Neutral Citation: **[2024] UKUT 00334 (TCC)**

Case Number: UT/2023/000021

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

JUDICIAL REVIEW – HMRC decision that NHS foundation trust not entitled to refund of COS ("Contracted Out Services") VAT - whether provision of services from NHS foundation trust to local authority (in form of providing specified health care services to public) a supply for consideration under Article 2 Principal VAT Directive– yes – whether economic activity under Article 9 – yes – whether services provided by the NHS trust acting "as" a public body under "special legal regime" for purposes of Article 13 – no – claim dismissed

Heard on: 10-12 July 2024
Judgment date: xx October 2024

Before

MR JUSTICE RICHARD SMITH
JUDGE SWAMI RAGHAVAN

Between

THE KING (on the applications of)

MIDLANDS PARTNERSHIP UNIVERSITY NHS FOUNDATION TRUST

Claimant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Defendants

Representation:

For the Claimants: Denis Edwards, Counsel, instructed by Clyde & Co Claims LLP

For the Defendants: Peter Mantle, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. Following changes in the Health and Social Care Act 2012 ("**HSCA 2012**"), local authorities in England assumed responsibility for a range of health-related services previously commissioned and provided by NHS bodies such as NHS clinical commissioning groups. This judicial review concerns the VAT treatment of arrangements by which such local authorities commissioned the Claimant NHS Foundation Health Trust ("the Trust") to provide various, free at point of use health services to the public. Those free services comprised health visiting services for children, integrated sexual health services, and services relating to infection prevention and control ("**IPC**").

2. The Trust's case is that its provision of such services to the local authority were "non-business" supplies. They were not "for consideration" under Article 2 of the Principal VAT Directive ("**PVD**") or, even if they were, they were not "economic activity" (under Article 9 PVD). As such, they were outside the scope of VAT and, accordingly, "COS" (Contracted Out Services) VAT under s41 Value Added Tax Act 1994 ("**VATA**") such that the Trust can obtain a refund of input VAT on the supplies[1].

3. The Trust also argues that, even if they are not "non-business" supplies, the Trust is not a taxable person under Article 13 PVD because they were made by the Trust as a public body pursuant to a special legal regime. HMRC rejected these arguments in its decision of 24 March 2022, which the Trust seeks to judicially review (there being no statutory right of appeal against that decision). HMRC's position is that the provision of sexual health and health visiting services are exempt supplies (such that no deduction of input tax is available) and that the IPC services are business supplies and standard rated (such that the Trust is liable for output VAT but can deduct input tax).

4. On 16 January 2023, the Administrative Court (Ouseley J) granted permission for the judicial review claim. The claim was subsequently transferred to the Upper Tribunal. Although the claim before us relates to historic VAT amounting to £800,693 in the periods between 2016 and 2019, the Trust informs us that it also bears on some £2.5 million of subsequent supplies and has ongoing significant budgetary implications for both the Trust and other, similarly placed NHS bodies.

LEGAL BACKGROUND TO CLAIM

5. The statutory basis for the Trust's COS VAT reclaim and the condition that the supply is "non-business" is found in s41 VATA. The term "non-business" is a short-hand for a supply which is "not for the purpose…of any business" carried on by the public body as emphasised in the extract from s41 below:

> "…
>
> (3) Where VAT is chargeable on the supply of goods or services to a Government department…and the supply… **is not for the purpose—**

[1] In *Milton Keynes Hospitals NHS Foundation Trust v HMRC* [2020 UKUT 0231 (TCC), the UT helpfully explained (at [4] to [5]) the purpose of the COS regime (under which VAT refunds are made to public bodies). This was to avoid public bodies (generally non-taxable persons when acting as such) having themselves to undertake in-house activities that could sensibly have been outsourced simply to avoid the VAT charged by external contractors. The regime is not addressed in the PVD although some EU Member States have introduced a similar regime.

(a) of any business carried on by the department

…

then, if and to the extent that the Treasury so direct and subject to subsection (4) below, the Commissioners shall, on a claim made by the department at such time and in such form and manner as the Commissioners may determine, refund to it the amount of the VAT so chargeable.

…"

6. So far as s41 VATA is concerned, NHS foundation trusts, such as the Trust, are included within the definition of Government Department pursuant to the definitions in sub paragraph 6 and 7(c). The Treasury Direction contemplated by s41 was made by the Treasury in a Direction of 2 December 2002. Pursuant to Paragraph 2 of that Direction, the government department may claim a refund of tax charged on specified supplies. That is however subject to a condition in 3a) of the Direction which states, relevantly, that the tax refund will only be paid if "the supply of those services…is not for the purpose of …any business carried on by the department".

7. The parties agree that the principles governing the scope and principal terms pertaining to COS VAT are the same as those found in EU law. The term "business" in 3(a) of s41 VATA and in 3(a) of the Direction has the same meaning as "economic activity (Article 9 PVD). As explained in the case-law to which we will come later, it is also clear that, for a supply to constitute "economic activity", it is a necessary, but not sufficient, condition that the supply be "for consideration" (Article 2 PVD). Those two Articles provide as follows:

8. Article 2 PVD:

"The following transactions shall be subject to VAT:

(a) supply of goods for consideration…by a taxable person acting as such…"

9. Article 9 PVD:

"Taxable person' shall mean any person who, independently, carries out in any place" any economic activity, whatever the purpose or results of that activity."

10. Finally, the Trust further argues that, even if it is engaged in "economic activity" under Article 9, if it is acting "as a public authority" when doing so pursuant to s41A VATA 1994, the relevant supply will not be treated as "in the course or furtherance of a business". Under that section, no VAT would be chargeable on the supply (unless not charging VAT would lead to significant distortion of competition). Section 41A reflects Article 13 PVD. Under the principles developed by the CJEU in relation to Article 13, a body governed by public law (which it is accepted the Trust is) will be acting as such when it is subject to a "special legal regime". We also address Article 13 and the related body of domestic and CJEU jurisprudence later in this decision.

ISSUES AND REMEDY SOUGHT

11. The judicial review claim, as argued by the parties, is in essence, a dispute over the correct application of the relevant VAT legal principles to the facts of this case. Although the Trust puts its formal case on the basis of a number of different grounds, the parties agree that those turn on resolution of the following three broad issues:

(1) Were the relevant supplies in return for consideration (Article 2 PVD)?

(2) Did the supplies constitute economic activities (Article 9 PVD)?

(3) When making the supplies, was the Trust doing so as a public body acting as such (Article 13 PVD)?

12. The remedy the Trust seeks is an order

(1) declaring that:

(a) when making supplies of the services (or any of them), it is engaged in activities which are not business activities and/ or is acting as a public body acting as such pursuant to a special legal regime such that it is not a taxable person by virtue of Article 13; and

(b) the Trust is entitled to recover as COS VAT under s41 VATA.

(2) quashing HMRC's decision of 24 March 2022.

BACKGROUND NHS FRAMEWORK EVIDENCE AND FACTS

13. The evidence advanced by the Trust in support of its claim took the form of two witness statements from Mr Chris Sands, Chief Financial Officer of the Trust which, amongst the exhibits, included sample contracts between the Trust and local authorities concerned. There was no cross-examination. We accept Mr Sands' evidence of fact, albeit noting that, in providing a narrative background in some parts of the statement, he summarised statutory provisions which we were taken to directly in submission, or he offered opinion on the VAT treatment of the supplies or on the interpretation of the relevant statutory duties of the Trust even though these aspects were matters of law for the tribunal.

14. In this section, we briefly address the legal context in which the Trust carried out the services, the factual background to its service provision, and outline the key features of the contracts it entered into with local authorities. We will return to the detail of the legislation and contracts as necessary later in our discussion of the various issues.

NHS health legislation

15. Section 1 of the National Health Service Act 2006 ("**the 2006 Act**") sets out the duty on the Secretary of State to promote a "comprehensive health service" in England "to secure improvement – a) in the physical and mental health of the people of England, and b) in the prevention diagnosis and treatment of physical and mental illness". For that purpose, the Secretary of State "must exercise the functions conferred by this Act so as to secure that services are provided in accordance with this Act" (ss1(2)). The services provided as part of the health services "must be free of charge" except in so far as making and recovery of charges is expressly provided for under enactment (ss 1(4)).

Local authorities

16. HSCA 2012 inserted a new s2B (Functions of local authorities and Secretary of State as to improvement of public health) into the 2006 Act requiring that each local authority "must take such steps as it considers appropriate for improving the health of the people of England" (ss2B(2)). The steps that may be taken are stated to include matters such as providing information and advice (a), providing services or facilities designed to promote healthy living, for the prevention, diagnosis or treatment of illness (b) and (c), and making available the services of any person or any facilities (g).

17. Under s6C of the 2006 Act, Regulations may require a local authority to exercise any of the public health functions of the Secretary of State, or its own public health functions.

