned with whether in enacting Group 2 in Schedule 7A Parliament has applied the reduced rate to a lesser extent than envisaged by the Directive – an issue that I could not sensibly attempt to resolve, not having heard any submissions on the (apparently controversial) issue of the legal basis for Group 2 in the Directive. HMRC's objection in this case is to the application of the reduced rate to energy-saving materials installed as part of a wider supply having a different character: installation of a boiler or a central heating system. To the extent that there is an issue of EU law in this case, it seems to me to be whether the *Commission v France* line of authority allows a Member State to apply a reduced rate to energy-saving materials when supplied as part of a wider supply if that wider supply is not one to which the Directive would allow the reduced rate to apply as a whole. That is a question to which the answer could not be described as *acte clair*.

33. I do not need to answer that question, however, since it is clear to me that, even where EU law does allow a reduced rate to be applied to an element of a wider supply, a separate issue of national law arises as to whether the national VAT legislation does so. In both the *Commission v France* cases it was accepted that the national law did so: in *gas and electricity* the reduced rate was explicitly limited to the network connection charge and in *undertakers* it was explicitly limited to transportation of the body. Similarly, in *Zweckverband* the Court's ruling was that "Member States *may apply* a reduced rate to concrete and specific aspects", inevitably raising an issue of national law as to whether a Member State has done so. In the *Central Water Authority* case the contested exemption was in terms limited to the renting of the water meter and infrastructure works; it is implicit in the Privy Council's judgment that the Minister had purported to amend the Act in such a way as to exempt those even if they were elements of a wider taxable supply: the issue was whether he had had power to do so. The First-tier Tribunal in both *Colaingrove* and *Morrison* identified an issue as to whether the legislation provided for a reduced rate for elements of a wider supply and the same approach is implicit in the passage from Vos J's judgment that I have quoted at the end of paragraph 28 above.

34. I have therefore considered, as a matter of construction of the VAT Act, whether it applies a reduced rate to the supply and installation of energy-saving materials when provided as part of a wider supply of installation of a boiler or a central heating system. Since I have been compelled to the conclusion that the legislation does not do this, I do not need to reach a conclusion on whether the

Commission v France line of authority would permit a Member State to apply a reduced rate in this way.

35. This part of Mr Milne's argument relied on the legislative history of the 1994 Act and the development of the *CPP* case-law. Provision for reduced rates was first introduced into the Act with effect from 1 April 1995 by the Finance Act 1995. This introduced additional subsections into s 2 (rate of tax) and an additional Schedule A1. New s 2(1A) provided that "VAT charged on any supply for the time being falling within paragraph 1 of Schedule A1 ... shall be charged at the rate of 8 per cent". Apart from amendment of the rate to 5 per cent, the subsection remained in these terms until 10 May 2001. The Schedule included supplies of fuel but did not initially refer to energy-saving materials; a new paragraph 1 was substituted with effect from 1 July 1998 by the Value Added Tax (Reduced Rate) Order 1998; this contained additional subparagraphs referring to:

(b) supplies to a qualifying person of any services of installing energy-saving materials in the qualifying person's sole or main residence; and

(c) supplies of energy-saving materials made to a qualifying person by a person who installs those materials in the qualifying person's sole or main residence.

36. "Energy-saving materials" were defined as insulation for walls, floors, ceilings, roofs or lofts or for water tanks, pipes or other plumbing fittings; draught stripping for windows and doors; central heating system controls; and hot water system controls. A qualifying person was someone aged 60 or over or receiving certain social security benefits. It was also provided that "A supply to which sub-paragraph (1)(b) or (c) above applies is a supply falling within this paragraph only to the extent that the consideration for it is or is to be funded by a grant made under a relevant scheme".

37. The Finance Act 2000 further amended paragraph 1 by introducing references to

(aa) supplies of services of installing List A energy-saving materials in residential accommodation ...;

(ab) supplies of List A energy-saving materials by a person who installs those materials in residential accommodation ...;

(b) supplies to a qualifying person of any services of installing List B energy-saving materials in the qualifying person's sole or main residence;

(c) supplies of List B energy-saving materials made to a qualifying person by a person who installs those materials in the qualifying person's sole or main residence.

