[2013] UKUT 0247 (TCC)
Appeal number: FTC/66/2012

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

VAT - supply of disposable barbecues - whether VAT chargeable at a reduced rate on the charcoal element of the supply - reduced rate of VAT on solid fuel pursuant to Schedule 7A Group 1 Item 1(a) VATA 1994 - Commission v France Case C-94/09 considered - interaction with Card Protection Plan v C & E Case C-349/96 considered - significance of charcoal being a concrete and specific aspect of the supply - appeal dismissed

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

W M Morrison Supermarkets PLC **Appellant**

- and -

Commissioners for Her Majesty's Revenue and Customs **Respondents**

Tribunal: Mr Justice Vos

Release Date: 23 May 2013

Sitting in public in London on 9th and 10th May 2013

Mr David Scorey, instructed by PricewaterhouseCoopers Legal LLP, for the Appellant, W M Morrison Supermarkets PLC

Mr Richard Chapman, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents, the Commissioners of Her Majesty's Revenue and Customs

DECISION

Introduction

1. This is an appeal by W M Morrison Supermarkets PLC ("Morrison") from a decision of the First-tier Tribunal (Tax) (Tribunal Judge Jonathan Cannan and Ms Susan Stott) (the "FTT") released on 6th June 2012 (the "Decision"). The FTT upheld the rejection by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") of Morrison's voluntary disclosure in the sum of £192,934.51 in relation to the fuel element of disposable barbecues.

2. The disposable barbecues sold by Morrison are designed to be disposed of after a single use. They comprise a rectangular foil tray which contains charcoal and lighting paper and is covered by a metal grill.

3. The single issue in the appeal is whether disposable barbecues of this kind should be properly regarded as mixed rate supplies containing charcoal subject to the reduced rate of VAT pursuant to Group 1 of Schedule 7A to the Value Added Tax Act 1994 ("VATA 1994"), or whether they are single supplies subject to VAT at the standard rate of VAT.

4. There are two other appeals on foot on exactly the same issue, brought by two other supermarket chains, Tesco and Asda. This appeal has been designated the lead case, subject to rules 5 and 18 of the Tribunal Rules 2009.

5. Morrison has also claimed compound interest at a commercial rate if its appeal is successful, but this part of its claim has been stayed pending resolution of that issue in other cases before the Courts.

6. Before turning to deal with the several authorities that bear upon the issue in the appeal, and the competing arguments of the parties, I will set out some of the material chronological background.

Chronological background

7. On 1st August 1980, Morrison was registered for VAT.

8. Prior to 19th October 2006, manufacturers of disposable barbecues had advised retailers (with the knowledge of HMRC) to treat sales of them as subject to VAT at an overall mixed rate, treating the charcoal element of the package at the reduced rate of VAT and the grill at the standard rate.

9. On 19th October 2006, HMRC issued Business Brief 17/06 clarifying that the correct treatment of sales of disposable barbecues was as a single standard rated supply.

10. On 5 November 2010, Morrison lodged a voluntary disclosure claiming the sum of £192,934.51 in respect of allegedly overpaid VAT for the period from October 2006 to October 2010 in respect of sales of disposable barbecues. Morrison's contention was that the charcoal element of the barbecues (which was said to be 50%) should have been treated at the reduced rate of VAT, on the basis that the sale of solid fuel, in respect of which the UK legislation provides for the application of a reduced rate of VAT, constituted a concrete and specific aspect of that category of supply.

11. On 9th December 2010, the Commissioners rejected Morrison's claimed VAT refund on the basis that the sale of disposable barbecues was "*still considered to be a single standard rated supply*".

12. On 8th February 2011, Morrison requested a review of HMRC's decision by an HMRC officer not previously involved in the matter.

13. On 4th March 2011, Ms Tracy Watkins CTA of HMRC upheld the decision made on 9th December 2010.

14. On 15th April 2011, Morrison lodged a notice of appeal on the following grounds:-

    i) The disposable barbecues are mixed rate supplies containing charcoal which is subject to the reduced rate of VAT pursuant to Group 1 of Schedule 7A to VATA 1994.

    ii) HMRC have erred in fact and/or law in determining that disposable barbecues are single supplies subject to VAT at the standard rate of VAT.

15. On 11th July 2011, HMRC filed their Statement of Case in the FTT, contending that a typical customer purchasing a disposable barbecue does so to obtain the barbecue as a whole as a means of cooking.

16. On 17th April 2012, Morrison's appeal was heard by the FTT. Its decision dismissing Morrison's appeal was released on 6th June 2012. The core of the FTT's reasoning is contained in paragraphs 43-46 as follows:-

"43. In Purple Parking [infra] the question of whether there could be a carve out did not arise. Hence the CJEU was concerned only with the CPP [infra] analysis. ***In our view, CPP is concerned with defining the nature of transactions for VAT purposes. In particular whether a transaction is to be construed as a single supply or as multiple supplies. In contrast, Commission v France [infra] is concerned with whether Member States can identify specific aspects of what would otherwise be a single supply and treat them as falling inside or outside an exemption or reduced rate****. It is not concerned with any general principle beyond identifying the circumstances in which Member States are entitled to treat a single supply as comprising different elements to which different rates can apply.* ***In the present circumstances the UK domestic legislation does not seek to carve out the charcoal element of the supply so as to subject it to a reduced rate****.* ***Nor does it seek to carve out the barbecue grill so as to tax it at a different rate to the charcoal****.*

44. In all the cases we have been referred to above the ECJ has described the principle of applying dual rates of tax in terms of Member States having the possibility of limiting the application of a reduced rate. To use Mr Scorey's [counsel for Morrison] terminology, they are concerned with domestic provisions which Member States may choose to use to carve out elements of a supply so as to give rise to a dual rate of tax. They are not concerned with

identifying any obligation on Member States to carve out elements of a supply.

45. It is not open to a taxpayer to carve out an element of what would otherwise be treated as a single supply in order to apply a reduced rate to that element of the supply. We were not referred to any authority in which such a general principle has been established.

46. It follows that we do not accept Mr Scorey's 7th principle [infra], at least in the sense he seeks to employ it. The scope of an exemption or reduced rate by way of derogation is defined by the terms of the domestic legislation, provided that it is consistent with the Principal VAT Directive. In the present context the respondents [HMRC] are not seeking to limit the scope of the reduced rate in Schedule 7A by excluding from that reduced rate a supply that would otherwise fall within it. They are simply seeking to apply Schedule 7A which on its terms has no application to the supply of a disposable barbecue" (emphasis added).

