VALUE ADDED TAX – Article 59(c) Principal VAT Directive – matchmaking services – characterization of supply – whether "services of consultants" and/or "the provision of information" – appeal allowed

UPPER TRIBUNAL **Appeal number: UT/2020/0024**
TAX AND CHANCERY CHAMBER

BETWEEN

GRAY & FARRAR INTERNATIONAL LLP **Appellant**

-and-

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

TRIBUNAL: MR JUSTICE ADAM JOHNSON
JUDGE ASHLEY GREENBANK

Sitting in public at Rolls Building, 7 Rolls Buildings, Fetter Lane, London on 29 and 30 July 2021

David Milne QC and Barbara Belgrano, instructed by Harbottle & Lewis LLP, for the Appellant

Sarabjit Singh QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by the appellant, Gray & Farrar International LLP ("G&F"), which provides exclusive matchmaking services to clients in several jurisdictions.

2. G&F appeals against a decision of the First-tier Tribunal (Judge Hellier and Ms Wilkins) (the "FTT") dismissing G&F's appeals against:

> (1) a decision of the respondents, the Commissioners for Her Majesty's Revenue and Customs ("HMRC"), that G&F's services to clients belonging outside the EU did not constitute "services of consultants…and other similar services… and the provision of information…" within Article 59(c) of Council Directive 2006/112/EC (the "Principal VAT Directive") and so did not fall to be treated as supplied outside the EU and therefore outside the scope of Value Added Tax ("VAT"); and
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> (2) related assessments raised by HMRC on 14 June 2018 and 19 June 2018 in the sum of £1,745,667 for the VAT periods 12/12 to 06/15, 09/15 to 12/15, 03/16, 06/16 and 09/16.

3. The FTT's decision (the "FTT Decision") was made by the casting vote of the presiding member, Judge Hellier. It was released on 8 November 2019 and is reported with neutral citation number [2019] UKFTT 0684 (TC).

4. G&F appeals to this Tribunal with the permission of the FTT.

THE RELEVANT LEGISLATION

5. The only issue before the FTT was whether G&F's services fell within Article 59(c) of the Principal VAT Directive. If the services fell within Article 59(c), any services provided to clients belonging outside the EU would be treated as supplied outside the EU and would be outside the scope of VAT.

6. Article 59(c) is in the following form:

> the services of consultants, engineers, consultancy firms, lawyers, accountants and other similar services, as well as data processing and the provision of information

7. The provision which is now Article 59(c) appeared in similar form in the third indent to Article 9(2)(e) of Council Directive 77/388 (known as the "Sixth Directive"), which was the predecessor to the Principal VAT Directive. The only difference was that the reference to "consultancy firms" in Article 59(c) was replaced with the words "consultancy bureaux".

8. Article 59(c) is enacted in UK domestic law as paragraph 16(2)(d) of Schedule 4A to the Value Added Tax Act 1994 ("VATA"). Paragraph 16(2)(d) is in the following form:

> (d) services of consultants, engineers, consultancy bureaux, lawyers, accountants, and similar services, data processing and provision of information, other than any services relating to land

THE FACTS

9. The evidence before the FTT included witness statements of Virginia Sweetingham, the founder of the business, and her daughter, Claire Sweetingham, the current managing partner of G&F. They were both cross-examined on their statements.

10. The FTT set out its findings of fact at [37] to [67] of the FTT Decision. We have set out a summary below. It is taken largely from the FTT Decision.

(1) G&F was founded by Virginia Sweetingham in 2005. In the early years of the business, she worked alongside her daughter, Claire Sweetingham. Claire Sweetingham took over the management of the business in 2010. She is the current managing partner. (FTT [37], [38], [40])

(2) G&F describes its business in advertisements as a "matchmaking service". It attracts potential clients through advertisements and word of mouth. When a potential client approaches G&F, generally by email or telephone, there will usually be a short telephone conversation in which the extent and nature of G&F's services and terms will be discussed and there may be some intimation of the prospective client's needs. (FTT [41])

(3) A principle at the core of the business of G&F was and remains to take away some of the risks associated with dating by being an active intermediary. G&F's service includes some form of face-to-face contact with a client before any introductions are made. This enables G&F to verify its clients; it makes it more difficult for a person to present himself or herself differently as someone might do on an unmediated dating site; and it also enables a better match. To this was added, where appropriate, advice to a client on how to modify his or her behaviour. (FTT [39])

(4) G&F now offers three levels of matchmaking service: Club, Custom and Bespoke; between 2012 and 2016 it offered only two (Club and Bespoke):

> (a) For the Club service G&F agreed that over a 12 month period of active membership it would provide a minimum of eight introductions to potential partners from G&F's client base. An introduction occurs when each party, informed of the characteristics of the other, agrees to his or her telephone number being given to the other. Active membership can be paused while a relationship is ongoing or for other reasons such as holidays or work commitments. The fee for the Club service is £15,000 plus VAT.
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> (b) The Custom and Bespoke services were more expensive (£25,000 to £140,000) and encompassed searching for prospective matches outside G&F's client base, or where a client had particular geographical or other preferences. Claire Sweetingham thought that some 15% of G&F's clients required the making of a search outside its client base.

(FTT [42])

(5) G&F's terms and conditions are brief. Apart from matters of confidentiality the only express commitment by G&F is to provide the minimum of eight introductions which G&F consider suitable for the client's requirements within the 12 months of active membership. (FTT [43])

(6) G&F conducts some vetting of clients from publicly available data and, mainly in relation to Bespoke clients' potential matches, with its network of contacts. (FTT [45])

(7) When a client signs up to G&F's terms and conditions, the client is interviewed. Approximately 320 new clients are interviewed each year (FTT [60]). These interviews normally take 1½ to 2 hours and take place face-to-face or by Skype. After the interview (and perhaps after another meeting) G&F prepare a "brief" describing the client and the characteristics of the person he or she is seeking. These may include attributes such as sex, race, religion, location, wealth, age and appearance and also less tangible aspects such as characteristics and character. The brief is sent to the client for approval. (FTT [44])

(8) After the brief has been agreed G&F identifies possible matches from its existing client base or, in the case of the more tailored services, searches for and identifies possible matches by approaching its network of contacts or placing appropriate advertisements. When a match is identified each party is given a description of the other and some explanation of why the other might be a good match. If both are content, telephone numbers are provided. (FTT [46])

(9) Thereafter G&F make follow-up telephone calls often once or twice a week to the client, seeking feedback from each of its clients following an introduction: information as to whether the client had spoken to the counterparty and agreed a date, and on each client's impressions after the first and any subsequent dates. The feedback might give rise to amendments to the brief; if the date is successful or a relationship develops the client may put future introductions on hold; otherwise further introductions may be suggested. In the telephone calls, advice or coaching may be given to the client. (FTT [47])

(10) Claire Sweetingham undertakes the majority of interviews with clients. The balance are undertaken by a second interviewer. On the evidence before it, the FTT proceeded on the basis that Claire Sweetingham undertook approximately 65% of interviews, although it accepted that this was an indicative figure and not precise. (FTT [48])

(11) The second interviewer would not have the same extensive experience as Claire Sweetingham (FTT [49]). If a client was interviewed by the second interviewer Claire Sweetingham would have some (non-e-mail) contact with the client before or after the main interview, but before the brief was created. This interview would inform the brief. (FTT [50])

(12) Claire Sweetingham was responsible for the drafting of the brief before it was sent to the client either by drafting the brief herself or by reviewing a draft prepared by the second interviewer. (FTT 52])

