126TACD2020

NAME OF APPELLANT REDACTED

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal against the assessment to Value Added Tax (VAT) for the periods January - December 2011, January - December 2012 and January - December 2013 in the aggregate sum of €106,603 raised on 22nd December 2015 and broken down as follows:

Year Ended 31st December 2011	€ 28,721
Year Ended 31st December 2012	€ 39,285
Year Ended 31st December 2013	€ 38,597
Total	€106,603

2. While the substantive issue is concerned with the entitlement to the exemption from VAT in respect the services supplied by the Appellant pursuant to paragraph 2(3), Schedule 1 of the Value Added Tax Consolidation Act 2010 ("VATA 2010") and Article 132(c) of Council Directive 2006/112/EC as amended (the "Directive"), the Appellant also took issue with the time limit in raising the assessment and the failure to follow the correct legislative procedure in raising the assessment .

Preliminary issues

Time Limit

3. The Appellant argued that the earliest taxable period covered by the Assessment is the taxable period of 1 January to 28 February 2011. Accordingly, the relevant four-year time limit for raising the Assessment began to run from 28 February 2011 and expired on 28 February 2015. The Assessment raised by the Respondent was on 22 December 2015 and is therefore out of time as the four-year lookback period expired on 28

February 2015 being four years after the last day of the earliest taxable period covered by the Assessment.

4. At the hearing, the Respondent acknowledged that the amount assessed for the period to December 2011 was out of time and accordingly withdrew that portion of the assessment. As such the appeal is now confined to assessment in the sum of €39,285, and €38,597 for periods ended 31st December 2012 and 2013, respectively.

Procedural Failings

5. The Appellant asserted that in issuing the assessment, the Respondent did not follow the correct legislative procedure in accordance with VATA Chapter 2 of Part 13. Rather an estimate of the tax due should have issued in accordance with VATA, section 110 which permits the recovery of VAT where an '*accountable person'* has failed to furnish a return of the tax payable in accordance with regulations. In this context the amount of tax sought by Respondent is simply an estimate and the person to whom the estimate issued does not have a right of appeal of the quantum of the tax. Rather the person is entitled to appeal under VATA section 110(2) on the basis that it is not an accountable person as defined.

6. The Appellant argued that where no return has been filed, the appropriate statutory provision to invoke for the purposes of the collection of relevant amounts of VAT was under VATA, section 110. Under this provision, the Appellant would have been entitled to appeal on the basis that it is not in fact an accountable person. Equally, the Appellant did not submit a VAT return and therefore VATA, section 111 is not the appropriate legislative mechanism for the purpose of seeking the collection of the tax. The Appellant never filed a VAT return and was registered for VAT by the Respondent in the course of the audit and not of its own accord. Accordingly, on the basis that an assessment was raised in the absence of a return having been filed, the Respondent erred procedurally and did not follow the VATA in seeking recovery of the relevant amount of VAT and therefore the assessment is void *ab initio*. As such neither the Respondent nor the Tax Appeals Commission may deem an assessment to satisfy the legislative provisions of a VATA section 110 estimate accordingly, the assessment should be quashed.

7. The Respondent asserted that there is no interplay between VATA, section 110 and section 111 that suggests that the two provisions are mutually exclusion or that there is anything that precludes a Respondent officer from issuing an estimate or issuing an assessment where no return has been made. Therefore, to interpret the provisions as

proposed by the Appellant would involve incursion into the role of the Oireachtas in making law.

8. The Respondent also argued that *Menolly v Revenue* set out in very clear terms in the judgment of Mr. Justice Charleton the nature of the jurisdiction exercised by the Tax Appeals Commission, and that is a jurisdiction to confirm or abate or reduce perhaps in its entirety an assessment to tax, but this argument as to the invalidity of the administrative action taken by Respondent is one that could only possibly be brought in the High Court on foot of a judicial review, it is not one that can proceed in this forum.

Matter Determined at the Appeal Hearing

9. The essence of the Appellant's argument is that VATA section 110 takes precedence over Section 111. However as noted by the Respondent, there is no statutory impediment that precludes a Revenue officer from issuing an estimate or raising an assessment where no return has been made. VATA, section 113(1) provides:

> *"Where, in relation to any period, the inspector of taxes, or such other officer as the Revenue Commissioners may authorise to exercise the powers conferred by this section (in this section referred to as "other officer"), has reason to believe that an amount of tax is due and payable to the Revenue Commissioners by a person in any of the following circumstances:*
>
> *(a) the total amount of tax payable by the person including tax (if any) payable in accordance with section 108C(3),was greater than the total amount of tax (if any) paid by that person;*
>
> *(b) ….*
>
> *then, without prejudice to any other action which may be taken, the inspector or other officer—*
>
> *(i) may, in accordance with regulations but subject to section 113, make an assessment in one sum of—*
>
> *(I) the total amount of tax, including tax (if any) payable in accordance with section 108C(3), which in his or her opinion should have been paid,*
>
> *(II) …*

(ii) may serve a notice on the person specifying—

(I) the total amount of tax so assessed,

10. It is also significant that the Appellant appealed the assessment and that appeal was before me. As noted by the Respondent, any challenge to the manner in which the Respondent invokes the assessment procedures was a matter for judicial review and therefore not amenable for consideration before the Appeal Commissioners.