17. On 10th August 2012, Tribunal Judge Cannan granted permission to appeal to the Upper Tribunal on the ground that it was realistically arguable that there was an error of law in the Decision.

Legislative background

18. Article 98 of the Council Directive 2006/112/EC (the "Principal VAT Directive") provides as follows:

> "*1. Member States may apply either one or two reduced rates.*
>
> 2. *The reduced rates shall apply only to supplies of goods or services in the categories set out in Annex III*".

19. Annex III does not include supplies of fuel, though it does include "*supply of services by undertakers*" (which is of relevance to the French Undertakers' case which I shall come to in due course).

20. Article 99 of Principal VAT Directive provides that the reduced rate of VAT shall be fixed as a percentage of the taxable amount, which may not be less than 5%.

21. Article 102 of the Principal VAT Directive (in its form prior to 1st January 2010) provided that Member States may apply a reduced rate to the "*supply of natural gas, of electricity or of district heating, provided that no risk of distortion of competition thereby arises*".

22. Articles 110 and 113 of the Principal VAT Directive provide as follows:-

> "*110. Member States which, at 1 January 1991, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99 may continue to grant those exemptions or apply those reduced rates.*
>
> *The exemption and reduced rates referred to in the first paragraph must be in accordance with Community law and must have been*

adopted for clearly defined social reasons and for the benefit of the final consumer.

...

113. Member States which, at 1 January 1991, in accordance with Community law, were granting exemptions with deductibility of the VAT paid at the preceding stage or applying reduced rates lower than the minimum laid down in Article 99, in respect of goods and services other than those specified in Annex III, may apply the reduced rate, or one of the two reduced rates, provided for in Article 98 to the supply of such goods or services".

23. Group 1 of Schedule 7A to VATA 1994 makes provision for a 5% reduced rate of VAT on the supply of domestic fuel. Item 1(a) provides as follows:-

"*Supplies for qualifying use of –*

(a) coal, coke or other substances held out for sale solely as fuel;"

24. Note 1(1) provides as follows:

"*Item 1(a) shall be deemed to include combustible materials put up for sale for kindling fires ...*"

25. It is common ground that, for the purposes of Item 1(a), "*qualifying use*" includes domestic use, and that the sale of (i) charcoal for use in barbecues, and (ii) lighting paper used to ignite charcoal, qualifies for the reduced rate.

Authorities

26. A proper analysis of the relevant authorities is crucial to the outcome of this appeal. For that reason, I shall deal with the main authorities relied upon by the parties in chronological order, and before dealing with the arguments that have been advanced to the Upper Tribunal.

27. In Card Protection Plan v. Customs and Excise Commissioners (Case C-349/96) [1999] STC 270 ("CPP"), the CJEU considered the question of the appropriate criteria for deciding, for VAT purposes, whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately. The CJEU said this at paragraphs 27-30:-

> "*27 It must be borne in mind that the question of the extent of a transaction is of particular importance, for VAT purposes, both for identifying the place where the services are provided and for applying the rate of tax or, as in the present case, the exemption provisions in the Sixth Directive. In addition, having regard to the diversity of commercial operations, it is not possible to give exhaustive guidance on how to approach the problem correctly in all cases.*
>
> *28 However, as the Court held in Case C-231/94 Faaborg-Gelting Linien v Finanzamt Flensburg [1996] ECR I-2395, paragraphs 12 to 14, concerning the classification of restaurant transactions, where the transaction in question comprises a bundle of features*

and acts, regard must first be had to all the circumstances in which that transaction takes place.

29 In this respect, taking into account, first, that ***it follows from article 2(1) of the Sixth Directive that every supply of a service must normally be regarded as distinct and independent and, secondly, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service****.*

30. ***There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied****: Customs and Excise Commissioners v. Madgett and Baldwin (trading as Howden Court Hotel) (Joined Cases C-308/96 and 94/97) [1998] STC 1189, 1206, para 24*" (emphasis added).

28. In Commission of the European Communities v. French Republic (Case C-384/01) 8th May 2003 ("French Republic"), the CJEU considered the supply

of gas and electricity at a reduced rate pursuant to Article 12(3)(b) of the Sixth Council Directive 77/388/EC (now Article 102 of the Principal VAT Directive), which permitted Member States to apply a reduced rate of VAT specifically to supplies of gas and electricity. French domestic legislation provided for the standard rate on consumption of gas and electricity, but a reduced rate on standing charges for such supplies. The Commission argued that the same rate should apply to both in accordance with the principle of neutrality. The CJEU disagreed, holding as follows at paragraphs 27-28:-

> "*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 ...*
>
> *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*" (emphasis added).

29. It may be noted in passing that this appears to have been the first reference by the CJEU in this context to the term: "*concrete and specific aspects*" of a supply.

30. In Talacre Beach Caravan Sales Ltd v. Customs and Excise Commissioners (Case C-251/05) [2006] STC 1671 ("Talacre"), the CJEU considered the VAT treatment of supplies of fitted caravans including bathrooms, kitchen

fittings and the like. Group 9 of Schedule 8 to VATA 1994 applied the zero rate to a supply of a caravan itself, but a note in the Schedule specifically excluded the contents from that provision. Talacre contended, on the basis of CPP, that there was a single indivisible supply subject to a single (zero) rate of VAT, since the principal supply was the caravan itself and the contents were ancillary to that supply.

31. The CJEU considered the following question: "... *whether the fact that specific goods are counted as a single supply, including both a principal item which is by virtue of a Member State's legislation subject to an exemption with refund of the tax paid within the meaning of Article 28(2)(a) of the Sixth Directive [now article 110 of the Principal VAT Directive] and items which that legislation excludes from the scope of that exemption, prevents the Member State concerned from levying VAT at the standard rate on the supply of those excluded items*".

32. Advocate General Kokott said this at paragraphs 35-40 of her opinion:-

> "*35. If one were to apply the principles developed in the case law on composite supplies [e.g. CPP] irrespective of the particular circumstances of the present case, one might conclude that caravans and their removable contents in fact constitute one single supply. Only one rate of VAT would then have to be applied to that supply, namely the rate applicable for the principal element of the supply. Assuming that the principal element is the caravan, the zero rate would have to be extended to the ancillary supply of the removable contents.*

36. However, in the present situation the extension of the exemption would be contrary to the objectives of art 28 of the Sixth Directive, as set out above. This conflict between the principle that national exemptions under art 28(2)(a) of the Sixth Directive should not be extended and the rules developed in the case law for the treatment of composite supplies can be resolved by comparing the purpose of each principle.