(13) The brief would not simply record the wishes expressed by the client: sometimes a client would rely upon G&F to identify the type of person who would be a good match; sometimes Claire Sweetingham would identify requirements which the client had not articulated or realized. There were clients who articulated clear fixed requirements but there would be aspects of personality which could be teased out during the interview process which would be relevant to the brief: a client did not always know what he or she wanted even if they thought they did. (FTT [53])

(14) Claire Sweetingham's experience enabled her to identify, by reading between the lines, from intuition, from body language and from general approach, personality traits which were relevant to the selection of a suitable partner, and that such traits were, if accepted by the client, encapsulated in the brief and reflected in the introductions offered. However, a large part of the brief was usually either provided directly by the client or from factual enquiry. (FTT [54])

(15) The matching of one client to another (or of clients to headhunted possible matches) was not done by a computer program or by any sort of algorithm. Claire Sweetingham alone was responsible for the selection of introductions. The support team would tell her for which clients introductions were needed, she would devise a shortlist which would, inter alia, identify other clients within the target age range and sex, and she would look at the client's record and reports and the files on any previous introductions to find a new introduction. (FTT [55])

(16) The support team consisted of some four assistants (the number varied over the period in question) who had varied backgrounds and did not have extensive expertise in all the aspects of G&F's business.

(17) Save in relation to those clients who opted for the most expensive service (who dealt exclusively with Claire Sweetingham), contact telephone calls to clients after the initial interview process were normally conducted by the support team. (FTT [51])

(18) Although the support team generally communicated possible introductions to clients, sought feedback on how meetings and relationships (if formed) were going, and provided some coaching, counselling and support, G&F's offices were open plan and Claire Sweetingham could be brought into such conversations (or would ask to be brought into them) when needed and would also make follow up calls. (FTT [57])

(19) The support team also provided the majority of the hand-holding contact with clients on or after the provision of the details of a possible match, but when things went wrong Claire Sweetingham became more involved. (FTT [67])

THE FTT DECISION

11. We will address some of the detail of the FTT Decision when we address the issues which remain between the parties on this appeal. However, it will assist our explanation if we first provide a summary of the main points arising from the FTT Decision.

The scope of Article 59(c)

12. The FTT began by addressing various points concerning the scope of Article 59(c).

13. It first set out a series of points which, in the FTT's view, were not contentious. These points included:

(1) Article 59(c) falls to be interpreted in the same way as its predecessor Article 9(2)(e) of the Sixth Directive. (FTT [4]).

(2) The reference to "other similar services" in Article 59(c) is not to some common feature of the different types of supplies referred to in Article 59(c). It refers to services which are similar to each of the activities which are listed in Article 59(c) viewed separately. So, it is sufficient that the services provided by G&F are similar to the services provided by consultants or consultancy firms or fall within the reference to "data processing and the provision of information" (*Maatschap M J M Linthorst and others v Inspecteur der Belastingsdienst/Ondernemingen Roermond* (Case C-167/95) ("*Linthorst"*) [19]-[22], *von Hoffmann* v *Finanzamt Trier* (Case C-145/96) ("*von Hoffmann*") [20]-[21]). (FTT [5])

(3) For the purpose of determining if the services provided by G&F are services of consultants or similar services, G&F's services must be compared with services "principally and habitually" provided by a consultant. The services will be regarded as similar if both types of service serve the same purpose. (FTT [6])

(4) The services which consultants "principally or habitually" supply comprise the giving of "advice based on a high degree of expertise" (*American Express Services Europe Ltd v HMRC* [2010] EWHC 120 (Ch) ("*Amex*") per Proudman J at [80]). (FTT [7]).

(5) If material elements of the supply go beyond the provision of expert advice, the supply is not services of a consultant (*Banque Bruxelles Lambert SA v Belgium* (Case C-8/03) [2004] STC 1643 ("*BBL*") at [46], *Amex* [80]). (FTT [9])

(6) A supply of services can fall within Article 59(c) if it comprises one or more of the categories of supply within Article 59(c). It does not have to be shown that the supply of services falls only with one of the listed categories (*Amex* [72]). (FTT [10])

14. We should note, at this stage, that, although the FTT referred to the conclusions at paragraph [9] of its decision (to which we refer at [13(5)] above) in a section of its decision covering matters which were not in dispute, G&F take issue with those conclusions in this appeal.

15. The FTT then turned to the issues which it regarded as being in dispute before it.

(1) The first such issue was whether or not the reference to "services of consultants" in Article 59(c) was limited to services provided by members of the so-called "liberal professions". Having reviewed the case law, the FTT expressed the view that the phrase "services of consultants" in Article 59(c) is not limited to services provided by members of the liberal professions, but extended to services provided by persons who are "in ordinary usage 'consultants' and typically act in an independent manner". (FTT [25])

(2) The second issue was whether the phrase "data processing and the provision of information" in Article 59(c) should be read as a single composite phrase, as HMRC argued – so that a service could only fall within the phrase if it comprised both data processing and the provision of information – or, as G&F argued, as identifying separate activities – so that services could fall within Article 59(c) if they are either data processing or the provision of information. The FTT preferred G&F's interpretation. (FTT [36])

The nature of the supply made by G&F

16. Having set out its findings of fact and its views on the scope of Article 59(c), the FTT turned to the question of whether the supply made by G&F fell within that scope. It reached the following conclusions.

(1) The supply made by G&F was a single composite supply of services. The question as to whether that supply of services falls within Article 59(c) should be determined by reference to the "principal components" of the supply. A component which is ancillary to a principal component can be treated as subsumed within the principal element for the purpose of characterizing the supply. (FTT [68], [69])

(2) The nature of what is supplied should be decided from the point of view of a typical consumer of the supply. In this case, the typical consumer was a person seeking a partner with a view to a long-term relationship (FTT [72])

(3) G&F's service comprised a combination of information and advice. That was all that was provided to the client. The way in which G&F provided or created the advice or information - the preparation of the brief, the use of intuition and experience to determine an appropriate match – were simply part of the process by which G&F provided the advice and information to the client. (FTT [74]-[79])

(4) The information was given but was given within the framework of the provision of the advice. (FTT [73])

(5) Claire Sweetingham was an expert. The advice given by Claire Sweetingham as part of the supply made by G&F was within the domain of her expertise as a matchmaker. So that advice was expert advice; it was based on a "high degree of expertise". (FTT [81]-[83])

(6) The post-introduction liaison provided by the support team was not expert advice. Although there was no reference to the post-introduction liaison services in G&F's terms

and conditions, it was, however, an "important and material feature" of G&F's service that distinguished G&F's approach from other matchmaking businesses. It was not merely incidental to other parts of the supply. (FTT [84], [85])

17. At this point, the panel diverged in their views.

18. The member, Ms Wilkins, took the view that the post-introduction liaison provided by the support team was ancillary to the provision of information and expert advice in that it was designed to enable the expert advice and information to be better used. On that basis, she decided that the only material elements of the supply for the purposes of its characterization were the expert advice of Claire Sweetingham and the provision of information. Those elements fell within Article 59(c). (FTT [87], [88])

19. The presiding member, Judge Hellier, concluded that the services provided by the support team were a material element of the supply which could not be regarded as assisting the provision of information about a potential partner or the expert advice provided by Claire Sweetingham. Accordingly, the services provided by the support team could not be regarded as ancillary to the other elements of the supply. The effect of the inclusion of the support team's services in the service provided by G&F was that the service "went beyond" the provision of information and expert advice and so could not fall within Article 59(c). (FTT [89]-[91])

20. On that basis, on the casting vote of the presiding member, Judge Hellier, the FTT dismissed the appeal.

THE GROUNDS OF APPEAL

21. G&F applied for permission to appeal against the FTT Decision on the grounds that the FTT erred in law in that it failed properly to characterize the supply made by G&F, in particular, the FTT failed to give effect to the "predominant element" test as set out by the European Court of Justice ("CJEU"[1]) in *Levob Verzekeringen BV and OV Bank NV v Staatssecretaris van Financien* (Case C-41/04) ("*Levob*") [2006] STC 766 (at [21]-[22]) and, if it had done so, the FTT would inevitably have concluded that G&F's supply fell within Article 59(c) because the predominant element of its supply was services of consultants and/or the provision of information.