11. Furthermore, the jurisdiction of an Appeals Commissioner was clarified by Peart J. in the Court of Appeal judgment in *Robert Stanley v The Revenue Commissioners* [2017] IECA 279 when opining:

    33. *The jurisdiction of the Appeal Commissioners to determine appeals against assessments of tax does not, in my view, extend to determining whether or not the notice of assessment of tax which is the subject of the appeal to them is a lawful notice or whether it is unlawful by reason of being issued ultra vires the Revenue's statutory powers.*

    34. *A lawful assessment is a pre-requisite to the exercise by the Appeal Commissioners of their powers to hear and determine an appeal against an assessment. As the appellant has submitted, it is only where the notice is a valid notice of assessment that the issues of quantum of tax fall to be determined by the Appeal Commissioners on appeal. Where as in this case the issue raised is one of law and, specifically, of statutory interpretation as to the lawfulness of an assessment as opposed to the quantum of tax so assessed, the appellant was perfectly entitled to seek to have that issue determined by way of the present judicial review proceedings. This is clear from the judgment of Finlay C.J in Deighan v. Hearne [1990] 1 IR 499 where the Chief Justice expressed his agreement with what had been decided by the High Court, by stating the following at p. 506: "The learned High Court judge decided that having regard to the provisions of the income tax code and the procedure for assessment in default of the making of returns which has been outlined in the decision of the Court, that the Court could only intervene to set aside or vary an assessment otherwise than under the procedure provided by the Income Tax Acts if it were established either that the procedure carried out was ultra vires the statutory provisions or that one or other of those statutory provisions was invalid having regard to the provisions of the Constitution. The court could not try an issue of fact arising from an assessment made in default of a return otherwise than through the appeal procedure provided in the income tax code."*

12. Therefore, and contrary to the Appellant's submission, any challenge to the validity of the assessments that issued on 22nd December 2015 is a matter for judicial review and as a consequence does not fall within the jurisdiction of the Appeal Commissioners.

13. Finally *O'Rourke v The Appeal Commissioners and The Revenue Commissioner*s [2016] IESC 28, a judgment in which Charleton J made clear in the following passage at paragraph 21, that if the Appellant is unsuccessful on the preliminary issue, any appeal it wishes to bring cannot be brought until after the determination of the substantive appeal:

    "An appeal is not determined by a ruling that an inspector of taxes has validly made an assessment outside the statutory time limits …… . In any such case, an appeal is only determined by the Appeal Commissioners where there is a final decision by them as to liability to pay and as to the amount of tax for which the taxpayer is liable. Once that determination is made, an appeal may be taken within the relevant time limits by the taxpayer …. on any ground open to the taxpayer under the Taxes Consolidation Act 1997."

14. Therefore even if I am incorrect in determining that I only have jurisdiction to determine the substantive appeal, namely whether the services provided by the Appellant were exempt from VAT, and not the purported procedural failings of the Respondent, the Appellant's entitlement to challenge any adverse findings have not been prejudiced by my actions. On this basis, the hearing proceeded accordingly.

Legislation

15. Schedule 1 Paragraph 2(3) VATCA includes the following as part of the list of supplies which are VAT exempt pursuant to section 46 VATCA:

    "Professional medical care services recognised as such by the Department of Health and Children (other than dental or optical services), but only if those services are not supplied in the course of carrying on a business that wholly or partly consists of selling goods"

16. This gives effect to Article 132(1)(c) of the Directive which reads as follows:

    "The provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned."

Substantive Issue – Charge to VAT

The facts

17. From the evidence I have made the following findings of fact:

    a) Dr AA qualified in Country Redacted as a medical practitioner in 19XX and has been working in Ireland for approximately XX years as a member of the Irish Council of General Practitioners and is licensed to practice medicine in the State.

    b) Dr AA supplied services to GP Practises and Out of Hours service providers, such as ZZ, an out of hours family doctors service that operated in the Regions Redacted.

    c) To encourage doctors, including Dr AA, to incorporate companies, ZZ was willing to pay extra fees to doctors for the medical services rendered. There were also tax advantages for Dr AA to incorporate. Therefore, and after receiving advice from his accountant, the Appellant company was incorporated on ** July 20**. Its directors are Dr AA and his wife. As it was considered that the Appellant was providing medical services, the Appellant did not register for VAT.

    d) ZZ is an association between GPs in a certain area of the country. ZZ arranged for the provision of locums to GP practices to provide holiday or sick leave cover and to provide out of hour services to patients. As such Dr AA worked as the visiting GP seeing patients on behalf of a local GP but paid by ZZ. In most of the cases the patients were medical card patients and would not pay the GP practice directly. However, the private patients paid the GP practice directly.

    e) The Appellant through its employee, Dr AA, a registered medical practitioner licensed to practice medicine in the State, provided medical care to the patients attending the clinics of ZZ. When attending any medical consultation, Dr AA brought his own doctor's bag and saw patients as they arrived. Like any GP, he saw the patient, took their history, performed the examination, made the provisional diagnosis and decided on a cause of action. He worked up to 120 hours a week

    f) He worked for ZZ at the weekends and on some evenings. He arrived at the appropriate ZZ clinic, assigned to a room with a computer and an examination couch and saw patients as they arrived, either by appointment or walk in. He performed the normal GP functions and made the appropriate decisions about referrals or subsequent treatments. As every patient was different, the diagnosis and decisions

were between him and the patient. As such, he was not directed by anyone on how to perform his medical duties.

g) There was no written contract, between the Appellant and ZZ. While a contract was issued, Dr AA did not sign it as he had worked for ZZ for several years before any contract came to light. Therefore, Dr AA saw no reason to enter into a written contract as there was a working arrangement already in place. As such, he saw the written contract as a complication in an arrangement that was already working well and did not see any reason to go beyond what he was already providing. However, he familiarised himself with the ZZ Handbook, Policies, Guidelines and Procedures.

h) The Appellant had to be an unlimited company because doctors cannot incorporate under a limited company, specifically because there could be medical claims against the company. If a patient was dissatisfied with the level of care, a claim could be made against the Appellant and him personally. Professional indemnity insurance is not provided in the name of the company, it can only be obtained in the name of a natural person. As such, the Appellant did not have professional indemnity insurance but rather relied on the insurance of Dr AA. However, the Appellant contributed to part of the cost of the insurance premium.

i) If Dr AA was not registered with the Medical Council, he would not be entitled to work as a doctor as it would be illegal to do so. Also, if he did not hold professional indemnity insurance he could not register as a doctor. If he ceased to hold indemnity insurance, he ceased to be registered with the Medical Council. Therefore, it was a prerequisite to practice medicine in Ireland to have a valid professional indemnity insurance policy. He would not be allowed to work as a doctor if the professional indemnity insurance policy ceased.

j) ZZ is a large organisation and have a number of employees that carry out various different functions including administration, organising rotas and scheduling appointments. There was a director of finance who organised the discharge of fees to the Appellant based on the number of shifts worked and calculated on an hourly basis. ZZ also employed a medical director.

k) Dr AA consulted with the medical director in the same way that he would ask advice from colleagues on a particular medical issue. Alternatively, he would liaise with the medical director to discuss issues such as the prevalence of certain infectious diseases in areas such as measles etc. The medical director also sought his advice if there was a complaint from a patient or if there was a problem with a colleague and that consisted of most of his dealings with the medical director. Notwithstanding the

medical director's position, the Appellant through its employee Dr AA provided the medical care directly to the patients and ZZ had no involvement in the provision of medical services to patients under his care. Furthermore, the medical director did not issue any guidelines on how the Appellant or Dr AA performed his work.