37. ***The rules established in [CPP] and other relevant decisions are based on the consideration that splitting transactions too much could endanger the functioning of the VAT system. In contrast to this objective, is the concern to limit national derogations from the rules of the Sixth Directive to those which are absolutely necessary****.*

38. When balancing these objectives, the interest in not undermining the harmonisation of law achieved by the Sixth Directive by extending national exceptions should be given priority over the objectives pursued by the Court with its rules determining the scope of a supply. In essence those rules have been developed only for reasons of practicality and do not claim absolute application.

39. Thus in [CPP], para 27 the Court emphasises that the question of the correct method of proceeding when determining the scope of a supply cannot, in view of the diversity of commercial operations, be answered exhaustively for all cases. The rules laid down in CPP cannot therefore be applied systematically. ***Instead, when***

determining the scope of a supply all the circumstances must be taken into account, including the specific legal framework. In the present case, it is necessary to have regard to the particularity that the United Kingdom has established the exemption in a specific way in accordance with its socio-political evaluation and that national reliefs under the transitional regime of art 28 may continue to exist but may not be extended*.*

40. The application of a national exemption under art 28(2)(a) of the Sixth Directive is permissible only if it is -- in the view of the member state -- necessary for precisely defined social reasons for the benefit of the final consumer. ***In that regard the United Kingdom has determined that the zero rate should be applied only to the supply of caravans. It did not consider that the inclusion of the removable contents was justified on social grounds. This assessment of the national legislature cannot simply be overridden***" (emphasis added).

33. In its judgment in Talacre, the Court stated as follows:

"*20 It is also common ground that the VAT Act specifically excludes some items supplied with the caravans from exemption with refund of the tax paid. It follows that, so far as those items are concerned, the conditions laid down in Article 28(2)(a) of the Sixth Directive, in particular the condition that only exemptions in force on 1 January 1991 can be maintained, are not fulfilled [though they were fulfilled for the caravans themselves].*

21 ***Therefore, an exemption with refund of the tax paid in respect of those items would extend the scope of the exemption laid down for the supply of the caravans themselves. That would mean that items specifically excluded from exemption by the national legislation would be exempted nevertheless pursuant to Article 28(2)(a) of the Sixth Directive****.*

22 ***Clearly, such an interpretation of Article 28(2)(a) of the Sixth Directive would run counter to that provision's wording and purpose****, according to which the scope of the derogation laid down by the provision is restricted to what was expressly covered by the national legislation on 1 January 1991. As the Advocate General observed in points 15 and 16 of her Opinion, Article 28(2)(a) of the Sixth Directive can be compared to a 'stand-still' clause, intended to prevent social hardship likely to follow from the abolition of exemptions provided for by the national legislature but not included in the Sixth Directive. Having regard to that purpose, the content of the national legislation in force on 1 January 1991 is decisive in ascertaining the scope of the supplies in respect of which the Sixth Directive allows an exemption to be maintained during the transitional period.*

23 Furthermore, as the Court has pointed out on a number of occasions, ***the provisions of the Sixth Directive laying down exceptions to the general principle that VAT is to be levied on all goods or services supplied for consideration by a taxable person***

are to be interpreted strictly *(see, to that effect, Joined Cases C-308/96 and C-94/97 Madgett and Baldwin [1998] ECR I-6229, paragraph 34; Case C-384/01 Commission v France [2003] ECR I-4395, paragraph 28; Joined Cases C-394/04 and C-395/04 Ygeia [2005] ECR I-0000, paragraphs 15 and 16; and Case C-280/04 Jyske Finans [2005] ECR I-0000, paragraph 21). For that reason as well, the exemptions with refund of the tax paid referred to in Article 28(2)(a) of the Sixth Directive cannot cover items which were, as at 1 January 1991, excluded from such an exemption by the national legislature.*

24 ***The fact that the supply of the caravan and of its contents may be characterised as a single supply does not affect that conclusion***. ***The case-law on the taxation of single supplies, relied on by Talacre and referred to in paragraph 15 of this judgment, does not relate to the exemptions with refund of the tax paid with which Article 28 of the Sixth Directive is concerned***. *While it follows, admittedly, from that case-law that a single supply is, as a rule, subject to a single rate of VAT,* ***the case-law does not preclude some elements of that supply from being taxed separately where only such taxation complies with the conditions imposed by Article 28(2)(a) of the Sixth Directive*** *on the application of exemptions with refund of the tax paid.*

25 ***In this connection, as the Advocate General rightly pointed out in points 38 to 40 of her Opinion, referring to paragraph 27 of***

CCP, there is no set rule for determining the scope of a supply from the VAT point of view and therefore all the circumstances, including the specific legal framework, must be taken into account*. In the light of the wording and objective of Article 28(2)(a) of the Sixth Directive, recalled above,* ***a national exemption authorised under that article can be applied only if it was in force on 1 January 1991 and was necessary, in the opinion of the Member State concerned, for social reasons and for the benefit of the final consumer****. In the present case, the United Kingdom of Great Britain and Northern Ireland has determined that only the supply of the caravans themselves should be subject to the zero-rate. It did not consider that it was justified to apply that rate also to the supply of the contents of those caravans.*

26 Lastly, there is nothing to support the conclusion that the application of a separate rate of tax to some elements of the supply of fitted caravans would lead to insurmountable difficulties capable of affecting the proper working of the VAT system (see, by analogy, Case C-63/04 Centralan Property [2005] ECR I-0000, paragraphs 79 and 80).

27 In the light of all the foregoing, the answer to the question referred must be that the fact that specific goods are counted as a single supply, including both a principal item which is by virtue of a Member State's legislation subject to an exemption with refund of the tax paid within the meaning of Article 28(2)(a) of the Sixth

Directive and items which that legislation excludes from the scope of that exemption, does not prevent the Member State concerned from levying VAT at the standard rate on the supply of those excluded items" (emphasis added).