22. The FTT granted permission to appeal on those grounds.

23. In their respondents' notice, HMRC supported the FTT's conclusion on the characterization of the supply. However, HMRC challenged two aspects of the FTT Decision.

(1) HMRC asserted that the FTT erred in law in concluding that G&F's services fell within the scope of "services of consultants" within Article 59(c) because they did not possess any of the essential characteristics of an activity of a "liberal profession".

(2) HMRC also asserted that the FTT erred in law in its interpretation of the phrase "data processing and the provision of information" in Article 59(c) as referring separately to both (i) data processing and (ii) the provision of information rather than as a single composite phrase requiring the provision of both data processing and information.

24. There are therefore three issues before this Tribunal:

(1) the proper characterization of the supply made by G&F to clients;

[1] In this decision notice, we refer to both the European Court of Justice and its successor, the Court of Justice of the European Union, as the "CJEU".

(2) the meaning of "services of consultants" in Article 59(c) and whether the phrase is limited to supplies made by members of the "liberal professions";

(3) whether or not the phrase "data processing and the provision of information" in Article 59(c) should be read as a single composite phrase or whether the phrase should be read as applying separately to data processing and the provision of information.

25. The issues raised by HMRC in their respondents' notice go to the scope of Article 59(c). We will therefore address those issues before we turn to the issue raised by G&F's appeal as to whether or not, on a proper characterization of the supply, the services provided by G&F fall within the scope of Article 59(c) as correctly defined.

THE SCOPE OF ARTICLE 59(C)

Are "services of consultants" limited to supplies by members of the liberal professions?

26. As we have mentioned above, the FTT decided that the reference to "services of consultants" in Article 59(c) was not limited to supplies made by members of the so-called "liberal professions". In its respondent's notice, HMRC asserted that the FTT erred in law in reaching that conclusion.

Relevant case law

27. Before we turn to the FTT's reasons for its conclusions, we should first provide some context.

28. The key authority on this issue is the decision of the CJEU in *Linthorst*. That case involved the provision of veterinary services by a veterinary practice established in the Netherlands to cattle farmers in Belgium. The question before the court was whether under the third indent of Article 9(2)(e) of the Sixth Directive (the predecessor to Article 59(c)) the place of supply of the service was in Belgium. The CJEU decided that the veterinary services did not fall within the third indent of Article 9(2)(e).

29. In his opinion in that case, when rejecting the argument that veterinary services should be regarded as "similar services" within the third indent of Article 9(2)(e) by applying the ejusdem generis principle to the other services that are listed in that indent, the Advocate General, Advocate General Fennelly, said this (at paragraphs [21]-[22] of his opinion):

> 21. I do not find it easy to interpret the expression "merely similar activities". Presumably, the Court is saying that it is enough for activities to be "similar" to artistic or entertainment activities to bring them within the indent. The Court does not, on the other hand, seek to establish, in the terms of the first indent, any class or genus of activities such as could call for the application of the ejusdem generis principle of construction. The application of that principle presupposes that it is possible to identify, from the matters enumerated in the legal text under scrutiny, a genus which precedes the general words. The search is essentially for a sufficiently common element to permit the identification of a recognisable class. **The activities listed in the third indent of Article 9(2)(e) seem to me to be too heterogeneous and lacking in common elements. It has been suggested that the fact that the activities listed may broadly be regarded as constituting liberal professions provides a genus. However, I do not think that the legislator, by that indent, intended to enumerate a catalogue or establish a genus or class of activities corresponding to those of the traditional notion of liberal professions. An interpretation which seeks to compare the myriad of possible forms of modern consultancy work with the social and intellectual prestige—based generally on high standards of educational attainment and strict regulation of ethical and professional behaviour—of the traditional liberal professions would strain considerably the**

> **language of the indent.** The omission of medical services, of course, flows naturally from the exemption of such services pursuant to Article 13(A)(1)(c). They would, if included, undoubtedly have been "similar" to veterinary services. In the result, there is no class of activity in the catalogue which is "similar" to the normal activities of a veterinary surgeon, and, in my opinion, no common element other than the unsatisfactory notion of liberal professions can be identified to which those activities could be assimilated.
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> 22. Indeed—as I have already stated in respect of the fourth indent of Article 9(2)(c) —and having regard to the express transitional exemption expressly provided pursuant to Article 28(3)(b) and Annex F to the Sixth Directive for the treatment of animals by veterinary surgeons, if the legislator had wished to include the services of veterinary surgeons in the indent, as it clearly did with the services of lawyers, it would expressly have done so. Veterinary surgeons providing traditional veterinary service are exercising a specific profession whose role is readily understood by society. In the absence of a genus in the indent, as discussed in the preceding paragraph, it is necessary to examine whether such veterinary activities are similar to any of the activities listed in the indent. **The reference to "other similar services" cannot be construed as a reference to the professional status of the service providers of some of the services listed, such as lawyers—since both veterinary surgeons and lawyers could broadly be classified as members of liberal professions—but, on the contrary, must be interpreted as only covering those services which are similar—in terms of the concrete aspects of the service actually provided—to any one of the preceding expressly listed service activities. The similarity, such as it is, between the nature of the services provided by veterinary surgeons and those of consultants, or "consultancy bureaux" in particular, that arises from the advisory aspects of some of the work of veterinary surgeons is not sufficient, in my opinion, to bring them within the scope of the indent.**

(Our emphasis added.)

30. Having concluded at paragraph [22] of his opinion that the appropriate enquiry was whether the veterinary services were similar to one of the listed services set out in the third indent of Article 9(2)(e) and not whether the listed services were indicative of an underlying genus of activities, the Advocate General decided at paragraph [24] that the veterinary services were not similar to consultancy services because they went far beyond the provision of advice.

> 24. I am satisfied that, however indeterminate the scope of the notion of activities similar to those of "consultants" or "consultancy bureaux" might be, it cannot, on a reasonable interpretation, be construed as extending to the work of veterinary surgeons. The administration of health care to animals involves much more than purely advisory work connected with animals. It might be different if a group of veterinary surgeons established an undertaking which concentrated on providing animal-related business-advisory services to farmers, to those considering taking up farming activities or, indeed, to public authorities, but then their services would not constitute veterinary services as commonly understood. Equally, a veterinary surgeon might provide services which are genuinely of a consultancy nature; for example, he might advise persons, undertakings or bodies regularly on animal care. In any event, the national court has not found that this is the case with *Linthorst*, whose advisory work appears to be incidental to its normal veterinary activities.