Appellant's Submissions

18. The VAT assessment should not have been raised by the Respondent on the basis that the Appellant's activities were exempt from VAT by virtue of the medical exemption which applies to "*the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned*". The wording in the medical exemption provides the key phrase '*provision of medical care in the exercise of the medical and paramedical professions*' rather than for example, '*provision of medical care by medical or paramedical professionals'*. This wording permits a party other than the person supplying the service to be appropriately qualified as a medical professional and also allows for such other person to personally administer the medical care in question. As set out below, case law of the Court of Justice of the European Union (CJEU) provides that the VAT Directive does not preclude an incorporated entity from benefitting from the medical exemption.

19. The medical exemption has been laid down in Irish domestic law in VATA Paragraph 2(3) of Schedule 1 as "*Professional medical care services recognised as such by the Department of Health and Children (other than dental or optical services), but only if those services are not supplied in the course of carrying on a business that wholly or partly consists of selling goods"* and in VATA Paragraph 2(7) of Schedule 1 as "*Other professional medical care services that, on 1 January 2010, were recognised by the Revenue Commissioners as exempt activities*".

20. The Respondent argued in correspondence that the Appellant was engaged in the taxable supply of a staffing service in its provision of the services of Dr AA to relevant GP clinics. As such the Appellant is an employment agency and should be taxed accordingly, notwithstanding that it only has one employee, its director Dr AA.

21. The Respondent incorrectly categorised the nature of the services carried out by the Appellant as being a supply of staffing services liable to the standard rate of VAT. It is well established that the terms used to specify exemptions are required to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person. However, as set out in the case of *Werner Haderer* v *Finanzamt Wilmersdorf* (Case C-445/05) at paragraph 18 the requirement of strict interpretation does not mean that the terms

used to specify the exemption should be construed in such a way as to infringe upon the doctrine of fiscal neutrality or to deprive the exemptions of their intended effect:

> *"The terms used to specify those exemptions are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see Case -287/00 Commission v Germany [2002] ECR I-5811, paragraph 43, and Case C-8/01 Taksatorringen [2003] ECR I-13711, paragraph 36). Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT (see Case C-45/01 Dornier [2003] ECR I-12911, paragraph 42; Case C-498/03 KingscrestAssociates and Montecello [2005] ECR I-4427, paragraph 29; and Case C-106/05 L.u.P. [2006] ECR I-5123, paragraph 24). Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 13 should be construed in such a way as to deprive the exemptions of their intended effect (see, to that effect, Case C-284/03 Temco Europe [2004] ECR I-11237, paragraph 17, and also, in relation to university education, Commission v Germany, paragraph 47)."*

22. The exemption is not limited to the legal form of the person making the supply. It has also been held in successive CJEU decisions that the application of the medical exemption is not limited to the legal form of the person making the supply. In the case of *Ambulanter Pflegedienst Kugler v Finanzamt fur Korperschaften I in Berlin* (Case C-141/00), it was held at paragraph 31 that the Medical Exemption is "*not dependent on the legal form of the taxable person supplying the medical or paramedical services referred to in that provision*."

23. The basis for the above principle is outlined at paragraphs 27-30 of *Kugler* which focus on the rationale for the exemption is to reduce the cost of medical care and the upholding of the principle of fiscal neutrality:

> *27. On a literal interpretation, that provision does not require medical services to be supplied by a taxable person endowed with a particular legal form in order for them to be exempt. Just two conditions need to be met: medical services must be involved and they must be supplied by persons who possess the necessary professional qualifications.*
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> *28. That interpretation is not contradicted by the Court's case-law according to which the exemptions envisaged in Article 13 of the Sixth Directive are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be*

levied on all services supplied for consideration by a taxable person (see, in particular, SDC, cited above, paragraph 20).29 Exemption of medical services supplied by legal persons is consistent with the objective of reducing the cost of medical care (see, to that effect, Case C-76/99 Commission v France [2001] ECR I-249, paragraph 23), and with the principle of fiscal neutrality, inherent in the common system of VAT, in compliance with which the exemptions provided for in Article 13 of the Sixth Directive must be applied (see, in particular, Case C-216/97 Gregg [1999] ECR I-4947, paragraph 19).

29. *The principle of fiscal neutrality precludes, inter alia, economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned. It follows that that principle would be disregarded if the possibility of relying on the exemption which is envisaged for the provision of medical care referred to in Article 13(A)(1)(c) were dependent on the legal form in which the taxable person carries on his activity (see, to that effect, Gregg, cited above, paragraph 20)."*

24. This principle was upheld in the case of *Christoph-Dornier-Stiftung fur Kilinsche Psychologie v Finanzamt GieBen* (Case C-45/01) at paragraph 21:

    The answer to the third question must therefore be that since the exemption envisaged in Article 13A(1)(c) of the Sixth Directive is not dependent on the legal form of the taxable person providing the medical or paramedical services referred to in that provision, psychotherapeutic treatment provided by a foundation governed by private law and given by psychotherapists employed by the foundation may benefit from that exemption."

25. The application of the medical exemption is not limited to circumstances where the recipient of the service is in a contractual relationship with the supplier.