34. In Finanzamt Oschatz v. Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien (Case C-442/05) [2009] STC 1 ("Zweckverband"), the German VAT authorities applied a standard rate to the collection, piping, treatment and supply of drinking water to customers, even though transactions relating to the supply of water attracted a reduced rate under German legislation taking advantage of what is now Annex III.

35. The CJEU applied the principles in French Republic and held that Germany was at liberty to apply a reduced rate of VAT to concrete and specific aspects of water supplies. It said this at paragraphs 38-44:-

"38. By its question, the national court also asks whether laying a mains connection forms part of the water supplies covered by Category 2 of Annex H to the Sixth Directive [now Annex III].

39. It follows from art 12(3)(a) of the Sixth Directive [now article 98 of the Principal VAT Directive] that the application of either one or two reduced rates of VAT is an option accorded to the member states as an exception to the principle that the standard rate applies. Moreover, according to that provision, the reduced rates of VAT may be applied only to supplies of the goods and services specified in Annex H.

40. While the Sixth Directive does not define the concept of water supply, it is also not apparent from its provisions that that term should be interpreted differently according to the annex in which it is mentioned. Since a mains connection is essential in order to make water available to the public, as is clear from para 34 of this judgment, the view should accordingly be taken that such a connection also forms part of the water supplies referred to in Category 2 of Annex H to the Sixth Directive.

41. ***However, it should also be pointed out that there is nothing in the text of art 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, EC Commission v France (Case C-384/01) [2003] ECR 1-4395, para 27).*

42. The introduction and maintenance of reduced rates of VAT lower than the standard rate fixed in art 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, [French Republic]" (emphasis added).

36. In European Commission v. France (Case C-94/09) [2012] STC 573 ("French Undertakers"), the CJEU considered the supply of services by undertakers. It will be recalled that article 98 of the Principal VAT Directive permitted Member States to apply reduced rates to supplies of goods or services in the categories set out in Annex III, which included "*supply of services by undertakers*". Only transportation of the body was subject to a reduced rate under French domestic legislation. The Commission contended that all supplies provided by an undertaker constituted a single supply subject to a single rate. The CJEU held that there was nothing in article 98 that required it to mean that the reduced rate could be charged only if it was applied to all aspects of a category of supply contained in Annex III. It was, therefore, open to a Member State to limit the application of the reduced rate of VAT to concrete and specific aspects of a category in Annex III.

37. The CJEU said the following in paragraphs 24-34:-

> "*24. The rules defined by those provisions [articles 96 and 98 and Annex III to the Principal VAT Directive] are, in essence, identical to those set out in Article 12(3)(a), first and third subparagraphs, of the Sixth Directive and in Annex H, fifteenth category, thereto.*
>
> *25. The Court has held, as regards Article 12(3)(a), third subparagraph, of the Sixth Directive, that there is nothing in the text of that provision which requires that it be interpreted as meaning*

that the reduced rate can be charged only if it is applied to all aspects of a category of supply 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 Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien, paragraph 41, and, by analogy, Commission v France, paragraph 27).

26. The Court has inferred that, 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 a category of supply covered by Annex H to the Sixth Directive (see Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien, paragraph 43).

27. Since Article 98(1) and (2) of Directive 2006/112 in essence repeats the wording of Article 12(3)(a) of the Sixth Directive, the interpretation given by the Court to the earlier provision should be extended to the provision replacing it.

28. ***It follows that, where a Member State decides to make use of the possibility given by Article 98(1) and (2) of Directive 2006/112 to apply a reduced rate of VAT to a category of supply in Annex III to that directive, it has, subject to the requirement to observe the principle of fiscal neutrality inherent in the common system of VAT, the possibility of limiting the application of that reduced rate of VAT to concrete and specific aspects of that category****.*

*29. **The possibility thus granted to Member States of applying the reduced rate of VAT selectively is justified, inter alia, by the fact that, since that rate is the exception, the restriction of its application to concrete and specific aspects is consistent with the principle that exemptions or derogations must be interpreted restrictively** (Commission v France, paragraph 28).*

30. However, it must be pointed out that the exercise of that possibility is subject to the twofold condition, first, to isolate, for the purposes of the application of the reduced rate, only concrete and specific aspects of the category of supply at issue and, secondly, to comply with the principle of fiscal neutrality. Those conditions seek to ensure that the Member States make use of that possibility only under conditions ensuring the correct and straightforward application of the reduced rate chosen and the prevention of any possible evasion, avoidance or abuse.

31. The Commission maintains that the Member States, when they make use of the possibility available to them under Article 98 of Directive 2006/112 to apply a reduced rate of VAT, must comply with the criteria identified by case-law in order to determine whether a transaction including several elements must be considered to be a single supply, subject to the same tax treatment, or to be two or more separate supplies, which may be treated differently.

32. In this connection, it must be recalled that those criteria, such as the expectations of a typical consumer, to which the Commission refers, are intended to protect the functioning of the VAT system in the light of the diversity of commercial operations. However, the Court itself has acknowledged that it is impossible to give exhaustive guidance on that issue (CPP, paragraph 27) and pointed out that it is necessary to take into account all the circumstances in which the transaction at issue takes place (CPP, paragraph 28; Levob Verzekeringen and OV Bank, paragraph 19, and Case C-425/06 Part Service [2008] ECR I-897, paragraph 54).

33. ***It follows that, while those criteria [CPP] may be applied on a case-by-case basis, in order to prevent, inter alia, the contractual structure put in place by the taxable person and the consumer from leading to an artificial splitting into a number of fiscal transactions of a transaction which, from an economic point of view, must be regarded as a single transaction, they cannot be regarded as decisive for the purpose of the exercise by the Member States of the discretion left to them by Directive 2006/112 as regards the application of the reduced rate of VAT****. The exercise of such discretion requires general and objective criteria, such as those identified in Commission v France and Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien and reiterated in paragraphs 26, 28 and 30 of this judgment.*

> *34. Accordingly, in order to rule on the merits of this action, it is 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, in respect of which the French legislation provides for the application of a reduced rate of VAT, constitutes a concrete and specific aspect of that category of supply, as set out in Annex III, point 16, to Directive 2006/112, and, if so, to examine whether or not the application of that rate undermines the principle of fiscal neutrality*" (emphasis added).

38. In the result, the CJEU held that the transportation of a body by vehicle constituted a concrete and specific element in the supply of services by undertakers (see paragraph 39).