38. The energy-saving materials that had been covered by the previous version became List A energy-saving materials and the "qualifying person" and grant funding requirements were removed in respect of them; the requirements were retained for the additional category of List B energy-saving materials that was introduced. Mr Milne showed me that the relevant part of the Notes on Clauses to the Finance Bill 2000; these described the clause as extending the reduced rate to all homes and said that the

reduced rate would apply "when 'List A' energy-saving materials are fitted" in residential accommodation.

39. By way of background the Notes also said that the United Kingdom had a disproportionately high level of winter deaths and that recent research had established a link between cold homes and winter death and illness. They continued "The Government is, therefore, widening the reduced VAT rate to cover installation of energy-saving materials in all homes in order to reap the widest benefit in health terms. The cut in the VAT rate ... will apply to all insulation, draught stripping and central heating system controls that people pay to have fitted in their homes".

40. Finally, the Finance Act 2001 recast the reduced rate provisions of the Act into the general form that they currently take, with the repeal of the reduced rate subsections of s 2, the introduction of s 29A and the replacement of Schedule A1 by Schedule 7A, organised in Groups as was already the case with Schedules 8 and 9 dealing with exemption and zero-rating. Group 2 in Schedule 7A has remained as originally enacted apart from the addition of further categories of energy-saving materials and the recent deletion of references to installation in buildings used for a charitable purpose.

41. Mr Milne submitted that it would have been an odd choice for the Treasury and Parliament in 1998 and 2000 to have decided to continue to apply a reduced rate to fuel but to circumscribe the reduced rate for environmentally beneficial energy-saving materials by restricting its operation to the minority of cases where they were supplied as a stand-alone supply rather than in conjunction with a boiler or as components of a newly installed central heating system. Miss Bretherton's interpretation, he submitted, produced the particularly anomalous result (which she agreed that it produced, though I would reserve judgment on that) that, despite the conferring of a reduced rate on the installation of a boiler burning non-fossil fuels (Note 1(k) to Group 2), the installation of such a boiler would not attract the reduced rate where it was installed as part of a new central heating system, because the supply in *CPP* terms would be analysed as being of a central heating system and not of a boiler. Mr Milne's explanation of why the legislation was worded in a way that enabled Miss Bretherton to argue for this result was that it was drafted before the *CPP* notion of a complex single supply became fully established. He instanced the differing outcomes at various stages of the *CPP* litigation, where the service supplied by CPP had been analysed as a single standard-rated supply by the VAT Tribunal, as two distinct supplies by Popplewell J in the High Court, as a single standard-rated supply by the Court of Appeal and as a single exempt supply by the House of Lords.

42. I have considerable sympathy for Mr Milne's argument. I note first that the original provision for energy-saving materials referred to "supplies to a qualifying person of *any services* of installing energy-saving materials" (my emphasis). If the word 'any' in the expression 'any services' is not redundant, it could only widen the scope of the services covered, and could arguably extend them in the manner Mr Milne contends for. Secondly, while I accept Miss Bretherton's submission that introducing a reduced rate limited to the 'retro-fitting' of energy-saving materials into existing installations could be a perfectly rational legislative choice, designed to

encourage people to improve the efficiency of their heating systems in this way, it is not obvious to me why Parliament would not have wished to people to give a similar tax relief in respect of energy-saving materials fitted in new installations.