26. It was not contested by Respondent that a company such as the Appellant may in certain circumstances benefit from the medical exemption notwithstanding that it is the Appellant's director Dr AA who is providing the medical care and on whose credentials the medical exemption depends. Rather, it is Respondent's contention that by virtue of the Appellant's contractual relationship with relevant GP clinics and with ZZ (rather than with patients), it cannot be said to be supplying medical services but rather is engaged in a supply of staffing to its recipients. In other words, it is Respondent's view that the interposition of relevant GP clinics and ZZ in the supply chain changes the nature of the supply to one of staffing notwithstanding that the Appellant contracted with relevant GP clinics and ZZ for the fundamental purpose of providing medical care to patients. The

exemption is not limited to supplies to persons who actually receive the medical care provided that the supply is for the provision of medical care services.

27. In the case of *Werner Haderer* v *Finanzamt Wilmersdorf* (Case C-445/05), the CJEU held in the context of the exemption for educational services, that it is not necessary that the provider of such services have a contractual link with the recipient of such services. Paragraph 32-33 refers:

    "*In addition, as the Commission submits, the requirement that the tuition be given privately does not necessarily mean that there has to be a direct contractual link between the recipients of that tuition and the teacher who provides it. Indeed, such a contractual link often exists with persons other than the recipients, such as the parents of the pupils or students.*

    In the main proceedings, as paragraphs 5 to 8 of this judgment show, certain matters included in the case-file before the Court, taken in isolation, could certainly suggest that Mr Haderer carried out his activities on his own account and at his own risk, and thus that he was carrying them out 'privately'. That applies, in particular, to the lack of entitlement to the continued payment of fees if he was prevented from working, and to the fact that he bore the risk of the loss of his fee in the event of courses being cancelled."

28. Ultimately the CJEU held that the key factor is whether the supplier's activities consist of tuition given by a teacher "*on his own account and at his own risk*". The CJEU held that it is for the referring court to determine whether this is the case in those proceedings. The reference to having to provide tuition "*on his own account and at his own risk*" was deemed a necessary component by the CJEU in order to fulfil the criteria for the relevant exemption in the relevant VAT directive which applied to "*tuition given privately by teachers and covering school or university education*". It was deemed that a degree of independence from the relevant educational institution was necessary in order to meet the criteria of such tuition having been given "*privately*". Paragraph 30 of the decision refers:

    "*The term 'privately' enables the services supplied by the bodies mentioned in Article 13A(1)(i) of the Sixth Directive to be distinguished from those referred to in Article 13A(1)(j), which are provided by teachers on their own account and at their own risk*."

29. There is no such restrictive language contained in the medical exemption and therefore, the requirement to be operating on one's own account and at one's own risk should not apply *mutatis mutandis*.

30. The UK First Tier Tribunal case of *City Fresh Services Limited v The Commissioners for Her Majesty's Revenue and Customs* [2015] UK FTT 0364 (TC) TC04548 is directly on point and merits close examination as it is very helpful to the Appellant's case. In this case HMRC sought to levy VAT on supplies made by City Fresh Services Limited (City Fresh) to a dental partnership, the City Dental Practice (CDP) as a taxable supply of staffing. The Appellant, City Fresh was incorporated in 2009 by two partners of CDP for the purposes of availing of asset protection and tax deferrals. CDP provided dental services to the NHS Trust which in turn had a contractual relationship with relevant patients. It was not commercially viable for City Fresh to contract directly with the NHS trust and therefore CDP sub-contracted work to City Fresh.

31. It was not in dispute between the parties that the supplies between CDP and the NHS Trust were capable of benefitting from the medical exemption. However, HMRC's contention was that the supply from City Fresh to CDP amounted to a taxable supply of staffing services and that the exemption could not be applied between several parties in a supply chain.

32. City Fresh successfully argued that its supply to CDP was capable of benefitting from the medical exemption. In this context, the FTT observed the following at paragraph 34:

> *"The concept of providing medical care most naturally suggests the giving of care from one natural person to another but neither the EU law based VAT legislation nor the commercial realities of twenty first century health care make that an essential component of the supply of medical services."*

33. The FTT also placed reliance on the fact that HMRC did not have a difficulty with treating the supply of services from CDP directly to the NHS Trust as VAT exempt but deemed the supply from City Fresh to CDP as a supply of staffing, without fully explaining their basis for the distinction as expressed in the passage at paragraph 38:

> *"HMRC failed to explain why they believed that the addition of a third entity in a supply chain necessarily altered the nature of the supply being made. We do not accept their basic hypothesis that only one entity in a chain can be making an exempt supply of medical services to patients. As a sub-contractor CDP was not providing its services directly to patients, it was providing its services to the NHS Trust so that it could provide dental services to patients. In practice of course, the CDP dentists were*

looking in the mouths of NHS patients, but the legal and VAT analysis of what has occurred is that there are two supplies; one from CDP to the NHS Trust and another from the NHS Trust to patients."

34. It should be noted that the FTT dismissed out of hand the contention that the supply from City Fresh must be a supply of staff simply because it could not be a supply of medical care. It should be noted however that the FTT did recognise that in some instances the imposition of another party in the supply chain may have the effect of removing the effect of the exemption. In this respect it noted that if a supplier does not have a medical function as in *University Court of the University of Glasgow v R&C Commissioners* [2005] VTD 19, 052 or where it cannot be demonstrated that medical services will be carried out by the persons actually providing the services as in *Sally Moher t/as Premier Dental Agency v R&C Commissioners* [2011] 30 TC01148 and [2012] STC 1356.

35. On this latter point it is important to distinguish the case of *Sally Moher* in which it was held that providing individuals with medical expertise, dental nurses would be a supply of staff if the supplier had no control over how those nurses carried out their tasks. In that case, relevant nurses were under the control of the dentists to whom their services were contracted and it was adduced in evidence that the nurses often worked as part-time receptionists. In the case of the Appellant's provision of Dr AA's services, the evidence from Dr AA supported the fact that he was entirely independent in the provision of medical care directly to patients and was not subject to supervision or control from relevant GP clinics. In addition, Dr AA was *de facto* always being controlled by the Appellant given that Dr AA was the director of the Appellant and sole shareholder. The following excerpt from *Sally Moher* is instructive in this regard:

"It is difficult to see how one could rationally conclude that the Appellant was making supplies of medical care, once it is accepted that the nurses and auxiliaries were under the control of the dentists to whom they were assigned."

36. Therefore the *Sally Moher* case is not a comparable and analogous situation to this appeal as Dr AA was very much 'his own boss' when working for relevant GP and ZZ clinics.