39. In Purple Parking Ltd v. Commissioners for HM Revenue & Customs (Case C-117/11) [2012] STC 1680 ("Purple Parking"), the CJEU dispensed with any opinion from the Advocate General and even with an oral hearing. Purple Parking sought to recover the VAT on the passenger transport element (from car park to airport) of its off-airport parking package. This was a surprising claim considering that Group 8 of Schedule 8 to VATA 1994, which applied a zero rate to certain transport services, included Note 4A(b) which specifically excluded passenger transport as part of park and ride services from zero rating.

40. The Upper Tribunal asked the CJEU a number of questions including the following:-

> "*1. What particular factors does the referring court have to take into account when deciding whether, in circumstances such as those of the present case, a taxable person is providing a single taxable supply of parking services or two separate supplies, one of parking and one of transport of passengers? In particular:*
>
> *(a) Is this case covered by the reasoning adopted by the Court of Justice in [CPP]? …*
>
> *2. When the referring court is considering whether or not there is a single indivisible economic supply in answering Question 1(a), what account should it take of the principle of fiscal neutrality? …*
>
> *In particular: …*
>
> *(e) How is the referring court to take account of the conclusions reached by the [CJEU] in [French Undertakers] in relation to the principle of fiscal neutrality and transport services in that case?*"

41. At paragraphs 40-41, the CJEU said this:-

> "*40. Furthermore, as regards the importance of the judgment in **[French Undertakers]**, referred to in the second question, it follows from paras 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.*
>
> *41. In view of the foregoing considerations, the answer to the first and second questions is that* ***the Sixth Directive must be interpreted as meaning that, for the purpose of determining the rate of VAT applicable, services for the parking of a vehicle in an 'off-airport' car park and for the transport of the passengers of that vehicle between that car park and the airport terminal concerned must, in circumstances such as those at issue in the main proceedings, be regarded as a single complex supply of services in which the parking service is predominant***" (emphasis added).

42. In Colaingrove Limited v. The Commissioners for Her Majesty's Revenue & Customs [2013] UKFTT 116 (TC) ("Colaingrove"), decided by the FTT after the Decision in this case, the question was whether the electricity supplied to people renting static caravans should be charged at the reduced VAT rate. The FTT (Judge John Walters QC and Mr John Robinson) rejected a CPP analysis. The FTT said the following:-

"65. In consequence, it seems to us that ***the issue for our decision on this aspect of the case is whether the United Kingdom legislation has in fact provided for the reduced rate of VAT to apply to the 'concrete and specific' element (which consists of domestic fuel or power within Group 1 of Schedule 7A VATA) of a larger supply which falls to be characterised as something else*** *– in this case, serviced holiday accommodation.*

66. This issue is not as clear cut as it was in French Undertakers. In that case, the Ministerial Instruction No 68 of 14 April 2005 (Bulletin official des impôts 3 C-3-05) provided for the split VAT treatment of 'the external services for funerals' in terms – see: ibid. [6] and [7].

…

70. Mr Cordara has suggested (see: above) that ***section 29A(4) VATA and in Notes 4, 5 and 6 to Group 1, Schedule 7A, VATA all contain indications that Parliament intended the reduced rate of VAT to apply to the 'concrete and specific' element (consisting of domestic fuel or power*** *within Group 1 of Schedule 7A VATA) of a larger supply which (if the CPP jurisdiction were applicable to it) would fall to be characterised as something else.*

71. ***We agree with this submission****, for the reasons which Mr Cordara gives. Mr Hyam did not in his submissions give any*

reason why we should not infer from these provisions the legislative intention for which Mr Cordara contends (apart from the 'floodgates' argument about the undermining of the CPP jurisprudence, which we have referred to). Put shortly, these provisions seem to us to indicate that, quite apart from the expectations of a typical consumer of the supply as to what he/she was enjoying by receiving the supply, ***Parliament has provided for other criteria to apply in determining the nature of a supply of domestic fuel and power which is chargeable at the reduced rate****. We agree with Mr Cordara that these provisions indicate Parliament's intention that a supply of fuel or power may qualify to be taxed at the reduced rate by reference not only to the nature of what is supplied (the 'characteristics of the goods or services themselves' – see: section 29A(4) VATA) but also by reference to the beneficial social purpose to be achieved by the supply – for example, the supply of gas or electricity in whatever quantity for use in self-catering holiday accommodation or a caravan (see: Note 6, Group 1, Schedule 7A, VATA).*

72. For these reasons we conclude that the presumption that the references to 'supply', 'supplies' and 'any description of supply' in section 29 and Group 1, Schedule 7A, VATA refer to supplies as ascertained by application of the CPP jurisprudence must give way to the conclusion that that the United Kingdom legislation has provided for the reduced rate

> *of VAT to apply to the 'concrete and specific' element (which consists of domestic fuel or power within Group 1 of Schedule 7A VATA) of a larger supply which (if the CPP jurisprudence were applicable to it) would fall to be characterised as something else – in this case, serviced holiday accommodation.*
>
> …
>
> *94.* ***Cases where a Member State has legislated that a reduced rate of VAT will apply to a supply of goods or services which would be merely an element in a larger single complex supply (if the CPP jurisprudence were to be applied) are cases where the CPP jurisprudence is inappropriate to determine the scope and substance of the supplies made for VAT purposes and the rate(s) of VAT which they respectively attract***" (emphasis added).

43. Finally, in Director General, Mauritius Revenue Authority v. Central Water Authority [2013] UKPC 4 ("Mauritius Revenue Authority"), the Privy Council considered similar legislation in Mauritius, where water was at a standard rate, but standing charges were exempt. As a result, the Central Water Authority could not reclaim input tax incurred by them in creating the supply. The Privy Council refused to adopt a CPP analysis, and held that a different VAT rate could apply to a concrete and specific aspect of what would otherwise fall to be treated as a single service (see Lord Mance at paragraphs 26-29). Lord Mance said this as paragraph 26:-

> "*In so far as this submission suggests that the only relevant or recognisable supply was or should be treated for all purposes as having been of water, because that was the aim of all of the CWA's activities, the Board cannot accept it. In speaking of a "single service", the CPP principle does not mean that ancillary services or supplies entirely disappear. Rather, it treats them as ancillary services or supplies which share the tax treatment of the principal service.* ***The European Court of Justice case-law discussed in paragraphs 19 to 24 above shows that it can be both permissible and relevant to identify the ancillary elements for particular purposes. The power to exempt or attach a lower VAT rate to what would otherwise fall to be treated as a single service can thus attach to a "concrete and specific aspect" of such a service****. The Board sees no material difference in this respect between the language of the VAT Directives and that of the VAT Act 1998*" (emphasis added).