18. Relevant in this case, the Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch Representatives) Regulations 2013/315 ("**the 2013 Regulations**") made under various powers in the 2006 Act, including s6C, impose obligations

on local authorities to make arrangements "to secure the provision of a universal health visitor reviews" to eligible persons (Regulation 5A – Universal health visitor reviews), to "secure the provision of, open access sexual health services in its area…" (Regulation 6 – Sexual health services), and regarding protecting the health of the local population, including information and advice on arrangements to deal with infectious diseases and epidemiological surveillance (Regulation 8 – protecting the health of the local population).

19. Section 7A enables the Secretary of State to arrange for any of the Secretary's public health functions to be exercised by relevant bodies (which term includes a "local authority").

NHS foundation trusts

20. The 2006 Act refers to a number of different types of health body, such as National Health England, Clinical Commissioning Groups, NHS trusts, and NHS foundation trusts. As regards NHS foundation trusts, s43 provides:

> "**43 Provision of goods and services**
>
> (1) The principal purpose of an NHS foundation trust is the provision of goods and services for the purposes of the health service in England.
>
> (2) An NHS foundation trust may provide goods and services for any purposes related to—
>
> (a) the provision of services provided to individuals for or in connection with the prevention, diagnosis or treatment of illness, and
>
> (b) the promotion and protection of public health.
>
> (2A) An NHS foundation trust does not fulfil its principal purpose unless, in each financial year, its total income from the provision of goods and services for the purposes of the health service in England is greater than its total income from the provision of goods and services for any other purposes.
>
> (3) An NHS foundation trust may also carry on activities other than those mentioned in ... for the purpose of making additional income available in order better to carry on its principal purpose."

21. As explained in Mr Sands' evidence, the Trust was formed following a merger between South Staffordshire and Shropshire Healthcare NHS Foundation Trust and Staffordshire and Stoke on Trent Partnership NHS Trust on 1 June 2018. It provides physical and mental health, learning disability and adult social care services across Staffordshire, Stoke-on-Trent and Shropshire as well as a "vast range of community services for adults and children and specialised services such as rheumatology and rehabilitation which are delivered in venues ranging from health centres, GP practices, community hospitals and people's own homes."

22. Mr Sands also explained that the Trust is a "public benefit organisation" and that, as a "non-profit making NHS organisation, any surpluses are re-invested in improving services. In relation to any deficit for the services these would be subsidised from the Trusts overall budget."

23. The 2006 Act also concerns other NHS entities such as Clinical Commissioning Groups. Mr Sands explains how the Trust previously provided health visiting and sexual health services free to the public before 2012, with funding coming through Public Health England[2] and Clinical Commissioning Groups. The Trust itself employs staff from both the health and social care professions. (Health visitors for instance are specialist public health nurses who are either registered nurses or midwives who have undertaken a year's further post registration training

[2] An executive agency, at the relevant time, of the Department of Health and Social Care

in child health, health promotion, public health and education). The Trust also has leadership, management and HR staff to support these functions.

24. Following the 2012 changes and the imposition of statutory duties on the local authorities, the related funding now comes from the local authority concerned rather than from a Clinical Commissioning Group.

25. Mr Sands goes on to explain how, over time, local authorities decided to put these services out to tender. He describes how the Trust won local tenders and also some for out of county sexual health and health visiting (providing "children 0-19" services for Staffordshire County Council and Stoke on Trent City Council and sexual health services for Staffordshire County, Stoke on Trent, Shropshire, Telford and Wrekin, Leicester City and Leicestershire and Rutland County Councils).

Agreements between Trust and local authorities

26. Mr Sands' evidence exhibited the following sample agreements in respect of the three services in issue that were entered into between the Staffordshire and Stoke on Trent Partnership NHS ("**SSOTP**") (one of the trusts which was merged with the other to form the Trust) following the tender process undertaken by the relevant local authority:

1) *Health visiting*: an agreement between SSOTP and the Council of the City of Stoke-on-Trent (1 April 2017);

2) *Sexual health*: an agreement between SSOTP and Staffordshire County Council (1 April 2016); and

3) *IPC*: an executed agreement between SSOTP and Cheshire East Council (1 April 2016).

27. They are all lengthy documents, described as contracts, containing multiple annexes and appendices incorporating, in the case of health visiting and sexual health, reference to schedules of further particular and general conditions adapted from NHS template documents.

28. Each agreement specifies the relevant services, payment (amount and timing), and agreement duration as summarised below:

(1) *Health visiting services*:

(a) the provider is required to deliver (clause 4.1) "a progressive universal health visiting service delivering public elements of the HCP (the Healthy Child Programme) to all children 0-5 years and families in Stoke-on-Trent." At a minimum, it is expected the service will carry out an ante-natal visit and further visits at specified ages of the child.

(b) the total payment amount is £13.65 million (excluding VAT) with a duration of 3 years which the local authority could extend for an additional one or two years. Clause B8 "Charges and Payment" states "…in consideration for the provision of the Services in accordance with the terms of this Contract, the Authority shall pay the Provider the Charges". The agreement provides for monthly invoicing, with payment within 10 business days of invoice receipt.

(2) *Sexual Health*:

(a) the services to be provided encompass the full range of sexual health services (including testing and treatment of STIs, contraception and advice to be offered to those individuals requesting and/ or requiring specialist advice, screening and treatment in relation to their sexual health/contraception).

(b) the payment specified for each 12 month period was £1,773,936. The duration is 3 years extendable by 1 year by the local authorities. Payments are to be made monthly.

(3) *IPC services*:

(a) the services to be provided include infection control training, infection trend monitoring, data collection, specialist tuberculosis nurse provision and development of an infection control audits.

(b) the payment amount is £166,202 per year for 2 years, with possible extensions for further successive 12 month periods. The agreement for monthly invoicing in arrears, payable by the local authority 30 days from invoice receipt.

29. Both parties made submissions on various aspects of the contracts, including on the attractiveness of certain terms to private operators, or their ability to comply with such terms as compared with NHS bodies. Mr Sands' evidence covered similar points, including pointing out the predominance of NHS bodies as service providers, albeit mentioning some examples of private operators in other areas. Mr Sands' evidence also covered the following broad themes, namely that (1) the Trust was not performing the relevant services for profit (2). The health visiting and sexual health services were statutory services which had to be provided and could not "not be provided, or go out of business" (3) the Trust's financial record was one of running mainly at a deficit (4) the wider health impacts of providing the specified health services to the public and (5) the current trend was towards arrangements under s75 of the 2006 Act agreements involving a more collaborative approach and no tender. We address these points in further detail as appropriate in our discussion of the relevant issues.

ISSUES

30. Turning to the central issues arising on the Trust's claim, it is appropriate to note at the outset that these all concern the correct VAT analysis of the Trust's provision of services *to the local authority*. In the Trust's written argument there was some suggestion that the analysis entailed supplies of services to members of the public, one of the issues then arising being whether the local authority's payment to the Trust represented related consideration payable by a third party, the local authority. However, Mr Edwards, appearing for the Trust, helpfully confirmed at the hearing that he did not press such an analysis.

Issue 1: whether provision of services was "for consideration" under Article 2 PVD

Legal principles and approach

31. In *Wakefield College v HMRC* [2018] EWCA Civ 952, the Court of Appeal explained that satisfaction of the requirement for the relevant supply to be "for consideration" was a necessary, but not sufficient, condition for a finding of economic activity. It was "logically the first question to address" ([52]).

32. In *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) (at [14]), the European Court held that a supply is only "for consideration" within the meaning of Article 2, and hence taxable, if:

> "there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient"

33. That "legal relationship" has also been described in terms of a "direct link" between the supply of goods or services and the consideration provided by the recipient (*Apple & Pear Development Council v C&E Comrs* Case 102/86, at [11]; and *Gemeente Borsele* Case C-

520/14, at [24]-[26], or as a "quid pro quo" (*Apple & Pear* [1988] STC 221, Advocate General's opinion at pg 232h)).

34. As regards the amount of consideration, in summarising the law, the Court of Appeal in *Wakefield* explained (at [52]) that there was no need for the consideration to be equal in value to that of the goods or services. It was simply the price at which the goods or services were supplied. As the CJEU noted in *Borsele* (at [26]), it did not matter that the price paid was higher or lower than the cost price.

35. Regarding the proper legal *approach* to identifying whether there is consideration for VAT purposes under Article 2, it is clear from the UK Supreme Court's decisions in *Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners* [2014] UKSC 16, (at [31]-[32]) and *Airtours Holidays Transport Ltd v Revenue and Customs Commissioners* [2016] UKSC 21 (at [47]) that "when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts." At [49], the Supreme Court noted that the CJEU had observed in *Newey* (Case C-653/11) at [40] that "[e]conomic and commercial realities" are fundamental and that "the contractual position normally reflects the economic and commercial reality of the transactions".

36. No dispute arises around the above well-established core legal principles of when a supply is "for consideration" under Article 2 or the relevant legal approach to be taken. The dispute arises when it comes to their application to the particular circumstances of the Trust.