37. As regards the supply of staff argument, the FTT in City Fresh held at paragraph 42, the following which is worth quoting in full:

"The difference between making a supply of services and making a supply of staff that provide those services can be a fine distinction for VAT purposes. On the basis of

the authorities, a supply will be a supply of staff if the recipient, by controlling the persons supplied, can control their activities and in doing so change the nature of the supply made. This is made clear in the Sally Moher decision; the issue in that case was that it was not clear to what extent staff supplied would actually carry out the dental tasks for which they were qualified once under the supervision of the dentists to whom they were supplied. If it had been clear that they could only carry out dental work, the decision might have been different. Equally in the Glasgow University decision, the intervention of an intermediate entity with the ability and knowledge to direct the medically qualified individuals about how to utilise their 15 clinical skills changed the nature of the supply. There will be a supply of staff if there has been a change of control from the supplier to the recipient over the activities of the individuals concerned.

In this case, although there is an intervening entity, CDP, between the providers of the dental services and the ultimate recipient, the NHS Trust, we were not given any evidence that CDP changed the nature of the supply or that there was a change of control from City Fresh to CDP over the dentists' activities. From the evidence which we were given, this was a complete back to back arrangement, with the dental services required by the NHS Trust being sub-contracted as a whole to City Fresh. We saw no written evidence of how the dental services provider City Fresh was managed on a day to day basis by CDP, but from the oral evidence of Ms Athwal, it was clear that the two dentists provided only dental services to CDP and their day to day activities when they were acting through City Fresh were exactly the same as they were when it was CDP who were providing the services themselves to the NHS Trust.

We do not accept the point made by the Appellant that because there is a coincidence of individuals between the partnership and the directors of City Fresh that means that there can be no control of City Fresh by CDP. It is the corporate entity, not the directors, who are providing the service here. However we do accept in practice that there was no need for control of City Fresh by CDP because of the shared knowledge between the two entities of the dental services which were required and the exact identity of the services being provided."

38. It is worth pointing out that in the *Sally Moher* decision, the company was actually engaged in the supply of dental nurses as staff and was set up for that purpose. There was no evidence of the directors or owners of the company *in Sally Moher* having incorporated the company for any other purpose except for the purposes of trading as a dental nurse staffing business and the owners of the company did not carry on any medical care activities. Although the importance of the doctrine of separate legal personality is acknowledged, the situation is different where a person chooses to

incorporate for the purposes of providing professional medical services through a corporate vehicle. In effect, it is important to recognise that the reality is that the Appellant did not operate as an employment or staffing agency but rather supplied medical care services to patients of relevant GP clinics.

39. The issue of control and supervision also arose in the context of the *Rapid Sequence Limited v HMRC* [2013] UKFTT 432 (TC). Rapid Sequence was a bona fide employment agency which placed overseas locum anaesthesiologists with the NHS in the UK and described its principal activity as *"that of a brokerage for the placement of medical staff."* The difference between the fees charged to the NHS and the rates paid to the anaesthesiologists was the profit generated on behalf of the business. The service provided on the part of Rapid Sequence in the chain of supply was not found to be a medical supply. Their role was to vet and place locum doctors with the NHS and they were not involved in the day-to-day supervision of the locum doctors. Such supervision and administration were purely the domain of the NHS and the doctors exercised their own judgement while directly providing patient care.

40. This is not an analogous situation in the context of the Appellant. Dr AA is the sole employee and director of the company which supplies medical services rather than staff. The Appellant is not an employment agency and is not licensed as such.

41. Under the Employment Agency Act 1971, an Employment Agency must hold a licence if it is to carry on its business. The Act and Regulations made thereunder regulate the issuing of an Employment Agency Licence. However, The Appellant would not meet the definition of an employment agency under the act which is as follows:

> "*the business of an employment agency means the business of seeking, whether for reward or otherwise, on behalf of others, persons who will give or accept employment, and includes the obtaining or supplying for reward of persons who will accept employment from or render services to others."*

42. Dr AA did not operate as an employee of ZZ or GP clinics and therefore the Appellant cannot be said to be an employment agency engaged in a supply of staff. When carrying out his duties within the context of GP and ZZ clinics he did so autonomously, making decisions on the basis of his own expertise and skill, unencumbered by any third party supervision. *In City Fresh* there was no need to demonstrate the control of the City Fresh entity by CDP owing to the apparent shared knowledge between the two entities. This is comparable to the structure of the Appellant, where there is no differentiation between the service provided by the Appellant and the service provided by its sole employee and director Dr AA.

43. In correspondence to date, Respondent has primarily based their argument on the *Go Fair* (Case C-594/13) case of the CJEU which dealt with an actual employment agency whose sole object was to contract out labour on the basis of the *Gesetz zur Regelung der Arbeitnehmerüberlassung*, a German law regulating the contracting out of labour. The company in this case supplied temporary staff to various nursing homes. The employees of '*Go Fair'* formed part of the organisational structure of the relevant care establishments. They performed the care services in accordance with the remit given to them by those establishments and were to that extent bound by their instructions. The care establishments in question were also responsible for the general and specialist supervision of the activities carried out by the temporary agency workers. In this case it was held that the company was engaged in the taxable supply of staffing to care homes because this is what it was doing in reality. However, it should be noted that this case ultimately turned on whether the company in question met the criteria to be recognised as a 'body recognised as being devoted to social wellbeing' within the meaning of Article 132(1)(g), the exemption for services linked to welfare and social security work by recognised bodies. In the *Go Fair* decision, the company did not meet the criteria for an entirely different exemption to the medical exemption and therefore, this case is of limited persuasive authority. Paragraph 21 is worth quoting in this regard:

> "*It is apparent from the order for reference that the German legislature has not recognised temporary-work agencies such as 'go fair', which supply workers to care establishments, as bodies devoted to social wellbeing within the meaning of Article 132(1)(g) of Directive 2006/112*."[Emphasis added]

44. If the company in the *Go Fair* case met the relevant criteria for a 'body devoted to social wellbeing' under German law, the exemption would have applied notwithstanding that the company was in fact an employment agency.