Common ground

44. Two crucial matters are common ground between the parties to this appeal:-

i) First, that, if the CPP analysis is applied to the facts of this case, it would result, as the FTT held, in the supply of disposable barbecues being standard rated. This is at least partly because it is accepted that the typical consumer would regard the purchase of a disposable

barbecue as a single supply, not as a supply of charcoal and a supply of a foil tray and packaging.

ii) Secondly, that if the French Undertakers' analysis is applied to the facts of this case, the supply of the charcoal contained in a disposable barbecue is a concrete and specific element of the supply, so that it would be subject to the reduced VAT rate.

45. In order to decide which of these conclusions is properly applicable, it is necessary to consider the antecedent question of which analysis is applicable in this case.

Morrison's argument

46. Mr David Scorey, counsel for Morrison, has argued throughout that the following seven principles are to be derived from the CJEU's jurisprudence. Both the Commissioners and the FTT accepted the first six, but rejected the seventh:-

i) As a general rule, single supplies should have a single rate of tax so as to give simplicity and uniformity.

ii) The CPP analysis was a judicial creation dealing with harmonised rules under the Principal VAT Directive.

iii) Different considerations arise where there is a unilateral variation by a Member State of the rate of tax, under Article 98 (Annex III) or Article 113 or Article 110.

iv) When considering a non-harmonised area, the CJEU has held that the CPP analysis is not read across mechanically.

v) The reason for this is that in a non-harmonised area it is a matter for the Member State to define the scope and extent of the reduced rate or exemption, rather than the Commission or the CJEU.

vi) Once the scope and extent of the reduced rate has been determined by a Member State, a taxpayer cannot use a CPP analysis to widen the scope of the reduced rate.

vii) It follows that the reverse is equally true. The scope and extent of the reduced rate is determined by the domestic provisions which are permitted for socio-political policy reasons and justify deviation from the usual tax rate in a non-harmonised area. Just as a Member State's "socio-political evaluation" represented by a reduced rate must be respected by EU law (see the Attorney General's Opinion in Talacre at paragraph 39, and the CJEU at paragraph 25), the Member State cannot limit the scope of the reduced rate other than by legislation.

47. Mr Scorey added that it would have been easy for the UK Government to have legislated expressly to limit the application of Item 1(a) of Schedule 7A to VATA 1994 so as to exclude the charcoal in disposable barbecues from the exception.

48. Mr Scorey also submitted that the FTT decided in effect that the CPP analysis trumped the French Undertakers analysis, ignoring the CJEU's view that the fact that the supply might otherwise be characterised as a single

supply is irrelevant where a concrete and specific element of the supply is subject to a reduced rate.

49. In oral argument, Mr Scorey submitted that it was important to understand that the CJEU cases concerned three regimes under which reduced rates of VAT could be applied as follows:-

i) Article 102 of the Principal VAT Directive (formerly Article 12(3)(b) of the Sixth Directive) under which Member States may apply a reduced rate to the "*supply of natural gas, of electricity or of district heating, provided that no risk of distortion of competition thereby arises*";

ii) Article 98 and Annex III of the Principal VAT Directive (formerly Article 12(3)(a), 3rd sub-paragraph and Annex H of the Sixth Directive) which permits Member States to apply one or two reduced rates to the 18 specified categories of goods and services in Annex III; and

iii) Article 110 of the Principal VAT Directive (formerly Article 28(2)(a), 1st sub-paragraph of the Sixth Directive) allowing Member States which as at 1st January 1991 were granting exemptions by way of reduced rates to continue to do so, provided those exemptions had been adopted for clearly defined social reasons and for the benefit of the consumer.

50. Mr Scorey submitted that the CJEU decisions make it clear that it was never the intention of the Principal VAT Directive to restrict the ability of Member States to apply reduced VAT rates for defined social purposes within these

categories, even where those reductions resulted in the application of split rates. The authorities show that, provided the reduced rate applies to a concrete and specific aspect of the supply, the CPP analysis is irrelevant where the Member State has exercised its right to apply a reduced rate for social purposes.

51. Any other result, submits Mr Scorey, would drive a coach and horses through the Member States' ability to provide social benefits to its citizens by the use of permitted reduced rates of VAT. The fact that this case concerns disposable barbecues, which are actually used for a leisure purpose, masks the function of the exemptions which cover socially beneficial goods and services. Schedule 7A now applies a reduced rate of 5% to coal, coke and other solid fuels. But historically, solid fuels were always subject to a concession: Schedule 4 to the Finance Act 1972 zero rated them; Schedule 5 to the Value Added Tax Act 1983 did the same; Schedule 13 to VATA 1994 originally imposed a reduced rate of 8%, which was ultimately reduced to 5%. The social purpose was to enable citizens to cook food without incurring standard rate VAT on the fuel.

HMRC's argument

52. Mr Richard Chapman, counsel for HMRC, submits that there is a threshold question which must be applied so as to decide whether the CPP or the French Undertakers analysis applies. That threshold question, according to Mr Chapman's skeleton argument, was simply whether a Member State has acted so as to limit the application of a reduced rate of VAT.

i) If it has, he submitted, then the French Undertakers analysis must be applied, and different rates will be applied to different concrete and specific aspects of the supply irrespective of whether there is a single or multiple supply for the purposes of the CPP analysis.

ii) If it has not, then the CPP analysis must be undertaken, and different rates will only be applicable if the CPP tests are passed.

53. In short, HMRC submits that the CPP tests apply only where the Member State has not exercised its right to legislate so as to restrict the application of reduced rates of VAT. Since there has been no such legislation here, the CPP analysis applies, and it is agreed, that by the application of that test, the disposable barbecues must be subject to the single standard VAT rate.

54. In his oral submissions, Mr Chapman refined his argument so as to suggest a rather more complex flow chart illustrating the correct approach taken from the authorities.