31. In its decision, the CJEU reached the same conclusion, but expressed its reasons rather differently. The CJEU said this at [20]-[23]:

> 20 It should be noted that the only common feature of the disparate activities mentioned in that provision is that they all come under the heading of liberal professions. Yet, as the German Government rightly observed, if the Community legislature had intended all activities carried on in an independent manner to be covered by that provision, it would have defined them in general terms.
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> 21 Moreover, if the legislature had intended that provision to cover the medical profession generally, as an activity typically carried out in an independent manner, it would have included it in the list, since, as the national court and the Advocate General in paragraph 22 of his Opinion pertinently observe, other provisions of the Sixth Directive, such as in particular the transitional exception provided pursuant to Article 28(3)(b) in conjunction with Annex F, specifically mention the services of veterinary surgeons.
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> 22 It is appropriate to add that, whereas veterinary surgeons' duties sometimes involve advisory or consultancy aspects, that fact is not enough to bring the principal and habitual activities of the profession of veterinary surgeon within the concepts of `consultants' or `consultancy bureaux' or to cause them to be regarded as `similar'.
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> 23 It must therefore be held that the typical duties of a veterinary surgeon do not fall within the third indent of Article 9(2)(e) of the Sixth Directive.

The FTT's approach

32. The FTT's analysis of the decision in *Linthorst* is set out at paragraphs [11]-[25] of the FTT Decision. Having referred to paragraphs [21]-[22] of the Advocate General's opinion and to paragraph [20] of the CJEU's decision, the FTT noted that the CJEU appeared to take a different view from the Advocate General in that the CJEU found that there was a common feature in the listed services in the third indent of Article 9(2)(e), but then held that the common feature does not "act to give 'other similar services' a generic meaning".

33. The FTT then referred to the differing conclusions reached by the VAT Tribunal in *Mohammed (t/a The Indian Palmist) v Customs & Excise Commissioners* (2003) VAT Decision 18397 ("*The Indian Palmist*") and the FTT in *Gabbitas Educational Consultants Limited v HMRC* [2009] UKFTT 325 (TC) ("*Gabbitas*"). The FTT gave four reasons for considering that the listed services in Article 59(c) should not be limited to services provided by members of the liberal professions. The FTT said that is at [17]-[25]:

> 17. It seems to us that there are four reasons for concluding that the meaning of the listed providers is not to be taken as limited to those which are liberal professions in the sense defined in *Christiane*, but that the Court considered that each of the specified classes of activity was limited to those which were carried on in an "independent" manner.
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> 18. First, *Christiane* was decided in 2001 after both *Linthorst* and *Hoffman* so it is unlikely that the definition given in that case was in the mind of the court in *Linthorst* or *Hoffman* . Whilst the Advocate General in *Linthorst* gave a description of the basis for the social prestige accorded to the "traditional" liberal professions, his description, although similar in parts, was not identical to that of liberal profession in *Christiane*.
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> 19. *Christiane* was not concerned with para (c) and neither that provision nor *Hoffman* nor *Linthorst* were referred to in the judgement. The case concerned the meaning of liberal professions in Annex F2 of the then Directive. This described certain services to which reduced rates of VAT could be applied in the following terms:

"services provided by authors, artists, performers, writers and other members of liberal professions …"

The Court cannot have intended its definition to affect the breadth of para (c).

20. Second, the second sentence of [20] *Linthorst* appears to us to equate liberal professions with activities carried out in an independent manner. That equation with such services also appears in [21]:

"Moreover, if the legislature had intended that provision to cover medical services generally, as an activity typically carried out in an independent manner, it would have included it in the list …"

that suggests that the Court did not regard the matters the Advocate General had said were features of "traditional" liberal professions as important features of the communality.

21. Third, the Court's own acknowledgement in the first sentence of [21] of the "disparate" listed activities, the legislative notion of activities of both consultants and consultancy bureaux (without any mention of their regulation), and the Advocate General's reference to "traditional" liberal professions (rather than simply liberal professions) in [22], seem to us to indicate that the meaning to be accorded to the Court's use of the phrase "liberal profession" is capable of being understood as being wide enough to embrace the listed activities rather than limiting the listed activities by reference to liberal professions.

22. Fourth, the description in the first sentence [20] *Linthorst* of the listed services was not necessary for its conclusion or its reasoning. It came to the conclusion that the vets were not consultants, not because veterinary surgery was not a liberal profession, but because vets habitually did more than give advice.

23. It does not seem to us therefore that the purpose of paragraph [20] was to enunciate any limitation on the meaning of the listed suppliers. Rather it was to say that even if there was a common feature of those suppliers it was not the intention of the legislation that merely because a supplier possessed such common features a supply by it would fall within "other similar services".

24. Finally we note that, as the first section of the quote above from paragraph [31] of *Germany* makes clear, what falls within para(c) would not be the services provided by a member of the liberal profession falling within one of the categories (if that were the test) but the services such a person would principally and habitually supply. It is not the status of the supplier which governs the application of para(c) but the nature of the supply. Even if the listed suppliers were limited to those in liberal professions as defined in *Christiane* , the question would be whether the services at issue would be such as would be supplied by a person who was a member of the liberal professions listed, not whether they were in fact supplied by such a person.

25. We conclude that services will fall within para(c) if they are services of the sort which are primarily and habitually supplied by one or more of the specifically listed suppliers and that "consultants" are not limited to persons who are members of the liberal professions but to persons who are in ordinary usage "consultants" and typically act in an independent manner – that is to say are not dependent on, or integrated with, their client.

34. The references in this passage to "*Christiane*" are to the decision of the CJEU in *Christiane Urbing-Adam v Administration de L'enregistrement et domain* (Case C-267/99) ("*Urbing-Adam*").

The parties' submissions

35. HMRC disputes the FTT's reasoning. Mr Singh QC says that the effect of the CJEU decision in *Linthorst* is that the listed services in Article 59(c) are limited to the provision of services by members of the liberal professions. The activities of members of the liberal professions can be identified by reference to three key factors: whether the activities are of an intellectual character, whether they require high level qualifications, and whether they are subject to clear and strict professional regulation (as set out by the CJEU in *Urbing-Adam* at [39]).

36. In particular, Mr Singh QC rejects the four reasons given by the FTT for dismissing HMRC's arguments on this point:

(1) The *Urbing-Adam* case was indeed decided after *Linthorst*, but the criteria for identifying members of the liberal professions set out by the CJEU in *Urbing-Adam* were essentially the same as those identified by the Advocate General in *Linthorst* (at [21] of his opinion).

(2) The equation by the CJEU (in the second sentence of paragraph [20] of its decision in *Linthorst*) of activities of the liberal professions with services carried out in an independent manner was simply a reference to the activities carried out. It did not define the activities themselves.

(3) The FTT was wrong to conclude that the CJEU did not regard the matters identified by the Advocate General as features of traditional liberal professions as important common features of supplies within the third indent of Article 9(2)(e). The CJEU in *Linthorst* specifically identifies the common feature of all the listed services in Article 59(c) as being activities of members of the liberal professions in the first sentence of paragraph [20] of its decision.

(4) It could not be said that the CJEU did not rely upon its finding in the first sentence of paragraph [20] of its decision in reaching its conclusion. The court relies on both (i) the fact that the listed services do not cover all the liberal professions and (ii) the fact that veterinary services are not limited to the provision of advice, in arriving at its conclusion.

37. HMRC also point out that G&F's interpretation of the meaning of Article 59(c) gives a very broad meaning to the phrase "services of consultants". That broad scope is not consistent with the decision of the VAT Tribunal in *The Indian Palmist*, nor was it consistent with the decision of Proudman J in *Amex* at [76].