45. Reliance is also placed on the CJEU case of *Sparekassernes Datacenter* (*SDC) v Skatteministeriet* (Case C-2/95) which is authority for the proposition that a VAT exemption may apply in an outsourcing context. In this decision, the CJEU held that where the outsourced services *"fulfil the specific and essential functions"* of the relevant VAT exempt outsourced services, those services may qualify for the exemption and that it is for the national court in each case to determine whether the outsourced services are specific and essential functions of the relevant VAT exempt service. Without prejudice to the argument that the Appellant's services supplied to relevant GP clinics qualifies for the Medical Exemption in their own right, there is a good argument that the Appellant's services may qualify for the Medical Exemption on the basis that they are an outsourcing of the specific and essential functions of the services supplied by GP clinics

to patients. It is for the national court to determine whether the criteria are fulfilled in the circumstances.

46. As previously set out, in the cases of *Kugler* and *Dornier* the CJEU provided the medical exemption may apply to the services of a non-natural legal person. The CJEU passed their rationale in part on grounds of seeking to protect against infringement of the doctrine of fiscal neutrality. The requirement for fiscal neutrality in the operation of the VAT system is mentioned at Recital 7 of the VAT Directive which states the following:

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

47. However, the principle has been developed further in several decisions of the CJEU. In the case of *Elida Gibbs Limited v Commissioners of Customs and Excise* (C-317/94) a manufacturer of retail goods operated a promotional scheme. Such scheme entailed the taxpayer issuing money-off vouchers to customers, who could then obtain priced reductions from relevant retailers who could in turn seek a refund from the taxpayer. The taxpayer calculated the taxable amount on its supplies as being net of the refund amount stated on the money-off coupons, i.e. it reduced its output VAT in respect of supplies of its products to retailers. A separate scheme also entailed the issuing of cash-back vouchers whereby customers could present cash-back vouchers directly to the retailer for a refund of a portion of the price paid to acquire the taxpayer's goods from relevant retailers. The taxpayer similarly took a deduction in its VAT return for the VAT attributable to the amounts refunded.

48. The UK tax authority argued that as the refund is to a third party, the final customer, it could not reduce its output VAT on its supply to the retailer. The ECJ found in favour of the taxpayer, asserting the fundamental principle of fiscal neutrality, that the final consumer should bear the burden of VAT.

49. Paragraphs 22-24 of the Elida Gibbs decision are instructive in this regard:

    "It is not, in fact, the taxable persons who themselves bear the burden of VAT. The sole requirement imposed on them, when they take part in the production and distribution process prior to the stage of final taxation, regardless of the number of transactions involved, is that, at each stage of the process, they collect the tax on behalf of the tax authorities and account for it to them. In order to guarantee complete neutrality of the machinery as far as taxable persons are concerned, the

Sixth Directive provides, in Title XI, for a system of deductions designed to ensure that the taxable person is not improperly charged VAT. As the Court held in its judgment in Case 15/81 Schul v Inspecteur der Invoerrechten en Accijnzen [1982] ECR 1409, paragraph 10, a basic feature of the VAT system is that VAT is chargeable on each transaction only after deduction of the amount of VAT borne directly by the cost of the various price components of the goods and services. The procedure for deduction is so arranged that only taxable persons are authorized to deduct from the VAT for which they are liable the VAT which the goods and services have already borne. It follows that, having regard in each case to the machinery of the VAT system, its operation and the role of the intermediaries, the tax authorities may not in any circumstances charge an amount exceeding the tax paid by the final consumer."

50. Although that excerpt refers to supplies of goods, the principle applies equally to supplies of services and bears some relevance to the facts at hand by analogy. To subject the Appellant's income to VAT would mean that it or the GP clinics bears the final burden of VAT in the supply chain, even though the ultimate consumer is the patient. This would be contrary to the doctrine of fiscal neutrality and would lead to a consequent increase in the price of medical care received by patients due to the imposition of VAT in the supply chain. This is also contrary to the intention of the drafters of the VAT Directive who included an exemption for medical care supplies for the social purpose of seeking to keep the cost of healthcare low for EU consumers. The doctrine of fiscal neutrality should prevent the application of VAT in such circumstances.

51. It is helpful to consider the case of *Commissioners for Her Majesty's Revenue and Customs v The Rank Group plc* (Joined Cases C 259/10 and C 260/10) which also expanded upon the doctrine of fiscal neutrality. In this decision, the CJEU held that the principle of fiscal neutrality requires that two supplies of services, machine bingo and slot machines, which are identical or similar from the point of view of the consumer and meet the same needs of the consumer must be treated the same for VAT purposes. For the purposes of establishing whether two supplies are identical or similar from the point of view of the consumer the CJEU held that it is not necessary that the different treatment lead to the distortion of competition. Rather, it must be considered whether two supplies are comparable from the point of view of the average consumer and whether they meet the same needs of that consumer. Paragraphs 32-36 of the Rank Group decision are useful to cite in this context:

"According to settled case-law, the principle of fiscal neutrality precludes treating similar goods and supplies of services, which are thus in competition with each other, differently for VAT purposes (see, inter alia, Case C-481/98 Commission v France [2001] ECR I-3369, paragraph 22; Case C-498/03 Kingscrest Associates and

Montecello [2005] ECR I-4427, paragraphs 41 and 54; Case C-309/06 Marks & Spencer [2008] ECR I-2283, paragraph 47, and Case C-41/09 Commission v Netherlands [2011] ECR I-0000, paragraph 66).

According to that description of the principle the similar nature of two supplies of services entails the consequence that they are in competition with each other.

Accordingly, the actual existence of competition between two supplies of services does not constitute an independent and additional condition for infringement of the principle of fiscal neutrality if the supplies in question are identical or similar from the point of view of the consumer and meet the same needs of the consumer (see, to that effect, Case C 109/02 Commission v Germany [2003] ECR I-12691, paragraphs 22 and 23, and Joined Cases C-453/02 and C-462/02 Linneweber and Akritidis[2005] ECR I-1131, paragraphs 19 to 21, 24, 25 and 28).