43. I have nevertheless found myself unable to accede to Mr Milne's submission, for the following reasons. The first is that it requires a departure from the clear literal meaning of the legislation. Both the former s 2(1A) and the current s 29A of the VAT Act refer to a reduced rate for a "supply", and s 29A reinforces that with a requirement that the supply must be "of a description" contained in Schedule 7A. To read the provisions as applying the reduced rate applied to elements within a supply would be to depart from the unambiguous meaning of the words used. I would need to be "abundantly sure" that that was the result that was intended and that "by inadvertence the draftsman and Parliament failed to give effect to that purpose": see *Inco Europe Ltd. v First Choice Distribution* [2000] 1 WLR 586 at 592. Mr Milne's thesis is that Parliament expected its legislation to achieve the result he contends for by virtue of the energy-saving materials being analysed as a separate supply. I am far from being abundantly sure that Parliament was misled by the state of the case-law on complex supplies into believing that the words used would achieve that result in that way.

44. Though there was uncertainty about the correct approach to classifying a complex supply, the principle that different elements could amount to a single supply was well established by 1994. In giving judgment in *CPP* in the Court of Appeal in that year ([1994] STC 199) Balcombe LJ set out the principles that:

> "2. The question whether there is one supply or two is a question of law on which the court is entitled and bound to form its own view (see *British Airways plc v Customs and Excise Comrs* [1990] STC 643.
>
> 3. In deciding whether there is one supply or two where two separate elements are present, the test is whether one element is 'incidental to, or an integral part of' the other (see *Customs and Excise Comrs v United Biscuits (United Kingdom) Ltd (trading as Simmers* [1992] STC 325)."

45. Balcombe LJ went on to echo Parker LJ in the *British Airways* case in referring to the impracticality of treating a simple transaction as involving more than one supply, and to contrast the "big commercial contract clearly involving the provision of goods and services of various kinds" in *Bophuthatswana National Commercial Cpn Ltd v Customs and Excise Comrs* [1993] STC 702, to which Mr Milne also referred in his submissions. Balcombe LJ proceeded to reach the conclusion, with which the other members of the court agreed, that in *CPP* the provision of insurance was incidental to the provision of a credit card registration service. (The House of Lords came to the opposite conclusion, partly because the CJEU had in the meantime held that a larger number of the elements of the supply amounted to insurance for the purpose of the Sixth Directive.)

46. Irrespective of what precise outcome might have been foreseeable as regards the *CPP* litigation, in which the House of Lords made a reference to the CJEU in October

1996 and the Court gave judgment in February 1999, it does not seem to me that Parliament in 1995 or the Treasury in 1998 could have had any confidence that an installation of energy-saving materials as part of an installation of a boiler or a central heating system would be analysed as involving a separate supply of the energy-saving materials to which the reduced rate would apply. Such a result had become even more unlikely by 2000, following the ECJ's judgment.

47. The other indications, helpful to Mr Milne's case, that I have identified are not in my judgment strong enough satisfy the *Inco Europe* test. The words "any supplies" did not feature in the 'List A' part of the legislation as it was framed in 2000; if the Treasury attributed significance to them in 1998, Parliament did not do so in 2000. The reference in the Notes on Clauses to "all insulation", etc., could include energy-saving materials fitted as part of a wider installation, but is nevertheless ambiguous and could equally refer to what I have termed 'retro-fitting'.

48. I am therefore compelled to reach the conclusion that when AN Checker installs energy-saving materials along with a replacement boiler or as part of the installation of a central heating system, it is making a standard-rated supply of which the energy-saving materials are elements. That conclusion must in my view follow whether AN Checker is itself installing an individual item, such as a thermostat, which falls within the definition of energy-saving materials or installing a larger item, such as a boiler, into which energy-saving materials such as insulation have been incorporated by its manufacturer. Even if I had concluded that the reference to "installation of energy-saving materials" included such installation as part of a wider supply, I would not have concluded that the words were apt to cover installation of, say, a boiler in which energy-saving materials had been included by its manufacturer. Accordingly I decide the issue identified in the Tribunal's earlier Order as follows:

> "The supply of the installation of energy saving materials together with services of installation of a boiler or of a central heating system is a single supply subject to a single rate of VAT at the standard rate."

49. This document contains full reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NICHOLAS PAINES QC
TRIBUNAL JUDGE

RELEASE DATE: 24 September 2013