Parties' submissions in summary

37. The Trust's essential point is that, when the contracts are considered in their wider context and economic reality, its provision of services to the relevant local authority is not properly regarded as "for consideration". Crucially, the provision is by one public body to another of state funded public healthcare services that the NHS is legally required to make to patients who wish them. Given its functions and duties as part of the state-funded comprehensive public health service, the Trust submits that it is "highly-contrived" to say that there is a direct link between the sums it receives under "contracts" with local authorities and the supplies of services: 1) the sums paid reflect grants of public money, the contracts merely being mechanisms through which that public money is routed 2) the Trust is bound to provide the services "as part of its free, integrated, holistic and comprehensive healthcare provision" under the NHS Act and NHS Constitution and 3) the true recipients are individuals who pay nothing for the services – there is accordingly no "price" as such for the services which must be provided even if the "price" is insufficient to cover their cost.

38. HMRC's core submission is that the necessary direct link is to be straightforwardly found in the agreements. Pursuant to these, the Trust is obliged to carry out specific identified services in compliance with specified service standards. In return for doing so, the Trust is entitled to payment from the local authority. There is nothing in the surrounding circumstances to vitiate the proper VAT analysis based on that contractual characterisation. The fact that the bodies and the funding of the services are public in nature is irrelevant under CJEU case-law. As Mr Mantle submitted for HMRC, this is not a "grant-funding with conditions" type of case.

Discussion: Issue 1 – is the Trust's supply of services to the local authority "for consideration?

39. Starting, consistent with the proper approach indicated by the case-law above, with the contractual position, each of the contracts clearly reflects an obligation on the Trust to provide services and an obligation on the local authority to make payment. The two obligations are plainly reciprocal. Each contract also contains termination provisions, entitling the local

authority to cease paying if there are failures in the agreed service level, or for the Trust to terminate its service obligations if the local authority defaults on payment. On a straightforward contractual analysis, the requisite legal relationship or direct link between the remuneration received and the service given is undoubtedly present.

40. The Trust does not disavow the existence of the contract but emphasises the need to look at the wider reality and public health provision context in which the contract subsists. Relying on the matters identified below, Mr Edwards submits that, when that is done, the requisite direct link is not present.

Public duty and public funding

41. A key feature relied on by the Trust is that provision of the relevant services is a matter of statutory duty.

42. Mr Sands' evidence refers (at [13]) to sexual health and health visiting services being statutory services, going on to explain:

> "These services "cannot not be provided, or go out of business". They are services which must be provided. If these services were running at a significant loss, there would be negotiations with commissioners, but NHS providers would ensure continuity of provision while funding was negotiated."

43. The question of what statutory duties there are and where those duties fall is, of course, a matter of law. We have set out above the 2013 Regulations (see [18]) which impose specific duties in respect of health visiting, sexual health and IPC on local authorities. In respect of the Trust, there was some dispute about the interpretation of s43 of the 2006 Act (set out at [20] above). Mr Edwards sought to argue that it was not realistic to read the reference to "may" as meaning that the Trust had a discretion not to exercise the powers identified there. NHS foundation trusts were a central part of the country's public health architecture and key to the delivery of the Secretary of State's duty to provide a comprehensive health service. If s43 was not interpreted as a statutory duty, the NHS foundation trust would have no raison d'être.

44. We found this argument unavailing: the legislative scheme imposes on local authorities specific *duties* in respect of the provision of the specific health services with which this case is concerned. The fact that bodies such as the Trust are themselves *empowered* to carry out those services by dint of their powers to provide services more broadly to prevent, diagnose and treat illness or to protect and promote public health does not mean that they are subject to the same duties. To the contrary, the straightforward interpretation of the words of s43 (and the use of "may") is that the Trust is not so subject.

45. However, as HMRC point out, even if that analysis is wrong, and the Trust were under such a duty, that would still not preclude the provision of the relevant service to the local authority being "for consideration". The relevance of such provision being made under a public duty was considered in *Lajvér Meliorációs Nonprofit Kft* (Case C-263/15). The case concerned not for profit companies which operated works including a water disposal system on agricultural land. The operations included the maintenance of public roads to ensure water flowed freely, such maintenance being an obligation imposed by law. The services were funded publicly but also by an operating fee charged to landowners. Issues arose to whether such payment was "for consideration" and the activity "economic activity". The court at [41] noted that the road maintenance obligation had:

> "…no bearing on the assessment as to whether the activity at issue in the main proceedings is effected 'for consideration', such a fact not being liable to call into question the classification of such an activity as a 'supply of services' or

> the direct link between the service provided and the consideration given for it."

46. It explained at [42]:

> "It has been held that the fact that the activity in question consists in the performance of duties conferred and regulated by law in the public interest is irrelevant for the purposes of determining whether that activity can be classified as a supply of services effected for consideration…"

47. The Trust also argues the significance of the *funding* by the local authorities for the services performed by the Trust being from public money. However, as HMRC point out, the case-law does not appear to attach the same significance to this aspect either. Earlier at [38] of *Lajver*, the CJEU explained that the concept of "economic activity" was :

> "objective in nature and applies not only without regard to the purpose or results of the transactions concerned but also without regard to the method of financing chosen by the operator concerned, which also holds true in relation to public subsidies".

48. There is no reason to suppose that the public nature of the means of financing the payment to the Trust for the relevant services (which did not appear to us be in dispute) would preclude the payment being "for consideration" either. As noted in *Office des Produits Wallons* (Case C-184/00) (as referred to by the Upper Tribunal in *Colchester Institute v HMRC* [2020] UKUT 368 (TCC)) consideration (in that case, third party consideration) could take the form of a subsidy paid from public funds so long as the subsidy bore a direct link with the services in issue. The focus thus remains on the requisite relationship between the payment and the services.

49. Equally, as set out in [38] of *Lajver* above, there is no reason why *the result* of the transactions (here that members of the public receive free health services) should bear on the question of whether there is the requisite legal relationship between the payment the local authority makes on the one hand and the services the Trust provides on the other. We thus reject the Trust's argument that it was relevant that the "true recipients" of the service provision were the public who were getting health care service for free, which meant the Trust was providing services without a "price" in any meaningful sense. No difficulty arises, in our view, in the local authority being meaningfully considered as the recipient of the service and paying the price for its provision even if the ultimate beneficiary is the public from which no payment is sought. Indeed, it is through the Trust's service provision to the local authority that the local authority is able to discharge its duty under the 2013 Regulations. In a similar vein, Mr Edwards submitted that it was relevant that there was a benefit to the interests of the NHS as a whole in the Trust providing the services, thereby avoiding greater "downstream" costs to the NHS otherwise arising from poorer public health. However, that there may be such important collateral benefits does not, in our view, undermine the proper analysis that the services were carried out by the Trust for consideration.

50. As regards the amount of payment, Mr Edwards also submitted that it was significant to the analysis that the sums did not take account of the Trust's overheads. That was, he suggested, indicative of the performance of the duties being for the community as a whole rather than a simple *quid pro quo*. Again, the fact that the service provision would have wider benefits to the public is no way inconsistent with it being of clear benefit to the local authority. HMRC rightly pointed to the lack of specific evidence of the operating costs for provision of the services but, even if the point is assumed in the Trust's favour, the case-law is clear that a lack of correspondence to market value, or cost of provision does not preclude there being consideration (see for instance [52] *Wakefield* referred to at [34] above) and more recently in

the *Latvian Information Case* (Case C-87/23) at ([28]) (referred to in more detail under the next issue).

51. Mr Edwards' reliance on the Trust's treatment in its accounts of the payments for these services as "health income" (as opposed to "other income" - see the provisions of s43(2A) [20]) above) is also beside the point. However the income is described and accounted for by the recipient, the real question remains whether the income is payment for the relevant services pursuant to the requisite legal relationship. The evidence for such treatment by the Trust was not in any case clear but, even if it had been, there would be nothing inconsistent with income treated as health income by the Trust amounting to consideration for VAT purposes for the provision of the relevant health services.

52. Drawing on the Advocate General's reasoning in *Apple & Pear*, Mr Edwards submitted that the service provision was not "for consideration" because it was not consensual and because the local authority lacked control (see 234g and 235f). *Apple and Pear* concerned whether a statutorily imposed charge on apple and pear growers was consideration for supplies by the Council (whose functions related to promotion of the growers' industry). The ECJ concluded it was not; the benefits accrued to the whole industry. That position was contrasted with an earlier scheme the Council ran (the Kingdom Scheme), funded part by grant and part by voluntary charges for services directed toward the specific growers. Supplies under that scheme were for consideration.

53. We consider that the Advocate General's references to lack of consent and control can readily be understood in the context of the particular facts of that case in terms of explaining why there was not the requisite link between the growers' payment and what the Council did for those growers in return. Neither of those factors is relevant in the same way on the facts here. The local authority was not mandated to make the payment to the Trust; it could choose whether to carry out the duties itself or to award the contract to someone else. Nor did the local authority lack control over what the service provider did. It could stipulate (in quite prescriptive terms as can be seen from the detail of the service descriptions in the agreements) what the service provider was required to do.