That consideration is also valid as regards the existence of distortion of competition. The fact that two identical or similar supplies which meet the same needs are treated differently for the purposes of VAT gives rise, as a general rule, to a distortion of competition (see, to that effect, Case C-404/99 Commission v France [2001] ECR I-2667, paragraphs 46 and 47, and Case C-363/05 JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies [2007] ECR I-5517, paragraphs 47 to 51).

Having regard to the foregoing considerations, the answer to Question 1(b) and (c) in Case C-259/10 is that the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for the purposes of VAT of two supplies of services which are identical or similar from the point of view of the consumer and meet the same needs of the consumer is sufficient to establish an infringement of that principle. Such an infringement thus does not require in addition that the actual existence of competition between the services in question or distortion of competition because of such difference in treatment be established."

52. For the purposes of determining whether the imposition of VAT may lead to a distortion of competition, if the supplies of the Appellant and supplies of GP clinics are considered, it is certainly the case that the supplies are similar and may be identical from the point of the consumer. The fact that the Appellant supplies its services to GP clinics rather than contracting directly with patients should not be determinative.

53. It is also worth considering that a medical practice either incorporated or unincorporated which makes supplies directly to patients could be in competition with a

medical practice which subcontracts services to a person such as the Appellant. Both practices could be in competition from the point of view of a consumer and therefore subjecting the Appellant's supplies to VAT would constitute an infringement of the doctrine of fiscal neutrality.

54. The Appellant was not an accountable person for the period from 1 January 2011 to 31 December 2013 and accordingly, did not register for VAT or file VAT returns in respect of the period. The Respondent was therefore incorrect to raise the Assessment against the Appellant and should have raised an estimation of tax due.

55. On this basis, the Appellant's services are VAT exempt as they meet the criteria for the application of the medical exemption. It is factually incorrect for Respondent to argue that the supply constitutes a supply of staff services to GP clinics as the Appellant was not an employment agency. Accordingly, the assessment should be set aside.

Respondent's Submissions

56. There can be little controversy in proposing that exemptions from VAT are an exception to the rule that supplies of goods and services made in the course or furtherance of business are chargeable to VAT at the standard rate. Accordingly, exemptions from VAT and transactions subject to zero rating are to be construed strictly but not so as to deprive them of meaning.

57. In the decision of the High Court in *Bookfinders Limited v Revenue Commissioners* at paragraph 11 of its judgment, the Court (Keane J.) noted that the default rate of VAT applied to the provision of goods and services in the course of business generally; some specified goods and services attracted alternative rates of VAT provided for in other parts of the VATA. The court went on to consider the principles governing interpretation of VAT legislation and at paragraph 21 of its judgment summarised them in the following way:

> *(i) The general principle is that VAT is to be levied on all goods and services supplied for consideration by a taxable person; see, for example, the judgment of the Supreme Court in MacCàrthaigh .v. Cablelink Limited [2003] IR 510 at 513.*
>
> *(ii) Exemptions whereby VAT is to be charged at a reduced rate rather than the standard rate, are to be interpreted strictly, since they constitute an exemption to the general principle; see, for example, Blasi .v. Finanzant Munchen I, case C-346/95 at para. 18, and the cases cited there.*
>
> *(iii) The requirement whereby terms used to specify exemptions are to be interpreted strictly, does not mean that they should be construed in such a way as to deprive them or their intended effect; see Mestozamberk .v. Financni Reditelstvi Case C-18/12 at para. 18.*
>
> *(iv) An exclusion within an exemption triggers the reapplication of the general principle, and cannot, therefore, be interpreted strictly; see Blasi .v. Finanzant Munchen I, case C-346/95 at para. 19 and, as an illustration of the application of that principle, the United Kingdom VAT Tribunal Decision in Quaker Trading Limited .v. Her Majesty's Revenue and Customs (UK VAT Tribunal Decision 20604, 6 March 2008)."*

58. While noting that there was no disagreement between the parties as to the fundamental proposition that in considering legislation words should be given their

ordinary and every day meaning, there had been controversy as to whether the principles identified above applied to the construction of VAT legislation. The court concluded that they did. It did so for two reasons. First, the court noted that the argument advanced by the Appellant in that case, that the constructions of exemptions from VAT should be treated in the same way as the charge to direct tax, took no account of the "*conceptual distinction between direct and indirect taxation*". It went on to say that "*whether the obligation to collect and pay an individual tax on the supply of goods and services is indistinguishable from the obligation to pay a direct tax on income or assets for the purpose of the application of the principle against doubtful penalisation is in my view a doubtful proposition, and one for which the Appellant has cited no authority*."

59. Secondly the court concluded that the principle of conforming interpretation required that exemptions from VAT were to be construed strictly but not restrictively even taking account of the limits of the obligation of conforming interpretation.

60. The principles were also summarised by the CJEU in *Future Health Technologies Ltd v The Commissioners for her Majesty's Revenue & Customs* C-86/09 at paragraph 30:

> *"It also follows from the case-law relating to the Sixth Directive that the terms used to specify the exemptions in Article 132 of Directive 2006/112 are to be interpreted strictly, since they constitute exceptions to the general principle, arising from Article 2(1)(a) and (c) of Directive 2006/112, that VAT is to be levied on all goods and services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT. Thus, the requirement of strict interpretation does not mean that the terms used to specify the exemptions referred to in Article 132 should be construed in such a way as to deprive the exemptions of their intended effect (see by analogy, in particular, Case C 445/05 Haderer [2007] ECR I 4841, paragraph 18 and the case-law cited; Case C 461/08 Don Bosco Onroerend Goed [2009] ECR I 0000, paragraph 25 and the case-law cited; as well as Eulitz, paragraph 27 and the case-law cited)."*

61. The CJEU has had some opportunity to consider cases in which providers of services have argued for exemption from VAT on the basis that the services came within the exemption provided for in Article 132. In particular in *Ambulanter Pflegedienst Kugler GmbH .v. Finanzant Fur Korperschasten in Berlin* (Case C-2002/473), the court considered the charging of VAT at a reduced rate on outpatient care provided by *Kugler*. Kugler was a limited liability company which ran an outpatient care service and pursued

exclusively benevolent aims by supporting people who were dependent on the assistance of others or who were in need of economic assistance. It provided medical care, general care and domestic help. The tax authority determined that Kugler did not meet the conditions for exemption because as a legal person it did not exercise the professions referred to in the exemption provisions of the German Tax Code. Nor did it run a body providing medical care within the meaning of other of those provisions.