55. Mr Chapman submitted that the following questions only arise when a Member State has exercised its option under the Principal VAT Directive to enact domestic legislation providing for the application of a reduced rate of VAT. In such a situation, the first question is whether the relevant domestic legislative provision expressly refers to the goods or services in question (the "first question"). (In our case, the answer, according to HMRC, to this question is 'no' because there is no mention of disposable barbecues in Item 1(a) of Schedule 7A to VATA 1994)

i) If the answer is 'no', then a straightforward CPP analysis will apply, so that the supply will be either (i) a single supply of one type of goods or services (e.g. in our case, charcoal), or (ii) a single supply of another type of goods or services (e.g. in our case, packaging and grills), or (iii) a multiple supply of goods or services at different VAT rates.

ii) If the answer is 'yes', then the further threshold question (the "second question") is whether the domestic legislation in question is seeking to limit or restrict the application of a reduced rate of VAT. (In our case, according to HMRC, even if the answer to the first question were 'yes', since Item 1(a) does not seek to limit or restrict the application of a reduced rate of VAT, the answer to the second question is that it does not):-

a) If the domestic legislation in question is seeking to limit or restrict the application of a reduced rate of VAT, then the French Undertakers' test is applied so as to establish whether the relevant part of the supply is a concrete and specific aspect. This test has, according to HMRC, a twofold importance because (a) it determines whether the limitation is a justifiable limitation, so that a concrete and specific aspect will be given effect in accordance with the domestic legislation; and (b) it determines which aspects are concrete and specific and attract a reduced rate.

b) If the domestic legislation in question is not seeking to limit or restrict the application of a reduced rate of VAT, then a CPP

analysis will apply. (In this situation, according to HMRC, there will be nothing for the French Undertakers' test to bite on, because it is about whether the legislative limitation in question is one that is of an appropriate kind to allow there to be dual rates of VAT to become applicable).

56. Mr Chapman submitted that this analysis is supported by the cases that I have mentioned. In particular, he pointed to:-

i) Paragraph 28 of the ECJU's judgment in French Republic highlighting that "*since the reduced rate is the exception, the restriction of its application to concrete and specific aspects … is consistent with the principle that exemptions or derogations must be interpreted restrictively*".

ii) Paragraph 29 of the CJEU's judgment in French Undertakers saying that: "*[t]he possibility thus granted to Member States of applying the reduced rate of VAT selectively is justified, inter alia, by the fact that, since that rate is the exception, the restriction of its application to concrete and specific aspects is consistent with the principle that exemptions or derogations must be interpreted restrictively*".

Discussion

57. I was much attracted by Mr Scorey's argument when he opened his case. It seemed to me that he was right to submit that the CJEU decisions make it clear that it was never the intention of the Directive to restrict the ability of Member States to apply reduced VAT rates for defined social purposes

within the categories in the Directive, even where those reductions resulted in the application of split rates. As the Advocate General said in Talacre at paragraph 39: "*[i]nstead, when determining the scope of a supply all the circumstances must be taken into account, including the specific legal framework. In the present case, it is necessary to have regard to the particularity that the United Kingdom has established the exemption in a specific way in accordance with its socio-political evaluation and that national reliefs under the transitional regime of art 28 may continue to exist but may not be extended*". Moreover, the CJEU in Talacre said at paragraph 24 that: "*[t]he fact that the supply of the caravan and of its contents may be characterised as a single supply does not affect that conclusion. The case-law on the taxation of single supplies [CPP], relied on by Talacre and referred to in paragraph 15 of this judgment, does not relate to the exemptions with refund of the tax paid with which Article 28 of the Sixth Directive is concerned*"; in other words, even if the CPP analysis results in a single supply, where the exemptions allowed by Article 110 are concerned, "*the case-law does not preclude some elements of that supply from being taxed separately where only such taxation complies with the conditions imposed by Article 28(2)(a) of the Sixth Directive on the application of exemptions with refund of the tax paid*". These conditions are only that they must be in accordance with EU law, and have been adopted for clearly defined social reasons and for the benefit of the consumer.

58. In addition, of course, Mr Scorey relied on the passages that I have already cited in French Republic, Zweckverband, and French Undertakers, which make it clear that Member States may apply a reduced rate of VAT to

concrete and specific aspects of supplies permitted by the Directive provided they comply with the principle of fiscal neutrality.

59. But all this does not, in my judgment, address the real question, which is when the French Undertakers' test is to be applied. On a close analysis of the decisions, there is actually nothing in the authorities that make it of general application wherever reduced rates of VAT are invoked. HMRC were right in my judgment to submit that the test first mentioned in French Republic and later picked up in French Undertakers is applicable only where the Member State seeks to limit or restrict the application of a reduced rate of VAT. Those were the facts in both cases.

60. It is perhaps useful to mention briefly each of the cases relied upon by Mr Scorey to show why the principle he seeks to extract from them is wider than they will bear.

61. In French Republic, there was, as I have said, a domestic legislative limitation on an Article 102 reduced rate for domestic fuel. The CJEU simply said that there was "*nothing in the text of [Article 102] 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*", and that "*since the reduced rate is the exception, the restriction of its application to concrete and specific aspects … is consistent with the principle that exemptions or derogations must be interpreted restrictively*". As the first of these authorities, French Republic is important. The CJEU was laying down the principle that Article 102 did not deny Member States the opportunity to apply it by domestic legislation to definable parts of fuel

supply, and they could do so to 'concrete and specific aspects' of such supply.

62. Morrison places great reliance on Talacre, but it does not, in my view, take Morrison where it seeks to go. The decision in Talacre was simplicity itself. The UK domestic legislation had said that caravans themselves, but not fittings within them, were zero rated. The CJEU simply gave effect to that provision. It was an Article 110 case where caravans had historically been at a reduced rate in the UK, and it was the first attempt to use the CPP analysis to gain an advantage for the taxpayer. It was in that context that the Advocate General said that the CPP analysis could not be used "*systematically*", and "*all the circumstances must be taken into account, including the specific legal framework*" when determining the scope of a supply. The main circumstance there was the express limitation in the UK statute. The CJEU simply said that the CPP analysis could not be used to extend the restricted Article 110 exception for caravans to include their contents. It did not make any general statement abrogating the application of the CPP test when one needed to determine for EU law purposes whether there was a single or a multiple supply. Nor did the CJEU have anything to say about the application of the "*concrete and specific aspects*" test.

63. In Zweckverband, the CJEU was again dealing with a case where national legislation had specifically restricted the reduced rate to water, excluding water supply charges under Annex III. It merely said that the Sixth Directive did not prevent Member States making a selective application of the reduced rate provided there was no risk of a distortion of competition.