38. G&F accept the FTT's reasoning. G&F note that the FTT's reasoning was adopted (with a minor clarification) by a differently constituted FTT in *Mandarin Consulting Limited v HMRC* [2020] UKFTT 0228 (TC) ("*Mandarin Consulting*"). It is also consistent with the decision of the FTT in *Gabbitas*. Furthermore, G&F say that the decision in *Linthorst* does not support HMRC's interpretation of Article 59(c). Instead, they say that the CJEU decision is clear that the question of whether a given supply falls within Article 59(c) cannot be determined solely asking whether it is being provided by a member of the liberal professions or by a member of the medical profession. The focus is on the nature of the service itself.

Discussion

39. We are faced with two competing interpretations of the effect of the decision of the CJEU in *Linthorst* on this issue.

(1) The first is that advanced by the FTT and supported by G&F – that the focus in the CJEU decision in *Linthorst* is on the nature of the service that is being provided. The reference to the activities of certain professions in Article 59(c), which might be regarded

as members of the liberal professions, is simply a means of describing a particular activity. It does limit the scope of the definition. This approach is reflected in the FTT Decision, and also in the decisions of the FTT in *Mandarin Consulting* and *Gabbitas*.

(2) The second is that advanced by HMRC – that the effect of the reference to the liberal professions in the first sentence of paragraph [20] of the CJEU's decision in *Linthorst* is that the provision of services by members of the liberal professions is the common feature of all the activities that are mentioned in the first part of the third indent of Article 9(2)(e) (and therefore in Article 59(c)), but that not all liberal professions are covered by that provision (for example, veterinary services in *Linthorst* or the services of arbitrators in *von Hoffmann*). On this analysis, it is then necessary to identify the characteristics of a liberal profession. Mr Singh QC says that these are the characteristics identified by the CJEU in *Urbing-Adam* (and by the Advocate General in *Linthorst*). This approach is reflected in the decision of the VAT Tribunal in *The Indian Palmist* and, Mr Singh QC says, in the decision of Proudman J in *Amex*.

40. We prefer the approach taken by the FTT in this case.

41. We agree with the FTT (and G&F) that the focus of Article 59(c) is on the nature of the service and not the characteristics of the person who is providing it. The list of professionals in Article 59(c) is used simply to define the nature of the activities. As a consequence, the reference to "other similar services" in that paragraph is to services which are similar to other services which are listed in Article 59(c). This is best illustrated by the decision of the CJEU in *von Hoffman* (see in particular [15]-[16], [19]-[20]). There is no reference in that decision to the liberal professions.

42. In *Linthorst*, the Advocate General clearly rejects the argument that the listed activities should be restricted to activities of the traditional liberal professions. HMRC's argument suggests that the CJEU does not whole-heartedly adopt the opinion of the Advocate General. However, we do not read paragraph [20] of the CJEU's decision as rejecting it. We agree with the FTT that the better view is that the purpose of the second sentence in paragraph [20] is to extract the feature of the independent nature of the service that is being provided rather than impose any limitation on the services falling with Article 59(c) by reference to the characteristics of the person who is providing it.

43. In this respect, in our view, the failure of the CJEU to refer to the characteristics of the liberal professions in *Linthorst* is notable. The Advocate General had identified the relevant characteristics in his opinion. If the CJEU had considered that the third indent of Article 9(2)(e) was limited to services provided by members of the liberal professions, in our view, it would have referred to those characteristics in its decision. The CJEU does not refer to them at all.

44. We do not regard this conclusion as contrary to the decision of Proudman J in *Amex*. In that case, Proudman J refers to the liberal professions at paragraph [76] of her decision, but she does so in the context of a reference to the decision of the CJEU in *Linthorst*. Her conclusion (at *Amex* [80]) does not refer to any requirement that the service be provided by a member of the liberal professions.

Conclusion

45. For these reasons, we agree with the FTT that the listed activities in Article 59(c) are not confined to services provided by members of the liberal professions. We reject HMRC's submission.

Data processing and the provision of information

46. The FTT also decided that the phrase "data processing and the provision of information" in Article 59(c) and paragraph 16(2)(d) Schedule 4A VATA specifies two activities: (i) the

processing of data for a customer and (ii) the provision of information to a customer. In doing so, it rejected HMRC's submissions that the phrase should be treated as a single phrase so that a supply could only fall within the phrase if it involved both the supply of data and the provision of information.

The relevant legislation

47. We have set out the relevant legislation earlier in this decision notice.

48. There are slight differences in wording between paragraph 16(2)(d) Schedule 4A VATA and Article 59(c) of the Principal VAT Directive. As can be seen from an analysis of the text, those differences include: the omission (in the text of paragraph 16(2)(d)) of the definite article "the" before "services of consultants" and "provision of information", the word "other" before "similar services" and the words "as well as" before "data processing"; and the insertion of an extra comma after the word "accountants".

The FTT's approach

49. Before the FTT, HMRC argued that the insertion of the additional comma and the relationship between data processing and the provision of information in paragraph 16(2)(d) supported their interpretation of the phrase. They also relied on the FTT decision in *Fairpay Ltd v HMRC* [2008] STI 394 VAT Decision 20455 ("*Fairpay*") in support of their view.

50. The FTT rejected HMRC's submissions. It gave three reasons for doing so (FTT [31]-[35]).

(1) the decision of the FTT in *Fairpay* did not support HMRC's view;

(2) the wording of Article 59(c) – in particular, the words "as well as" and the insertion of the definite article before "provision of information" suggested that the phrase should be read as referring to two separate activities; and

(3) the case law, to the extent that it addressed the question, supported that view (*Amex* [82] per Proudman J, *BBL* [46]).

The parties' submissions

51. HMRC say that the FTT erred in its approach.

(1) If the approach advocated by the FTT was correct, the wording would be "data processing or the provision of information" not "data processing and the provision of information".

(2) The FTT's interpretation produces an inordinately wide and vague provision. Such a wide interpretation is inconsistent with the remainder of the provision.

(3) HMRC's interpretation is supported by the decision of the FTT in *Fairpay*. The decisions of Proudman J in *Amex* and the CJEU in *BBL* did not address the interpretation of the phrase and are not in point.

52. G&F support the FTT's interpretation.

Discussion

53. We prefer the FTT's approach. Our reasons are set out below.

54. We must refer to the wording of the Principal VAT Directive in preference to the wording of the domestic legislation as it would be incumbent upon us, so far as possible, to read the domestic legislation in conformity with the Directive which it is intended to implement. The textual differences are too small to suggest that there was any intention on the part of Parliament to depart from the meaning of the Directive.

55. As regards the textual analysis, we agree with the FTT that the words "as well as" in the text of the Directive suggest that the phrase is a new list and should be read as referring to "data processing" and "provision of information" as separate activities.

56. We do not gain much assistance from the cases to which we have been referred. However, the balance of authority, such as it is, supports the FTT's interpretation.

(1) The point is raised in argument in *Fairpay* (see *Fairpay* [24]) but the FTT's decision (*Fairpay* [31]) does not turn on the point. It is accepted that the taxpayer, *Fairpay*, was engaged in some data processing and the question before the tribunal was whether the other activities of the company were such that its supplies could be treated as falling within the third indent of Article 9(2)(e) of the Sixth Directive. The FTT decides that the company's activities were such that its supplies were not confined to supplies within the third indent of Article 9(2)(e).

(2) In *Amex*, Proudman J refers separately to "the provision of information" at *Amex* [82] and to "data processing" and "the provision of information" disjunctively at *Amex* [84] (in the phrase "nor were they data processing nor the supply of information"). However, the point was not directly in issue and could not be said to be decided by her judgment.