54. Standing back from all these arguments, none of the features relied on by the Trust, whether concerning the public nature of the bodies involved, the provision of the service or the funding, either alone or in combination, provides a basis, in our view, to suggest that the contractual position, according to which the Trust provides services to the local authority in return for payment, did not amount to a supply "for consideration". The agreement is not simply, as Mr Edwards suggests, a mechanism for transfer of public funds but a contract under which services are provided in return for payment. His submission that the agreements were "not the product of hard-nosed negotiations in which risks are allocated" does not implicate the legal test for consideration for VAT purposes and does not reflect the evidence in any event, Mr Sands confirming that the contracts were "negotiated". In our judgment, the contractual position does reflect the economic reality and there are no relevant vitiating facts.

55. Although Mr Edwards submitted that it was unrealistic to regard the payment as being given in return for services, in agreement with Mr Mantle, we consider it would be unrealistic to consider the opposite to be true. There would be no sense in the local authorities giving money away without any obligation on the counterparty, in this case the Trust, to provide the services contracted for. And from the service provider's perspective, the fact that it was possible, as the Trust has done in some cases, to successfully bid to undertake services outside of the local area covered by the NHS foundation trust (see [25]) reinforces the point that the Trust was not carrying out these services to the local authority because it was obliged to do so, or that it is doing so for free. The Trust's reference to *Hong Kong Trade Development Council*

(Case 89/81) for the proposition that goods or services provided free are not supplied for consideration does not therefore assist; the contractual analysis and the economic reality confirm that the Trust performed the services in return for the payments from the local authority.

56. Mr Edwards also relied on passages in the same case conveying the sense of there being a negotiation and a bargain being struck which he submitted was inapposite regarding the position here of public bodies dealing with other public bodies and carrying out public functions. However, it is clear there was a competitive tender process. Even if NHS bodies might comprise the preponderance of tenderers, the public bodies here clearly reached their own bargain. As Mr Sands confirmed, this was after those parties had undertaken their own negotiation.

57. In our judgment, the payments made by the local authorities under the respective contracts were clearly "for consideration" for the purposes of Article 2. The Trust's case on this issue therefore fails.

58. Regarding the Trust's argument that it was inconsistent to treat the supply as "non-business" when all that had changed was the change in the funding entity from Clinical Care Commissioning Groups/ Public Health England to the local authorities - the "movement of some statutory deckchairs" as Mr Edwards put it - we express no view on whether the previous treatment was correct. The Trust's judicial review claim is in respect of the correct legal treatment of the three specific supplies in the specific period between 2016 and 2019. That was correspondingly the focus of the evidence before us. We did not receive any detailed evidence on those prior arrangements and what, if any, agreements were in place and, if so, what their terms were. For similar reasons, it would not be appropriate to express a view on the correctness of HMRC's treatment of other types of healthcare supply or on Mr Edwards' more general submission that there are very many contracts performed within the NHS system, in respect of which, he says, HMRC do not treat the relevant supplies as being "for consideration".

Issue 2: is the supply "economic activity" under Article 9 PVD?

59. The next issue is whether the activity in question (the supply for consideration of services from the Trust to the local authority) is an economic activity within the meaning of Article 9 PVD.

60. In *Wakefield*, the issue was whether supply of courses to students paying subsidised fees was an economic activity. The Court of Appeal undertook a rigorous analysis, unravelling the principles established by the CJEU jurisprudence on the meaning of "economic activity" under Article 9, reconciling how they sat with the "for consideration" requirement under Article 2. At [53], the Court noted that satisfaction of the test of whether a supply was "for consideration" did not give rise to a "presumption or general rule that the supply constitutes an economic activity" but that, as the Advocate General had remarked in *Borsele*, "the same outcomes may often be expected".

61. The Court of Appeal explained, following its review of the case-law, that "the issue is whether the supply is made for the purposes of obtaining income therefrom on a continuing basis" **(**[55]) and that required:

> "a wide-ranging, not a narrow enquiry. All the objective circumstances in which the goods or services are supplied must be examined….this does not include subjective factors such as whether the supplier is aiming to make a profit."

62. The question of "purpose" under Article 9 was "an entirely objective enquiry" and "fact-sensitive". Regarding the CJEU cases of *Commission v Finland* (Case C-246/08) (supply of

legal aid services) and *Borsele* (school transport), to which we were referred as well, the Court noted that these provided "helpful pointers to at least some of the factors relevant" to subsidised educational activities but that there was not "a checklist of factors to work through" and that "[e]ven where the same factors are present they may assume different relative importance in different cases".

Discussion on Issue 2: whether economic activity

63. As the Court of Appeal clarified in *Wakefield*, the key question for whether the "economic activity" requirement is satisfied is whether the supply is "…made for the purpose of obtaining income".

64. Many of the Trust's submissions on this issue overlapped to a large extent with those under Article 2 regarding the activity being one carried out by public bodies in line with public duties and with public funding. However a central tenet of the Trust's case on Issue 2 was that the provision of healthcare services by the Trust was not operated, or for that matter realistically capable of being operated, in the way that a private operator seeking profit would do it. Rather, the Trust's activity reflected the performance of its statutory functions. The very fact that various constraints were imposed on service operators undertaking the specified health services meant that it was an unattractive activity for private operators to take on. That reflected the public health nature of the activity and the fact that it was one typically carried out by public bodies.

65. HMRC's response, in brief, is that the existence of a statutory duty or function underlying the particular activity is legally irrelevant to the analysis whether that activity is "economic". Moreover, it was wrong, as a matter of law, to make a comparison with a *profit-seeking* private operator.

Public duty and public funding

66. Turning then to the relevance of the activity being carried out as a matter of public duty, as already indicated above, the court in *Lajver* has indicated that this factor is not relevant (see [45] and [46] above).

67. Similarly in *Commission v Finland* where the question arose as to whether legal aid services provided by public offices pursuant to legally regulated duties, in return for part payment, constituted economic activities, the CJEU held at [40]:

> "…in view of the objective character of the term 'economic activities', the fact that the activity of the public offices consists in the performance of duties which are conferred and regulated by law, in the public interest and without any business or commercial objective, is in that regard irrelevant.".

68. As to the relevance of the funding being public funding, the Trust's skeleton noted that the CJEU in *Commission v Finland* had found that, despite the individual's fee contribution being consideration, there was nevertheless no economic activity. On that basis, the Trust argues that where public funding "comes first" (in the sense the public funding was needed for the services to function in the first place) there is no economic activity. We do not agree that this proposition follows. The focus of enquiry in *Commission v Finland* was on the part payments made by individuals. It was those payments which comprised the relevant "income" in respect of which the question was asked: was the supply made for the "purpose of obtaining income"? There was no suggestion that the public funding received by the public offices providing the legal aid services was reflected in the consideration for those supplies. As such, the question of whether there was a "purpose of obtaining" (publicly funded) income so as to give rise to an economic activity did not arise. By contrast, we have concluded under Issue 1 that the publicly funded payment made by the local authorities to the Trust did constitute consideration for the provision of the relevant health services in this case.

Comparison with how activity typically carried out in market

69. The other legal point of contention concerns the nature of any comparison between the taxpayer's service provision and how the services are usually carried out. It is not in dispute that this can be a relevant factor (as noted in *Wakefield* (at [75]) and applied to the facts there (at [85]), the Court of Appeal observing that the viability of the "market in the provision of further and higher education" was "underpinned by a combination of grant aid and fees" and that there was no reason to suppose that the taxpayer college in that case was anything other than a "typical participant in that market"). The particular issue concerns whether the appropriate comparison is with a profit seeking operator acting as an entrepreneur.

70. In support of such a contention, Mr Edwards' submissions relied heavily on the case of *Gmina O* (Case C-612/21) and, in particular, the reasoning in the Advocate General's opinion. The facts concerned a municipal authority scheme under which it arranged for contractors to install renewable energy in the houses of individual residents, with the residents making a contribution of 25%, the remaining 75% being funded by another higher level authority (the provincial authority).

71. In her discussion of whether the service could be classified as economic activity, the Advocate General noted (at [50]) "the question of whether the amount of compensation was determined on the basis of criteria which ensured that it was sufficient to cover the operating costs of the provider of the service may be a relevant factor" and "the Court has denied activity specifically on the grounds that the contributions paid by the recipients of the service concerned covered only a small part of the operating costs incurred by the provider" (footnoting cases including *Commission v Finland* and *Borsele*). At [52], she pointed to various "noticeable differences from the activity of a typical taxpayer with a comparable job (here, "profession of solar energy system installer"), including (at [53]) that the municipal authority's organisational costs were not added, with a profit margin, to the price of the service. Regarding the 75% contribution, the Advocate General noted (at [55]) the higher level provincial authority's decision as to whether to make that contribution was only made after the installation work had been carried out. There thus remained "uncertainty atypical for a "normal" taxable person, over a fee that at most covers the costs. (i.e. uncertainty over whether the provincial authority would decide to provide its 75% contribution):

> "…In this respect, the Municipality is not developing an entrepreneurial initiative nor does it have any chance to make a profit… As a result, it only bears the risk of loss. No typical taxable person would run his or her business in such a way that he organises something for a customer, but only bears the risk of loss and does not have any chance of making a profit, even in the very long term.
>
> In addition, the reason behind the Municipality's actions does not relate to economics. It is not about generating further revenue or maximising existing profits or about achieving surpluses of any kind. Instead, reasons based on general interest (environmental protection and energy security), which benefit everyone or individuals, are the primary considerations. The typical taxable person acts differently."