64. The French Undertakers case was, once again, a case where national legislation had restricted the application of a reduced rate permitted under Annex III. The CJEU expressly applied Zweckverband, but added that "*[t]he possibility thus granted to Member States of applying the reduced rate of VAT selectively is justified, inter alia, by the fact that, since that rate is the exception, the restriction of its application to concrete and specific aspects is consistent with the principle that exemptions or derogations must be interpreted restrictively*" taking the explanation from the words used in French Republic. Because the Commission had argued for the application of the CPP analysis in order to overcome the restriction imposed by the French legislation, the CJEU went on to say that CPP was not exhaustive, and that its analysis "*cannot be regarded as decisive for the purpose of the exercise by the Member States of the discretion left to them by [the Principal VAT Directive] as regards the application of the reduced rate of VAT*". In short, in that case Zweckverband and French Republic were applicable. But, just as in Talacre, the CJEU did not say that a CPP test was abrogated by the "*concrete and specific*". It was simply that the CPP test could not be used by the Commission to override the legitimate restriction imposed by French legislation.

65. Purple Parking must be given less weight on account of the absence of an opinion from the Advocate General and even the absence of a hearing. But, whilst paragraph 41 does appear to apply a CPP test, the main basis for the decision in paragraph 40 seems to me to be the one one would expect, namely that effect should be given to the express provisions of the UK legislation that said that passenger transport as part of park and ride services

was not to be zero rated. It provides no warrant for suggesting that a CPP analysis is automatically excluded where a supply includes a zero rated element. It will depend what question needs to be answered.

66. In Colaingrove, the FTT asked itself whether UK legislation had in fact provided for the reduced rate to apply to the 'concrete and specific' element of the supply of domestic fuel. But it never actually answered that question. Had it done so, it would have concluded that UK legislation had not done so, because there was no specific legislative provision providing that the domestic fuel element of caravan rentals should be charged at a reduced rate. There was only the general provision for domestic fuel to be at a reduced rate. Since the decision is under appeal, I shall not comment on whether the argument that VATA 1994 contained "*indications that Parliament intended the reduced rate of VAT to apply to the 'concrete and specific'*" fuel element in the supply was sufficient to support the decision. But I can say that I do not accept the correctness of the wholly general statement at paragraph 94 to the effect that "*[c]ases where a Member State has legislated that a reduced rate of VAT will apply to a supply of goods or services which would be merely an element in a larger single complex supply (if the CPP jurisprudence were to be applied) are cases where the CPP jurisprudence is inappropriate to determine the scope and substance of the supplies made for VAT purposes and the rate(s) of VAT which they respectively attract*".

67. In my judgment, the CPP analysis will always be applicable to ascertain whether there is a single or multiple supply, but as Lord Mance pointed out in Mauritius Revenue Authority: "*[t]he power to exempt or attach a lower*

VAT rate to what would otherwise fall to be treated as a single service [under the CPP test] can … attach to a "concrete and specific aspect" of such a service".

68. With that introduction, I return to the basic question, which is when the French Undertakers' analysis is properly to be employed. In my judgment, it is only where the domestic legislation seeks to restrict the application of a reduced rate of VAT. It is then appropriate to ask whether the restriction in question is in respect of a "concrete and specific aspect" of the supply. If it is, it will not matter that the whole supply would have been regarded as a single supply by the application of a CPP analysis. The French Undertakers test has not 'trumped' the CPP test in any meaningful sense. All that has happened is that a different question has been asked and answered. In the very specific situation where the Member State has legislated within the limits permitted by Annex III, or Articles 102 or 110 to restrict the application of a reduced rate in some way, the French Undertaker's test is applied to see whether such a restriction is permissible. If it is, then the reduced rate will apply as the legislation envisages. If not, it will not.

69. I think there is something to be said for Mr Chapman's complex flowchart analysis set out above, but I am not sure that it caters for all possibilities or that it is, as one might say, watertight. It is not necessary to approve it for the purposes of this appeal, which has raised only one very simple question.

70. In my judgment, the FTT was right when it said: "*CPP is concerned with defining the nature of transactions for VAT purposes*", and French Republic is "*concerned with whether Member States can 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 FTT reached the correct conclusion because "*[i]n the present circumstances the UK domestic legislation does not seek to carve out the charcoal element of the supply so as to subject it to a reduced rate*". Moreover it was insightful to say that "*[i]t is not open to a taxpayer to carve out an element of what would otherwise be treated as a single supply in order to apply a reduced rate to that element of the supply*", and that HMRC "*are simply seeking to apply Schedule 7A which on its terms has no application to the supply of a disposable barbecue*".

71. Whilst it is true that Talacre held that the scope of the reduced rate could not be extended by the use of a CPP analysis (as suggested by Mr Scorey's 6th point), it does not follow that a reduced rate that a Member State has made applicable to one type of supply must be respected, even if it has been decided upon for socio-economic reasons, whether or not that supply is to be properly regarded as only a constituent part of a single supply for VAT purposes on a CPP analysis. The reasoning confuses the obvious importance of Member States being able to decide for socio-economic reasons, and within the limits of the Principal VAT Directive and EU law which supplies should be at a reduced rate, and the technical rules that decide whether those rules are effective. The French Undertakers test is simply there to decide if a limitation imposed by the Member State is effective; it will only be so, as a matter of EU law, if it carves out a "*concrete and specific aspect*" of the supply. The CPP test will always, subject to the provisos in that case itself, be used to decide the character of a

supply – whether it is properly to be regarded under EU law as a single or multiple supply.

72. It was suggested in argument that one of these tests might emasculate the other. There is no risk of that, in my judgment, once one understands that they are directed at different situations and are applied for different purposes.

73. Finally, I might mention that it is wrong to suggest that this result destroys the Member States' ability to provide social benefits to its citizens by the use of permitted reduced rates of VAT. It is precisely because the domestic statute did not expressly identify "charcoal as part of disposable barbecues" as being worthy of a reduced rate that they do not attract one. The disposable barbecue is acknowledged to be a single supply. The result is neither surprising nor undesirable since disposable barbecues are leisure items, and are not likely to be used as a regular means of using solid fuel for domestic cooking, at which the exemption in Item 1(a) of Schedule 7A is obviously aimed.

Conclusion

74. For the reasons I have sought to give, I conclude that the FTT was correct in its conclusion and that Morrison's appeal must be dismissed. I will deal with any consequential matters in the usual way.