(3) In *BBL*, the CJEU refers to "data processing" and "the provision of information" disjunctively at *BBL* [46] (in the phrase "data processing services and information provision services"). Once again, the point was not directly at issue, although we note that all parts of a decision of the CJEU are regarded as authoritative.

57. For these reasons, we take the view that the phrase "data processing and the provision of information" in Article 59(c) and paragraph 16(2)(d) Schedule 4A VATA specifies two activities: (i) the processing of data and (ii) the provision of information. We reject HMRC's submission.

THE NATURE OF THE SUPPLY MADE BY G&F

58. We should now turn to the characterization of the supply that was made by G&F.

The FTT Decision

59. From our summary of the FTT's findings of fact that we have set out above, the key components of the service provided by G&F were (i) the interview and vetting process; (ii) the preparation of the brief; (iii) the matching process and (iv) the post-introduction liaison with clients. Claire Sweetingham undertook most (but not all) of the interviews and supervised the vetting process. She also prepared or supervised the preparation of the brief and undertook the matching process. The support team undertook most of the post-introduction liaison with clients.

60. The FTT found that the typical consumer would view the services provided by G&F as a combination of advice and information. That was all that was provided. The information regarding a potential match was provided as part of the service of providing the advice. The other activities – the interviews, the vetting process, the preparation of the brief, the matching process – were the means by which the advice and information were provided. The relevant passage in the FTT Decision is at FTT [72]-[79]:

> 72. In determining the nature of what is done the perspective must be from that of the typical consumer, for the issue is what he or she receives not how it is supplied. We accept Mr Singh QC's formulation of that perspective as being from the point of view of a client seeking a person with a view to a long-term relationship, and so we ask what was supplied in pursuance of that purpose.

> 73. There was plainly the provision of information: the name, some details and the telephone number of particular person(s), but that on its own did not satisfy the customer's purpose: to do that the information had to come with G&F's advice or opinion that the particular person had been verified and might be compatible - and that was express or implied in the provision of that information. That advice was part of what was provided when the details of a prospective match were given out.
>
> 74. On receipt of further information from one of the clients after a date G&F might refine the brief and that might fructify in a better recommendation - one which was more likely to result in a long-term relationship - to accompany the next set of a person's details. But the service received was not the refinement of the brief but the more sculpted advice which accompanied the later suggestion for an introduction.
>
> 75. Mr Singh QC argues that G&F's activities went far beyond the provision of advice and information because they involved all the other elements that go into the service of matchmaking. Those activities he said included ascertaining and executing the needs of the client, reading the non-verbal clues, reading body language, and the inexplicable magic of applying knowledge based on intuition and experience to identify people who may be compatible.
>
> 76. It seemed to us that the way in which G&F provides or creates the advice is not part of what it is providing. Although it uses intuition and experience to give advice it is not supplying the activity of using intuition and experience, rather it is merely using that as a tool to formulate the advice and to decide on the information it gives to the client. The knowledge and calculations of the engineer, her questioning of the client as to the required capacity of the bridge and the text book research of the lawyer are used to make the supply to their respective clients but are not what they supply.
>
> 77. G&F may also provide advice in the formulation of the brief for a client. If a client is told "you are the sort of person who needs someone like this" that is part of the service of finding a person with whom the client can have a long-term relationship and is advice provided to the client.
>
> 78. In the regular telephone calls G&F seek information from the client and may provide a 'listening ear' which may enhance future advice. In addition it may provide coaching or counselling. The seeking of information is not part of what the client receives but the other elements are. Coaching and counselling are behavioural advice.
>
> 79. It seems to us that this information and this advice are all that a client receives and therefore are the constituents of the supply by G&F. Mr Singh QC suggested that the role of the advice given to clients was more limited than the witnesses suggested; we suspect that in some cases he may be right but that does not matter because in those cases where the advice was of lesser significance the provision of information about a potential match was correspondingly larger.

61. The FTT found that the advice provided by Claire Sweetingham was expert advice. Given the FTT's conclusions on the scope of Article 59(c), it followed that the advice provided by Claire Sweetingham could be regarded as within the scope of "services of consultants…or other similar services" in Article 59(c).

62. The post-introduction liaison provided by the support team was a material feature of the service. The advice provided by the support team, however, was not expert advice.

63. As we have mentioned above, at this point the views of the panel diverged. The member, Ms Wilkins, found that the advice provided by the support team was ancillary to the other elements of the supply and so the material elements of the supply (the expert advice of Claire Sweetingham and the provision of information) all fell within Article 59(c). However, Judge Hellier, whom we must treat as providing the decision of the FTT, concluded that the addition of the post-introduction liaison service meant that the supply went beyond the provision of expert advice and information, and so fell outside Article 59(c).

64. The reasoning of Judge Hellier is recorded at [90] and [91] of the FTT Decision in the following terms:

> 90. Whilst he [Judge Hellier] considered that the actions of the liaison team promoted and helped the making of a successful relationship, he was not persuaded that the support provided by the liaison team assisted the provision of information about a potential partner or served the supply of Claire Sweetingham's advice that a particular person might be suitable. It was support in the developing of a relationship – support in addition to the use of the information and expert advice received - and was not shown to be sufficiently inconsequential to say that it was just part of those elements.
>
> 91. On this basis he concludes that the service provided went beyond the provision of information and expert advice and did not fall within para (c)

The parties' submissions in outline

65. In summary, G&F say that Judge Hellier did not apply the correct test. If there was no principal element to which the other aspects of the supply were ancillary, the service provided by G&F should be categorized by reference to the predominant element (*Levob Verzekeringen BV v Staatssecretaris van Financien* (Case C-41/04) [2006] STC 766 ("*Levob*")). The predominant element was the expert advice provided by Claire Sweetingham combined with the provision of contact details, which fell within the scope of "services of consultants…or other similar services" and the "provision of information" in Article 59(c).

66. By taking the view that the addition of the post-introduction services meant that the overall service provided by G&F went beyond the provision of expert advice and information and so fell outside Article 59(c), Judge Hellier allowed the post-introduction services to define the nature of the supply. That was not a permissible conclusion given that the FTT found that post-introduction services were a less important element of the supply.

67. HMRC support Judge Hellier's conclusion. HMRC say that properly characterized G&F's service was the supply of introductory services. Although the supply contained elements that might be regarded as advice and/or the provision of information, the true nature of the service for which the typical consumer bargained was the provision of introductions. That supply was fundamentally different from the provision of expert advice and information and so was outside the scope of Article 59(c).

68. HMRC's approach was based on the case law suggesting that there was an "overarching supply" test for the purposes of the characterization of a composite single supply where no predominant element could be identified. Judge Hellier's description of a supply which "went beyond the provision of advice and information" was, in essence, a description of the application of the overarching test.

Discussion

69. As the parties disagree on the means of characterizing a composite supply for VAT purposes, we will begin by setting out our view of the correct approach to the characterization of a single composite supply.