72. The CJEU agreed that the activity was not economic activity for Article 9 purposes, noting (at [35]) that "all the circumstances in which [the activity] is supplied have to be examined … by making a case-by-case assessment, referring to the typical conduct of an active entrepreneur in the field concerned, here, an RES installer". The reasoning of the CJEU contained substantially similar points. The court noted that the payments received remained "structurally lower than the total costs incurred", contrasting an RES installer "which would have endeavoured, by setting its prices, to absorb its costs and to make a profit" and also (at

[39]) that the timing uncertainty of the 75% contribution meant it did not appear "economically viable" for an RES installer to only seek a 25% contribution.

73. Mr Edwards' submission was that the Trust was motivated by public interest considerations of diagnosing and treating illness for the long term good; they were not those of an "active entrepreneur" looking for a return. Mr Sands' evidence explained:

> "the services are not profit led and the Trust strives to maintain the balance between providing free NHS care at the point of use to patients and meeting its operating costs. The promotion and protection of public health is a principle purpose of the Trust for the health service. The Trust has a financial duty to breakeven each year."

74. Moreover, Mr Edwards highlighted that the typical operators in the "market", such as it was, were public sector NHS bodies like the Trust. In addition, he pointed to various clauses in the contracts with the local authorities which meant that they were unattractive to private operators seeking a return. For instance, there were clauses on continuous improvement, some anticipating that payments would decrease over time with the efficiency targets specified, and extensive equality and diversity obligations and reference to detailed health guidance. Mr Edwards suggested that public sector NHS bodies with existing resources would be far better equipped to comply with these and that they would be unattractive to private operators. Similarly, he argued that the dispute resolution clauses in the contracts were not of the type one would expect to see in a usual commercial contract.

75. Mr Sands' evidence explained that, although the relevant services were tendered openly:

> "…the strict parameters around the national specification, quality standards, breadth of the service tendered in an integrated model, and the tight financial constraint favour[ed] large bodies with historic asset base and experience and economy of scale mean[t] NHS providers have remained predominant."

76. His evidence also stated that: "[h]igh set up costs, addressing TUPE liabilities and low profit margins with tighter constraint in local authority funding could be prohibiting factors for bodies outside NHS". Mr Sands' evidence went on to note the predominance of NHS bodies amongst the service providers. However he acknowledged that there were some instances "where non-nhs bodies [were] commissioned to deliver services inhouse or private (Virgin Care) and not-for profits organisations". In respect of sexual health services, he confirms the presence of Virgin in the North East and Cheshire East and West and CICs (Community Interest Companies) such as Spectrum in Essex and Southend.

77. In agreement with Mr Mantle, however, we accept that the central point underpinning the above arguments, the suggested contrast with a profit seeking entrepreneur, is wide of the mark, not least given the CJEU's latest exposition of principle in the *Latvian Information Rights case.*

78. That case concerned an association not permitted to make a profit by national law and co-financed by public subsidies which arranged projects and paid for third party companies to supply training services. The association received payments from the training recipients which it treated as consideration for taxable supplies and, in respect of which, it deducted input tax on the third party company invoices. The deduction was denied by the tax authority, including for the association's lack of profit-making objective and the expectation that no profits would be made.

79. The CJEU concluded that the association's status as non-profit making did not preclude it from being regarded as a taxable person carrying out an economic activity. Referring to the case-by-case assessment by reference to "the typical conduct of an active entrepreneur in the field concerned" indicated in *Gmina O* (and *Gmina L* – a similar case concerning a municipality

which commissioned third party companies to carry out asbestos removal for residents), the CJEU explained:

> "47 In that regard, it is true that the fact that, in fixing the cost of the supply of training services which it invoices to the recipients of those services, the Association seeks solely to cover its operating costs in order to achieve financial equilibrium appears not to correspond to the typical conduct of any entrepreneur, which is to strive for profitability.
>
> 48 However, that analysis does not correspond to the wording of Article 9(1) of Directive 2006/112 and is also not supported by the facts set out in the order for reference.
>
> 49 First of all, it follows from the wording of that provision that 'taxable person' means any person who, independently, carries out any economic activity, whatever the purpose or results of that activity. It follows that the Association's aim of simply balancing its accounts is not sufficient to rule out the possibility that it is carrying out an economic activity. For the same reason, an undertaking which seek to make a profit but the activity of which proves to be loss-making on a long-term basis, for example due to underperformance, would nevertheless remain a taxable person if an analysis of all the circumstances in which that activity is carried out, referred to in paragraph 46 of the present judgment, leads to that activity being regarded as economic in nature."

80. This reasoning also reflects that of Advocate General Kokott in the case (the same Advocate General who had given the opinion in both *Gmina O* referred to above and in *Gmina L*). From this, it is clear that the fact the Trust does not have a purpose of making profits and therefore might not carry out the activity in the same way as a profit seeking entrepreneur does not mean that it is not carrying out an economic activity.

81. In any event, none of the features relied upon by the Trust would appear to prevent a private operator providing the relevant services, at least on a not for profit basis. To the extent there were "strict parameters around the national specification, quality standards", that appears simply to reflect that the healthcare market is, for good reason, highly regulated. The evidence that there are in fact private operators in some regions shows that it is possible for such private operators to form part of the market. Nor were we persuaded that certain aspects relied on, such as the type of dispute resolution provision, advanced the analysis. Under the sexual health contract dispute resolution clause, where the commissioning body was, as here, a local authority, the mediation contemplated was to be arranged by CEDR. That remained the case irrespective of whether the provider was an NHS foundation trust or a private body. (The provision of an NHS body nominated mediator only applied where both the commissioner and provider were NHS bodies.). Nor was there any evidence that private operators would have any greater difficulty complying with the other matters relied on such as the extensive equality and diversity requirements.

82. Mr Edwards argued that the private operator presence is so negligible that there is, in effect, no market. However, taking the position presented by Mr Sands in his evidence, and even ignoring those private operators which are known to engage in this area, we would not see any difficulty with services put out for tender by local authorities and NHS bodies, either local to the area or out of area, bidding to carry them out in return for income, themselves being a market, albeit one which operates within the broader framework of the public health system. The fact the competitors are public bodies does not make it any less of a market or mean that those participating in it could not be capable of carrying out economic activity for VAT purposes. Mr Edwards observed that this is not the type of case in which a public body is "delving into pre-existing market to supply services as part of public service activities". We

understand this to mean that is not a case where a public body is doing something outside its core function that private operators readily provide, such as car parking or cleaning services. However that does not prevent the provision of the relevant services here to local authorities being viewed as a market in its own right. In a similar vein, and for similar reasons as we explained under Issue 1, it is nothing to the point, that the Trust treats the income as "health income" rather than "other" (see [51] above).

83. As to the Trust's argument regarding the extent to which the income received covers its operating costs of the service provision, and the extent to which it provides these at a loss, it is difficult to gain any meaningful picture in light of the lack of specific evidence. As HMRC highlighted, no figures for operating costs have been provided for any years in the period of claim. Mr Sands' evidence states that:

> "Having looked at the service line reporting information for children's services 0-19 and Sexual Health services, I can see that there is a deficit in each year the Trust has provided these services with the exception being 19/20 (the Trust did not collect the information in 20/21 in a relevant format as the work was stood down for Covid; and no deficit in 19/20 is likely to be an implication of Covid though I would need to undertake further research to confirm that).
>
> The overall picture is, however, very clear: both these services have made a loss in 3 of the relevant 4 years, which is consistent with the Trust's position that it provides these services as key core services which have to be subsidised from other Trust – that is public, NHS – funds."

84. However, no figures regarding the amount of deficit in the years of claim are provided and we were not taken to any corresponding evidence for IPC. As Mr Mantle points out, such evidence as there is shows that it was possible in one year to make a surplus. It was also not explained how the Covid pandemic would account for a surplus in health visiting services and sexual health services for the period 19/20 given that those services would presumably have continued to be provided until the wider impacts of the pandemic were felt towards the end of that period in March 2020. Mr Sands' evidence also mentioned that:

> "Due to the reducing absolute and real term level of funding through the public health grant, and the core nature of these services to the NHS and our statutory duties, these services are currently being provided at a loss on a fully cost absorbed basis. For 2022/23, the children's services across the Trust ended the financial year with a deficit of £361,000, against a deficit plan of £439,000. For 2022/23, the sexual health services across the Trust outturn with a deficit of £577,000, against a deficit plan of £736,000. These deficits were funded through the Trust's overall financial position which reported a small surplus."

85. Again, no information is provided regarding the IPC figures but as regards health visiting and sexual health, taking account of the large scale of the funding amounts (several millions of pounds per year for health visiting, £1.4 million for sexual health), it does not appear to us that the local authority payments were income that was so insignificant as to call into question the Trust's service provision being "for the purpose of obtaining income". That remained so even taking account the downward trend in funding Mr Sands referred to.

86. Referring to Mr Sands' evidence regarding the need to continue provision despite funding cuts, Mr Edwards submitted that it was significant that unlike a private operator, the Trust could not simply "hand back" the contract if the "economics" did not work but would have to continue to provide the services as part of its statutory public health care responsibilities. We are not persuaded that this argument is correct:

(1) As explained above (see [43] to [44]) the Trust (as opposed to the local authority) does not appear to be under a statutory duty to provide the relevant services.

(2) There was nothing to suggest from the sample contracts for the services in the periods of claim that the specified amounts could be unilaterally reduced during the currency of the agreement or that the effect of any reduction was unpredictable. (Although there was provision for yearly income to reduce in contemplation of the services being provided more efficiently - see [74] above - those amounts, or else the agreement mechanism by which the amounts would be determined, were agreed at the outset.) We also note that the contracts each contain termination provisions which would allow the service provider ultimately to terminate for breach (including for non-payment) and, in such event, an orderly hand over is contemplated. Such provisions do not suggest the Trust would have to continue providing the services without any payment.

(3) Situations where a contractor cannot "hand back a contract" because the "economics do not work" can just as easily arise with a private contractor.

87. Returning to the question of whether the purpose of the supply to the local authorities is obtaining income on a continuing basis, HMRC draws attention to the long duration of the contracts and the large absolute payments in return for carrying out the activity. We agree both features in this case point towards the Trust carrying out the services in order to obtain income from the local authority and to the economic activity requirement in Article 9 PVD being satisfied. Regarding whether the payments cover costs, as discussed, it is no impediment to finding economic activity that they do not. But in any case, as Mr Mantle points out, such evidence as there is shows that the income derived from the contracts with the local authorities is not insignificant. There is nothing to indicate the Trust would provide these services without obtaining the payments it does.

88. In addition, as to the wider circumstances, the fact that the Trust has gone to the not insignificant trouble and expense, in competition with other market participants, of putting a tender together to bid for such service provision in return for obtaining income not only in its own area but also, in certain cases, outside is also consistent with the presence of the requisite purpose of obtaining income. Together, all of these factors suggest to us that the relevant supplies are economic activity for the purposes of Article 9 PVD.

89. In terms of comparison with the facts of other decided cases, in line with the way the case was argued before us, we do not consider a detailed analysis is called for. Both parties rightly acknowledged that the question of economic activity was fact sensitive. They also both note that VAT case-law recognises that a small change in the facts can change the analysis. If, however, we were to test some of the facts here against cases where no economic activity was found, it is clear there is some distance between them. So for instance, in *Commission v Finland* and *Borsele*, the income in question was viewed as small and in *Gmina O* there was a lack of permanence and certainty as regards the reimbursement. Neither applies here in the context of the monthly contractual payments operating over multiple years.

90. Finally, in oral submission, Mr Edwards queried whether a public body reliant on public funds could be said to be a "person who, <u>independently</u>, carries out" (emphasis added) the economic activity, as required by the terms of Article 9 PVD. That was not a point referred to in the claim or skeleton argument but, in any case, we reject it. As Mr Mantle explained, the requirement to carry out the activity "independently" speaks to those situations where, for example, employees of a company are not regarded as independent from a company. On the facts here, the Trust is clearly acting as an independent body.

91. For these reasons, in our judgment each of the relevant supplies by the Trust to the local authority was economic activity. The Trust's case on Issue 2 therefore fails.

Issue 3: Engaging in the supplies of the services as a public authority - special legal regime

92. The Trust's case is that, even if (as we have found) its provision of services to local authorities was "for consideration" under Article 2 PVD, and "economic activity" under Article 9 PVD, such provision is nevertheless "non-business" because, pursuant to the first paragraph of Article 13 PVD the Trust is not a taxable person. That Article provides as follows:

> "**Article 13**
>
> 1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.
>
> However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.
>
> ...."

93. The Trust argues that it is not a taxable person under the first paragraph above because the relevant activities are engaged in "as" a public authority (there is no dispute the trust is a body "governed by public law").

94. The relevant interpretative principles for what is meant by a public authority engaging "as" such were considered by the CJEU in *Comune di Carpaneto Piacentino and others* (Case C-129/88). The CJEU explained (at [15]) (by reference to the equivalent provision of the predecessor legislation) that it was "the way in which the activities [were] carried out that determine[d] the scope of the treatment of public bodies as non-taxable persons" and that in so far as the provision:

> "15… makes such treatment of bodies governed by public law conditional on their acting "as public authorities", it excludes therefrom activities engaged in by them not as bodies governed by public law but as persons subject to private law. Consequently, the only criterion making it possible to distinguish with certainty between those two categories of activity is the legal regime applicable under national law.
>
> 16. It follows that the bodies governed by public law…engage in activities "as public authorities" within the meaning of that provision when they do so under the special legal regime applicable to them. On the other hand, when they act under the same legal conditions as those that apply to private traders, they cannot be regarded as acting "as public authorities"

95. The subsequent European and domestic jurisprudence on this aspect of Article 13, which had continued to reiterate the "special legal regime" requirement above, was the subject of detailed consideration earlier this year by the Court of Appeal in *Northumbria Healthcare NHS Foundation Trust v HMRC* [2024] EWCA 177. The issue there concerned the VAT treatment of charges for the provision of hospital car parking facilities by the taxpayer health trust appellant. The Court of Appeal distilled a number of principles, those most relevant to this case being that:

> (1) The sole test is whether the activities are engaged in under a special legal regime, or under the same legal conditions as private operators ([103]).

(2) The test draws a contrast between public authorities engaging in activities under a special legal regime applicable to them, on the one hand, and acting under the 'same legal conditions' as private operators on the other ([104]).

(3) The question is whether there are "legal powers, rules or restrictions that impact on the way in which the public authority carries on the activity and which do not apply to private operators? That is consistent with the CJEU's focus on the way in which an activity is carried on." ([105]).

(4) "The powers in question need to have a real impact on the activity in order to amount to a special legal regime … the condition should have an operative legal impact or effect on the way in which the activity may lawfully be carried out." ([106]).

(5) The national court must "analyse all the conditions laid down by national law for the pursuit of the activity". No distinction is drawn as to the source of the conditions. Guidance and a duty to adhere to it may constitute a form of law ([115] and [121]).

96. In the course of their submissions, HMRC also suggested that the legal conditions could not be "generic" but had to be specific ones. We were not persuaded that this requirement was reflected in the case-law to which we were referred and note that such requirement was not indicated in the Court of Appeal's comprehensive summary of the law in this area. Whether a legal condition (generic or specific) had real impact on the way a particular activity was carried out would depend on the analysis of the application of the statutory provision to the facts. The mere general nature of the rule would not exclude it from consideration in the first place.

Article 13 PVD- Application to the facts

97. The Trust's case is that there are number of pieces of legislation and guidance which constitute a special legal regime in this case, thereby satisfying the requirement in the first paragraph of Article 13. In this section we address that legislation and guidance. However, as we explain in more detail below, we have come to the view that the legal provisions and guidance relied on by the Trust do not fulfil the "special legal regime" requirement. In broad summary, this is either because those legal provisions do not, upon analysis, actually apply to the Trust or, if they do, they are not ones that have a real impact on the Trust's activity in respect of its provision of services to the local authority. Moreover, even to the extent it can be said that any do impact on the way the activity is carried out, this is not unique to the Trust but would apply to public and private operators alike such that it cannot be said that the Trusts are subject to legal conditions which their private operator counterparts are not.

NHS legislation

98. The Trust points out that the NHS related legislation is replete with provisions which would only apply to the Trust as opposed to private operators when performing its public health functions. We have set out much of this legislation above by way of the background (see [15] to [20] above). The Trust points, for example, to the s1 duty in the 2006 Act to promote a comprehensive health service, in respect of which it is submitted the Trust performs a fundamental role. We do not disagree that the Trust and others bodies like it undoubtedly play a key role in the provision of health services but, as HMRC point out, so far as the duty imposed by s1 of the 2006 Act is concerned, this falls on the Secretary of State who is not the same person as the Trust (as other provisions referring to the two in distinction, such as s43, make clear). It is also true that the Court of Appeal in *Northumbria* specifically mentioned the s1 duty (at [124]) but that foreshadowed the statutory guidance in that case relied on by the taxpayer (the 2015 Parking Principles which had been issued pursuant to the s2 of the 2006 Act).

99. Other 2006 Act provisions which the Trust relies on such as s2B, s6C (and the 2013 Regulations made thereunder) and s7A are similarly not relevant to NHS foundation health trusts, the relevant duties falling on local authorities.