The relevant case law

70. The parties referred us to an array of case law on this issue including the CJEU decisions in *Levob*, *Card Protection Plan v Customs and Excise Commissioners* (Case C-349/96) [1999] STC 270 ("*CPP*"), *Finanzamt Frankfurt am Main v Deutsche Bank* AG (Case C-44/11) ("*Deutsche Bank*") and *Mesto Zamberk v Financni reditelvsti* (Case C-18/12) [2014] STC 1703 ("*Mesto*"), and the decisions of the UK courts and tribunals in *College of Estate Management v Customs and Excise Commissioners* [2005] UKHL 62 ("*CEM*"), *Byrom (t/a Salon 24) v HMRC* [2006] EWHC 111 (Ch) ("*Byrom*"), *Honourable Society of Middle Temple v HMRC* [2013] STC 1998, *HMRC* v *Metropolitan International Schools Limited* [2017] UKUT 431 (TCC) ("*MIS*") and *HMRC v Ice Rink Co Ltd* [2019] UKUT 1026. That case law demonstrates that the CJEU and the courts and tribunals have adopted different tests in different circumstances to determine this question. The case law is analysed in some detail in the Upper Tribunal decision in *MIS* at [46]-[79]. We do not intend to repeat that analysis here. Instead, we will set out our view of the main principles that are to be drawn from that case law.

71. The characterization of a supply ordinarily takes place for a given statutory purpose, for example, as in this case, to determine the place of supply in accordance with the place of supply rules or to determine whether an exemption can apply. The question for the court is simply whether the supply meets the statutory description.

72. The primary test is the "predominant element" test as set out in the decision of the CJEU in *Mesto*.

(1) In its application for permission to appeal, G&F referred to the CJEU's decision in *Levob* as authority for the predominant element test. However, *Mesto* is the more recent comprehensive decision of the CJEU on this question.

(2) In *Mesto*, the CJEU had to consider whether supplies made by an aquatic centre which had both sporting and recreational facilities fell within the exemption in Article 132(1)(m) of the Principal VAT Directive for supplies of services closely linked to sport or physical education. The CJEU decided that, where it was possible to identify a predominant element amongst the elements that characterize the single complex supply, the supply should be characterized by reference to that predominant element. The CJEU said this at [29]:

> 29 In order to determine whether a single complex supply must be classified as a supply having a close link with the practice of sport within the meaning of Article 132(1)(m) of the VAT Directive, although that supply also includes elements which do not have such a link, it is necessary to take into consideration all the circumstances in which the transaction takes place in order to ascertain its characteristic elements and its predominant elements must be identified (see, to that effect, in particular, Case C-231/94 *Faaborg-Gelting Linien* [1996] ECR I-2395, paragraphs 12 and 14; *Levob Verzekeringen and OV Bank*, paragraph 27, and *Bog and Others*, paragraph 61).

(3) The predominant element must be determined from the point of view of the typical consumer of the supply and having regard, in an overall assessment, to the qualitative and not just the quantitative importance of the competing elements (*Mesto* [30]).

(4) The view of the typical consumer is determined by reference to objective factors derived from the objective characteristics of the supply (*Mesto* [33], [36]). The subjective intentions of particular users of the supply are not relevant (*Mesto* [35]).

(5) Examples of the application of the predominant element test can be found in the CJEU decision in *Levob* – where the CJEU decided that the supply of standard software

which was customized to meet the customer's needs was a supply of services (the customization) rather than a supply of goods (the software) – and *MIS* – where the Upper Tribunal found that the provision of distance-learning courses could not be characterized as a supply of books because the provision of books was not qualitatively the predominant element of the supply.

(6) There may be cases where the weighing up of the relevant characteristics of the supply does not produce a predominant element. That may not matter if the question is a question as to what the characterization is not – for example, if the question is whether or not the supply falls within a given exemption. In such cases, if the supply has no predominant characteristic then the supply will not fall within the exemption (see *Deutsche Bank*). (*MIS* [55]).

73. The "principal/ancillary" test as set out by the CJEU in *CPP* is also an available test. However, in most cases where the test can apply, the predominant element test can also apply and will produce the same result (*MIS* [58]).

(1) The "principal/ancillary" test is expressed in the following terms at *CPP* [30]:

> 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 (Joined Cases C-308/96 and C-94/97 *Commissioners of Customs and Excise v Madgett and Baldwin* [1998] ECR I-6229, paragraph 24).

(2) The "principal/ancillary" test can apply where it is possible to identify a principal element in the supply and all the other elements are either minor (and so can be ignored for the purposes of characterization) or ancillary to the principal supply.

(3) For this purpose, an element is ancillary to the principal supply if from the point of view of the typical consumer it does not constitute an aim itself, but is a means of better enjoying the principal service.

74. There is some support in the domestic case law, in particular, the decision of the House of Lords in *CEM* (*CEM* [12]-[13], per Lord Rodger) and the High Court in *Byrom* (*Byrom* [70], per Warren J) for a test involving the identification of the "overarching" nature of the supply. There are no examples of the application of the "overarching supply" test in the CJEU case law. However, as identified in *MIS* (*MIS* [75]-[78]), that test may have a part to play in the application of the other tests, in particular in identifying the qualitatively predominant element of a single composite supply and may, where the other tests cannot be applied, present "a useful test in its own right" (*MIS* [78(c)]).

The FTT's approach to characterization

75. On the question of the classification of the supply made by G&F, the FTT identified that the supply should be characterized by reference to the "principal components" of the supply (FTT [68]) and from the point of view of the typical consumer (FTT [72]). The FTT did not, however, refer to the predominant element test in its decision or to the CJEU decisions in *Levob*, or *Mesto*.

76. It would appear that both members of the FTT, at least initially, sought to apply the principal/ancillary test in *CPP* by seeking to determine whether there was a principal element of the supply to which all the other elements of the supply could be regarded as either merely incidental or ancillary (FTT [84]).

(1) The FTT member, Ms Wilkins, found that the provision of the post introduction liaison by the support team was ancillary to the other elements of the supply. This was because in her view the post-introduction liaison services did not constitute an aim in themselves. From the point of view of the typical consumer, they were a means of better enjoying the principal supply.

(2) Judge Hellier, on the other hand, was unable to conclude that the provision of the post-introduction liaison services by the support team was ancillary to the other elements of the supply and went on to conclude that the supply "went beyond" the provision of expert advice and information and therefore fell outside Article 59(c).

We are required to treat the decision of Judge Hellier, as the presiding member, as the decision of the FTT

77. Neither Mr Milne QC, for G&F, nor Mr Singh QC, for HMRC, support the application of the principal/ancillary test in this case.

78. Mr Milne QC says that Judge Hellier appears to have applied an "excess material elements" test in reaching his conclusion. There is no authority in the case law for the application of such a test. If Judge Hellier, having dismissed the application of the principal/ancillary test, had gone on – as he should have done – to consider the application of the predominant element test, he could not have reached any other conclusion than the predominant element was the provision of the expert advice by Claire Sweetingham combined with the information regarding a possible match.

79. Mr Singh QC suggested that Judge Hellier's approach could be justified, in effect, as an extension of the domestic case law that supports an "overarching supply" test (*CEM*, *Byrom*) in order to characterize the supply for VAT purposes. He also referred to the decision of Proudman J in *Amex* as a further example of the courts adopting this approach.