100. The Trust also points to the following 2006 Act provisions which we accept *do* refer to NHS foundation trusts such as the Trust. As we explain, they do not however in our views constitute a "special legal regime":

(1) The Trust refers to the fact that s43 is a primary legislative provision that does not apply to other operators. S43(3A) refers to information that must be specified in the Trust's annual reporting; it appears that under paragraph 26 of Schedule 7 to the 2006 Act, NHS foundation trusts, by virtue of their status as public benefit corporations are obliged to prepare annual reports. However there is nothing on the face of these provisions, or in the evidence, to explain how these obligations have any real impact on the way in which the activity of service provision to the local authority is carried out.

(2) S73B requires NHS foundation trusts and local authorities to have regard to any "documents" published by Secretary of State for Health & Social Care when exercising their public functions. However it was not clear to us what specific documents it might be suggested the Trust was obliged to have regard to or how any such obligation would then have a real impact on the way in which the service provision was carried out (as compared with private operators who carried out the relevant services).

(3) S75 provides for arrangements between NHS bodies and local authorities but this seems irrelevant since there is no suggestion that such arrangements were entered into during the period relevant to the current claim. In any case, it has not been articulated in what respect the arrangements would demonstrate the necessary real impact on the Trust's activities when compared with private operators.

101. S82 provides for a duty of co-operation between NHS bodies and local authorities "in order to secure and advance the health and welfare of the people .." but, again, the Trust's case does not go on to explain in what respect this duty means that the way in which the Trust carries out the services is different to private operators.

Consultation obligations and guidance

102. S242 of the 2006 Act (Public involvement and consultation) imposes an obligation on certain bodies (including NHS foundation trusts) to "make arrangements, as respects health services for which it is responsible, which secure that users of those services … are involved (whether by being consulted or provided with information, or in other ways) in the" planning of the provision, service provision changes, and decisions affecting the service operation.

103. HMRC submitted that it was questionable whether this provision even applied to the Trust. They point out that the definition in s242(3) of what is meant by a body being "responsible for health services" is written in terms of a body which "provides or will provide, those services to individuals" contrasted with the services here being provided by the Trust to the local authority. For our part, we do not see any difficulty with, on the one hand, the services (the VAT treatment of which is in issue) being the service provision to the local authority (those services being to provide certain health services to the public), and, on the other, the Trust also being a body "responsible for health services" for the purposes of s242. There is no dispute that, pursuant to the various agreements, the Trust did provide various health services to the public. However, for present purposes, we do not need to decide the scope of interpretation of s242 because, even on the basis the section does apply to the Trust, it was not established that the consultation obligation had a real impact on the way the Trust carried out its activities as compared with private operators.

104. In a similar vein, the Trust relies in respect of sexual health services provision on National Guidance (*MEDFASH 2005*). That guidance is stated to be produced by "Medical Foundation & Sexual Health a charity supported by the British Medical Association". The front page of the guidance carries the Department of Health logo and is described as being endorsed by that Department. A number of standards are set out including standard 3 "Empowering and involving people who use services" which, it is explained, set out how service users should be involved in planning and monitoring services.

105. Mr Edwards notes the guidance refers to s11 Health and Social Care Act 2001 (the predecessor provision to s242) and sets out Recommended Standards for Sexual Health Services. Arguing that this is binding on NHS foundation trusts and noting that some NHS bodies have been judicially reviewed for their alleged failure to consult, Mr Edwards submits that this sort of consultation obligation is a "world away" from how private sector contractors operate. We do not agree. According to its own terms, the application of the guidance is not restricted to public bodies such as the Trust; it applies to all who carry out the relevant services to the public. (The front page of the guidance refers to it being "For all settings providing NHS-funded sexual health services including general practice, hospital and community-based clinics, pharmacies, voluntary and independent sector organisations." At paragraph 3 the guidance goes on to note:

> "Sexual health services are provided in a range of settings, in primary care and acute trusts, in other statutory sector settings such as prisons, as well as in the community, voluntary and independent sectors. This document promotes consistent standards of care and a coordinated approach to service delivery, while recognising that clinical activity in different settings will vary in scope. Sexual health service networks are recommended to support development of a cohesive and comprehensive local service."

106. It is also appears that all operators, whether or not NHS foundation trusts would, because of the local authorities' tender terms, be expected to comply with the MedFASH guidance (Clause 5 of the 2015/16 contract (Integrated Sexual Health Service for Stoke-on-Trent and North Staffordshire sets out in respect of Discharge Criteria and Planning that services providers comply with various specified general principles and also under 5.2 "Other General Quality Standards" mentioning that the MedFASH Recommended Standards for Sexual Health Services are "of particular note")). These points are sufficient for us to consider that the guidance does not constitute a special legal regime. (We do not therefore address HMRC's further submission that the guidance was not capable of constituting law in the sense envisaged by the Court of Appeal in *Northumbria* as it was not statutory guidance generating a duty to adhere.)

Power to make directions in emergency – s253 of the 2006 Act

107. The Trust also pointed to the Secretary of State's power of direction in s253 2006 Act "to give directions" if he or she "considers that by reason of an emergency it is appropriate to do so". Under s253(1) and (2), such directions can be given to NHS bodies a) about the exercise of any of the body's functions, b) directing the body to cease exercise of any of its functions for a specified period c) to exercise any of its functions concurrently with another body or person for a specified period and d) to exercise any function conferred on another body or person under or by virtue of the 2006 Act for a specified period.

108. Mr Mantle's first point in response is that there was no evidence of such directions being exercised in the relevant period. We do not agree the lack of any such direction during the relevant period precludes the potential relevance of the provision. In principle, it is at least possible that the risk of such direction could mean that the way in which the services was provided was different. The more relevant point, which means the provision does not constitute

a special legal regime, is that such directions can be made to other bodies (under s253(1)(d)) direction can also be made to "a body or person, other than an NHS body providing services in pursuance of arrangements made…iii) by a local authority for the purpose of the exercise of its functions under or by virtue of section 2B or 6C(1)…").

109. In reply, Mr Edwards noted that s253(2A) provided for a narrower scope of direction for "other bodies" as compared with NHS bodies such as the Trust. It is true that the scope of direction is worded differently as between NHS bodies and other bodies but we do not regard the differences as material. As regards both types of body, the direction can require cessation of service. The only apparent difference is the way in which the power is worded in respect of the taking on of other functions. Whereas for NHS bodies, the direction extends to taking on functions, either concurrently or to the exclusion of, another body or person who has functions under the 2006 Act for a specified period, in respect of non-NHS bodies, the power is "to provide other services for the purposes of the health service for a specified period". Thus, in substance, private operators providing the relevant services to local authorities appear to be just as amenable to the kind of power of direction that NHS bodies are. In any case, no explanation is apparent from the face of the provisions or in the evidence before us that s253 gave rise to any real impact in the way operators carried out the relevant services.

NHS Constitution and Trust constitution

110. That is similarly why the Trust's points regarding the NHS constitution and the Trust's own constitution do not assist either. The Trust's case does not explain in what respect any obligations arising from such documents mean that the way in which an NHS Foundation Trust provides the services to local authorities is different. As explained in the NHS Constitution, it:

> "…establishes the principles and values of the NHS in England. It sets out rights to which patients public and staff are entitled , and pledges which the NHS is committed to achieve, together with responsibilities, which the public, patients and staff owe to one another to ensure that the NHS operates fairly and effectively…"

111. The NHS Constitution also states in its introduction that "…all NHS bodies, private and voluntary sector providers supplying NHS services, and local authorities in the exercise of their public health functions are required by law to take account of this Constitution" and that "references to NHS services include local authority public health services". The parties were unable to assist us on the particular legal provision which extended its application to private providers, albeit it seems that the Constitution itself is envisaged to have a wider impact than simply on NHS bodies. That appears to be borne out for instance in the contract for integrated Sexual health service that includes the NHS Services Condition "SC1 compliance with the Law and NHS Constitution" under which the parties "must abide by and promote awareness of the NHS constitution including the rights and pledges set out in it" and the obligation on providers to ensure that all sub-contractors and staff abide by it too.

112. As regards the Trust's constitution, the principal purpose clause at article 3 relied upon simply reflects s43 of the 2006 Act. That provision was also referenced in *Northumbria* ([124]) in relation to what the trust there was empowered to do. However, the reference was not sufficient to constitute a special legal regime but merely the context for Court of Appeal's specific analysis (at [125]) regarding the particular constraints in the Parking Principles at issue in that case, the court noting that their requirements for safety, convenience, and economic accessibility were not applied to the private car parking operators (whose starting point was considerations of revenue maximisation and profitability).

Other legislation

113. The Trust also relies on s23 Children and Families Act 2015. That provides for the duty to bring to the attention of the local authority children who, in the trust's opinion, have (or probably have) special educational needs or a disability (SEND). This is only relevant to children health visiting services. Although it is correct that it does impose an obligation on NHS foundation trusts, we do not consider this section helps the Trust in establishing the existence of a special legal regime. The relevant obligations apply just as much to a private operator through the contract terms stipulated for all providers under the relevant tender. (Clause 4.3 requires delivery against the SEND code of practice responsibilities as are then referred to in Appendix 3 (the reference to Appendix 2 in that clause appears to be in error.)) The Appendix explains that the practice sets out certain obligations including, at paragraph 5.15, that where the health body:

> "is of the opinion that a young child under compulsory school age has, or probably has SEN they **must** inform the child's parents and bring the child to the attention of the appropriate local authority…".