80. *Amex* concerned the treatment of services provided by UK subsidiary of a US company. The services included finance, project management and facilities management services relating to European real estate. One question before the court was whether the services could fall within the third indent of Article 9(2)(e) of the Sixth Directive (now Article 59(c)). Proudman J found that the services provided by the UK subsidiary could not fall within Article 9(2)(e). She said this at [80]:

> 80. Mr Cordara relied heavily on the category of consultancy services. A consultant gives advice based on a high degree of expertise. It seems to me that Amex Europe's activities went well beyond the habitual activity of a consultant (or consultancy bureau) in giving expert advice to a client. Plainly Amex Europe did provide advice to local business units. However the description of Amex Europe as 'an intelligent client', ascertaining and executing the needs of the local business units in accordance with group policy, was in my judgment properly characterised by the Tribunal as a management function going much further than consultancy activities. Consultants give advice, they do not make decisions. The Tribunal was right to give weight to the fact that Amex Europe either gave approval to lease and other transactions conducted by local business units or participated in the approval process when the approval of AETRSCo was also required. These were executive not consultancy functions. 'Management' is a concept of Community Law and (as Advocate-General Jacobs said in *Customs & Excise Commissioners v. Zoological Society of London* [2002] STC 521 at paragraph 32) is characterized by the taking of decisions rather than the mere implementation of policy.

81. Mr Singh QC says that this decision is an example of the operation of the overarching supply test. In effect, by saying that a supply has elements that "go beyond" the services specified in the third indent of Article 9(2)(e), Proudman J is taking the view that the overall service has become something else. In the present case, he says, Judge Hellier adopts a similar approach in arriving at the conclusion that the services provided by G&F did not fall within Article 59(c).

82. It is not clear to us that Judge Hellier did seek to apply an overarching test as Mr Singh QC suggests. Judge Hellier's reasoning (at FTT [90]-[91]) is that the post-introduction liaison services (which alone are not within Article 59(c)) are not ancillary to the other aspects of the supply (which are within Article 59(c)) and so the supply must "go beyond" (i.e. not fit) the description in Article 59(c). That reasoning, it seems to us, is consistent with the application of the principal/ancillary test as we have described.

83. The FTT did not go on to consider the potential application of the predominant element test in *Levob* and *Mesto*. It seems to us that, having dismissed the application of the principal/ancillary test, it was incumbent upon the FTT to do so. The predominant element test is the primary test derived from the CJEU case law. It permits of the possibility that there may be a material element of the supply, which is not ancillary to a principal element (in the sense used in *CPP*), but which does not govern the characterization of the supply because another element predominates: see for example, the software in *Levob*, the recreational facilities in *Mesto*, and the books in *MIS*.

84. In the present case, the FTT did not consider whether the post-introduction liaison services fell into that category. Judge Hellier's conclusion could only be consistent with the decision of the CJEU in *Mesto* if it could be said that the effect of the inclusion of the post-introduction liaison services within the composite supply was that the combination of the expert advice provided by Claire Sweetingham and the information about a potential match was not the predominant element of the supply. The FTT did not address that question because it did not consider the application of the predominant supply test in *Levob* and *Mesto*.

85. (In passing, we should note that that is the way in which we read Proudman J's decision in the *Amex* case: the provision of consultancy services by the UK company was not the predominant element of the supply. Viewed from the point of the view of the typical consumer, the US company, other elements were equally if not more important.)

86. We therefore agree with G&F. The FTT erred in law by failing properly to characterize the supply made by G&F and, in particular, by failing to consider the application of the predominant element test as set out by the CJEU in *Levob* and *Mesto*.

Remaking the decision

87. Having decided that the FTT Decision involved an error of law, pursuant to s12(2) of the Tribunals, Courts and Enforcement Act 2007, we must either remit the decision to the FTT or remake the decision. We will remake the decision.

88. The question before us is whether the service provided by G&F can properly be characterized as falling within the scope of Article 59(c). The parties have described the services provided by G&F in different terms, sometimes as "matchmaking services", sometimes as "introductory services". But the parties' descriptions of these services does not determine the question. We are not required to decide on the correct description of the services. We simply have to decide whether or not the services fall within the description in Article 59(c).

89. We should start by seeking to apply the predominant element test as set out by the CJEU in *Mesto*. That test requires us to take into account all of the characteristic elements of the

supply and to weigh the importance of those elements by reference to objective factors to determine the predominant element. In the present case, the FTT found that none of the key elements of the supply were merely incidental. That finding is not challenged. We take it to mean that all of the material elements of the supply – the provision of the advice through the matchmaking process, the provision of information (i.e. contact details) and the provision of the post-introduction liaison by the support team – have to be taken into account.

90. In applying that test, we have to consider what the typical consumer would regard as a qualitatively predominant element of the supply. In essence, we have to ask what is the typical consumer of the supply bargaining for? The FTT identified the typical consumer of G&F's service as a person "seeking [a partner] with a view to a long-term relationship" (FTT [72]). In our view, the qualitatively most important element to the typical consumer was the provision of the introduction to a prospective partner. That element incorporated both the advice about a potential match involved in the matchmaking process and the provision of information about the potential match. The FTT's findings at [72]-[77] are consistent with that conclusion. The FTT found that the other activities which G&F undertakes to create and deliver the advice are means by which the advice is provided not part of the supply (FTT [75]-[76]) and that the information (i.e. the details of the potential match) would only meet the typical client's purpose if the information was provided in the context of the advice (FTT [73]).

91. Given those findings, we take the view that the predominant element of the supply from the point of view of the typical consumer was the advice which was provided as part of the matchmaking service combined with the information relating to a potential match. It was these aspects of the supply that fundamentally met the typical consumer's requirements. It was what the typical consumer bargained for. The FTT found that the matchmaking advice was "expert advice" provided or supervised by Claire Sweetingham and accordingly that that advice fell within the scope of "services of consultants… or similar services" in Article 59(c). The provision of information also falls within Article 59(c). As we have mentioned above, a supply can fall within Article 59(c) even if aspects of the supply fall within more than one of the categories of supply described in Article 59(c) (*Amex* [72]).

92. In their findings, the FTT go further (at FTT [79]) to consider the circumstances in which the role of advice provided to clients of G&F may be more limited than in other cases. In such cases, the FTT explained their view that "that does not matter because in those cases where the advice was of lesser significance, the provision of information about a potential match was correspondingly larger" (FTT [79]). If and to the extent that, in this passage, the FTT was suggesting that it was appropriate to consider the nature of supplies made by G&F by reference to the views of particular consumers of that supply, such approach would be inconsistent with the application of the predominant element test in *Mesto*, which must be applied by reference to the characteristics of the supply from the point of view of the typical consumer determined by reference to objective factors. However, in our view, this finding simply confirms that the typical consumer would regard the supply as comprising predominantly a combination of expert advice and information, and the relative importance of those two aspects of the supply to individual consumers may vary. That finding is not inconsistent with the *Mesto* approach.

93. On the basis of the findings of the FTT, we do not regard the addition of the post-introduction liaison services as sufficient to disturb our conclusion that the combination of the expert advice of Claire Sweetingham and the provision of the information regarding a potential match was the predominant element of the supply made by G&F. The FTT noted that the provision of the post-introduction liaison services was not reflected in G&F's terms and conditions (FTT [84(2)]). Although the FTT found that the post-introduction liaison services were "material and important" (FTT [85]), in his reasons for the decision, Judge Hellier refers to those services as not being "sufficiently inconsequential" to be treated as simply part of the

other elements of the supply (FTT [90]). In our view, those findings are consistent with our conclusion.

94. For these reasons, we agree with G&F that the services provided by G&F were "consultancy services… or similar services… and the provision of information" falling within Article 59(c) of the Principal VAT Directive and paragraph 16(2)(d) Schedule 4A VATA. We remake the decision to that effect.

DECISION

95. For the reasons we have given above, we allow G&F's appeals.

Signed on Original

MR JUSTICE ADAM JOHNSON JUDGE ASHLEY GREENBANK

UPPER TRIBUNAL JUDGES

Release date: 25 November 2021