114. Similarly, the "best value" duty (pursuant s 3 of the Local Government Act 1999) under which the local authority must continuously improve the way its functions are exercised having regard to a combination of economy, efficiency and effectiveness and to applicable guidance (for instance that issued by the Treasury) is incorporated into the general terms of public health services contracts (clause 9.1 of the health visiting contract stipulates for instance "The Provider must to the extent reasonably practicable co-operate with and assist the Authority in fulfilling its Best Value Duty") and again it is not explained in any case how such duty affects the way NHS providers carry out services to local authorities differently to private operators.

115. Finally, Mr Edwards' submissions also mentioned s3 of the Care Act 2014, which provides for the promotion of the integration of care and support with health services. However, as HMRC point out, this applies to local authorities, not to the NHS trust. Nor, again, is it explained how the promotion obligation would have a real impact on the way the Trust provides its services to the local authority compared with private operators.

116. Mr Edwards made a more general submission contrasting the role of the NHS foundation trust as a "mover and shaker" in the field compared to a private operator as a "taker" of the relevant regulations; however, we saw no basis for that kind of characterisation. There was nothing in the tender arrangements shown to us to suggest such a distinction in practice.

117. In conclusion, we are not persuaded that any of the provisions relied upon, whether individually, or together, constitute a special legal regime.

Case that the Trust is a delegate of a local authority

118. A further argument that the Trust made under Issue 3 was that, even if the legal regime applicable to the Trust does not constitute a special legal regime, Article 13 is satisfied because the Trust is a delegate of the local authority (which is, the Trust argues, accepted by HMRC, to be subject to a special legal regime when carrying out its public health functions pursuant to legislation).

119. The Trust argues that HMRC's guidance VATGPB3240, which suggests that it is only *local authorities* which have had functions and duties transferred to them by another local authority that can benefit from a special legal regime, is wrong. In the Trust's submission the guidance is incompatible with the PVD and relevant EU law, it is arbitrary and it breaches the principles of neutrality, equal treatment and proportionality.

120. VATGPB3240 (which appears in HMRC's manual "VAT and Government and Public bodies") states

> **"Non-business activities: whether provided as a public authority: delegation from one local authority**
>
> Sometimes one local authority may delegate an activity to another, but the legal regime governing the activity specifically covers the first authority. We accept that the activity of the second local authority is also governed by a special legal regime because of the wider application of local government legislation."

121. In submission, Mr Mantle explained that the local government legislation referred to was s101 Local Government Act 1972 which provides that a local authority "may arrange for the discharge of any of their functions…b) by any other local authority."

122. We agree with HMRC that the Trust's case misinterprets the scope of the guidance. HMRC's acceptance of a delegation of an activity by one local authority to another does not say anything one way or the other on the position regarding a delegation from a local authority to another public authority such that no question of breach of neutrality, equal treatment or proportionality arises. In other words, the guidance does not purport to be exhaustive or indicate an exclusionary effect with respect to the Trust in the way it suggests.

123. Moreover, in relation to the assumption in the Trust's argument that HMRC have accepted that local authorities carrying out public health functions pursuant to the legislation do so under a special legal regime (see [118] above), Mr Mantle explained HMRC's position that it had not reached such a view. He suggested that there could be various reasons (other than a conclusion that there was a special legal regime under Article 13 PVD) for why a health service provision made directly by local authorities (rather than with the benefit of services provided by NHS foundation trusts) would result in such provision being "non-business". For instance, the provision of services made by local authorities might not be viewed as being for consideration under Article 2 PVD.

124. That submission (as to HMRC not having come to such a view) is consistent, again not only with the guidance (which applies *if* there is a special legal regime), but also with HMRC's review letter of 24 March 2022 in relation to which the judicial review claim is brought, which explained in response to the Trust's argument that the guidance should apply to it that:

> "HMRC offers no opinion on the existence and application of a special legal regime in relation to local authorities, in so far as it relates to the specific issue set out here. By extension, HMRC offers no opinion on whether the services would be a non-business activity if provided directly by a local authority."

125. However, even if we were to assume, as the Trust suggests, that HMRC do treat supplies of the services in issue here, when made by local authorities, as "non-business" on the basis the local authority is subject to a special legal regime for Article 13 purposes, we were not taken to any support for a general proposition that, if an arrangement could be regarded as a delegation to the Trust that would then mean there was no need to analyse whether *the Trust* was acting under a special legal regime applicable to *it*.

126. Mr Edwards referred us to *Saudaçor* (Case C-174/14) as an example of it being possible for a public authority to delegate to a private body (a company) and still be within Article 13. There, a company had been formed to plan and manage the regional health system within the framework of programme agreements entered into with the regional public authority. But there was no suggestion that the company was considered to benefit from Article 13 by virtue of being a delegate of the regional public authority. The focus remained on whether *the company* was subject to a special legal regime (the CJEU's judgment (at [72]) referring to consideration of the public law "available to Saudaçor" and an instrument that "could be used by Saudaçor").

127. Finally, lest it be suggested that we have accepted the Trust's overarching premise that it was the 'delegate' of the relevant local authorities in relation to their functions, we should add that this was anything but clear to us. Although asserted, it was not properly explained. Indeed, the requirements of the agreements for the Trust to provide certain health care services to the local authorities seemed to fall short of the delegation or discharge of the latter's duties or functions. Nor was it apparent to us how such delegation or discharge was, or legally could be, achieved through those agreements. We were not taken for instance to any equivalent to s101 Local Government Act 1972 permitting such contractual delegation of duties from the local authority to the Trust.

128. We accordingly agree with HMRC that the Trust is not subject to a special legal regime for the purposes of Article 13 and that the Trust's case on Issue 3 fails.

Issue 4: Leading to significant distortions of competition

129. This issue only arises if the Trust is successful on Issue 3, which it is not. We shall however briefly outline the issue and HMRC's stance on it in case we are wrong in that view. Under paragraph 2 of Article 13, even where the public body is engaging in activities "as" such, they will be regarded as a taxable person in respect of those activities "where their treatment as non-taxable persons would lead to significant distortions of competition". HMRC's position is that, based on *Rank Group plc v HMRC* (Joined Cases C-259/10 and C-260/10), HMRC can satisfy the requirement that the treatment would lead to that outcome as soon as actual competition has been found on the facts. In this case, if the issue arose for determination, HMRC would accordingly then say that they have shown that the activities would lead to significant actual or potential distortion on the basis of Mr Sands' evidence regarding the awareness of private economic operators being commissioners to deliver health visitor services (Virgin Care and non-for profit organisations are mentioned at [27] and [28] of his statement) and in relation to sexual health services (Virgin and Community Interest Companies such as Spectrum operating in Essex and Southend) at [42]). We have recorded that evidence above and that we have accepted it ([13] and [76]). HMRC's submission based on *Rank* was, however, specifically rejected by the Court of Appeal in *Northumbria* when it considered the application of the second paragraph of Article 13 to the issue there ([140]-[158]). HMRC accept that the Upper Tribunal is bound by the Court of Appeal's reasoning and that HMRC could not therefore succeed on this issue before us if it arose for determination. They reserve their position on this, however, in the view of their pending appeal against *Northumbria CA* to the Supreme Court.

130. Accordingly if we were wrong in our analysis above that there was not a special legal regime (Issue 3), HMRC's case that the Trust was a taxable person on the basis of the second paragraph of Article 13 (the burden being on them to show no significant distortion) would not succeed and the Trust's claim that HMRC were wrong not to have concluded the Trust's supplies were "non-business" would be correct.

DECISION

131. For the reasons given above, the Trust's case on Issues 1 to 3 fails (with the result that Issue 4 does not arise for determination).

132. We accordingly reject the Trust's judicial review ground that HMRC's decision was erroneous in law because it treated the supplies of services as "business" activities when they were not "for consideration" or "economic activity" for the purposes of the PVD or else because there was no special legal regime for the purposes of Article 13 PVD (the Trust's first ground). We also reject the Trust's third ground regarding the alleged limitation in HMRC's approach to local authority delegations to different bodies being irrational, arbitrary, in breach of neutrality, equal treatment and proportionality. The Trust's second ground that HMRC's

decision breached general principles of neutrality, legal certainty and proportionality was not argued by the parties as a discrete ground. As mentioned above, the Trust says that its judicial review turns on the resolution of Issues 1-3 (and if applicable 4). That is therefore how we have addressed the claim but, for the avoidance of doubt, ground 2 is also rejected.

133. The Trust's judicial review claim is accordingly dismissed.

MR JUSTICE RICHARD SMITH
JUDGE SWAMI RAGHAVAN

Release date: 24 October 2024