62. It is relevant to note that fundamentally, the nature of the supply made by Kugler was not in any doubt; the issue which arose was that as a matter of German law, from exemption from VAT in relation to those supplies was only provided to natural persons or organisations recognised as charitable. That this was the real matter in issue is apparent from the questions referred to the CJEU for determination. The first was whether the exemption provided for in Article 13(a)(1)(c) the Sixth VAT Directive (the predecessor provision to Article 132 of the VAT Directive) was dependent on the legal form of the taxable person supplying the services referred to. The CJEU held that the provision did not require medical services to be supplied by a taxable person endowed with a particular legal form in order for them to be exempt. It held that just two conditions needed to be met; medical services must be involved and they must be supplied by a person who possessed the necessary professional qualifications.

63. This finding was considered to be consistent with the long established principle that exemptions were to be interpreted strictly since they constitute exemptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person . The rationale for the conclusion which the court drew was the principle of fiscal neutrality which precludes economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned. The court found that this principle would be disregarded if the possibility of relying on an exemption was dependent on the legal form in which the taxable person carried on the relevant activity.

64. The issue in this case is not as to the legal form in which the provision of medical services is made. It is as to the nature of the supply made by the Appellant. The supply made by the Appellant is not a supply of medical services. It is therefore not a supply which attracts an exemption from VAT. It is a standard rated supply of staff.

65. In circumstances where the Appellant places heavy emphasis of the wording of the 2013 and 2015 agreements identified above, it is necessary to consider the principles applicable to the weighing of contractual terms in evidence in cases concerned with the identification of supplies made for the purposes of VAT. In *HM Revenue and Customs v Paul Newey* (Case C-2013/409) the CJEU held that:

> *"Contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purposes of identifying the supplier and the recipient of a "supply of services" within the meaning of Articles 2(1) and 6(1) of Sixth Council Directive 77/388/EEC [the Sixth VAT Directive]… they may in particular be disregarded if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage, which it is for the national court to determine."*

66. Quite apart from the foregoing, it is well settled that findings of fact can only stand where there is evidence to support them. Where the words on a page are not reflective of economic reality or where they are internally self contradictory it is necessary to consider the reality of the situation and arrive at a determination as to the facts which is supported by the admissible evidence. In particular, the Respondent emphasises that the description in the agreements furnished of the provision of "Medical Services" by the Appellant to ZZ is wholly undermined by the requirement for the doctor supplied by the Appellant to familiarise himself with the policies and practices of ZZ, thereby implicitly accepting an undertaking to abide by those policies and practices in a manner incompatible with the independent supply by the Appellant of medical services. See in this regard *Sally Moher T/A Premier Dental Agency v Commissioners for Her Majesty's Revenue and Customs* upper Tribunal decision of 22 March 2012 and Case C-594/13, *Go Fair*.

67. The *Moher* case was referred to in a First Tier Tribunal decision in the UK; *Rapid Sequence Limite*d – First Tier Tribunal decision of 5 July 2013. *Rapid Sequence* provided the services of anaesthetists to hospitals in the NHS and received fees for the services of the anaesthetists it procured based on the number of hours worked. It paid the anaesthetists separately an agreed hourly rate; the difference between those two rates representing the gross profit of its business. Rapid Sequence contended that the services it provided were exempt from VAT. The Tribunal rejected this contention as incompatible with the reality of services supplied by Rapid Sequence; noting that invoices generated by Rapid Sequence were based on hours worked multiplied by a relevant rate producing a total invoice value, that Rapid Sequence carried no insurance of its own in respect of any liabilities which might arise as a result of a Doctor performing his duties and that Rapid Sequence exercised no direction or supervision over doctors provided by it.

68. It was submitted that the logic of the foregoing principles points to the conclusion that the supply made by the Appellant herein is the supply of staff and not the supply of a medical service and that the mere description in written documents of a supply of

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"medical services" could not possibly override the economic and factual reality which entirely undermines that description.

69. The starting point in determining whether the Appellant was providing an exempt medical service pursuant to VATA, Sch 1 is set out by Fennelly, J in *Inspector of Taxes v Cablelink Limited* [2003] 4 IR 510, when stating at page 520:

> *"In my view, the conclusion of the Appeal Commissioners on the issue of whether there were one or two supplies is one of law and not of fact. It did not, in my view, entail the drawing of any inferences of fact. It is important to add, however, that it was a conclusion based on their appreciation of the facts that they had found based on the evidence they had heard. It behoves the court, therefore, to be particularly careful to give full effect to those findings of fact. It should not interpret them so as to diminish their value.*

70. In this regard, each service is separate and distinct. As such the question was posed to determine whether the Appellant was supplying an exempt service is one of law, albeit based on an appreciation of the facts.

71. Therefore, the correct approach as a matter of law in looking at supplies, is from the point of the consumer. The consumer in this appeal was ZZ notwithstanding that the recipient of the medical service was the patient in the chair.

72. To find in favour of the Appellant it would be necessary to conclude that the Appellant controlled Dr. AA in the supply of medical services and that Dr. AA and the Appellant was one and the same in the sense that it is the mind of Dr. AA which is controlling the provision of medical supplies. Furthermore, it would be necessary to take into account the involvement of ZZ and the medical director of ZZ and the administrative staff of ZZ, and the other involvement of ZZ in relation to the matter.

73. As can be discerned from *Medacy*, the supplier of the medical service if it is a legal entity, is the legal entity that takes ownership and responsibility for the service.

74. The administrators and staff are provided by ZZ and as such ZZ is providing the service to patients in organising the service, exercising a degree of supervision and control with the involvement of the medical director, but also in relation to the terms of the contract which reflected Dr AA's day-to-day duties and working life.

75. For a company to provide medical services, it is necessary that it takes responsibility for and exercising administration, organisation and control over the supply of those services, and it was ZZ and not the Appellant that performed such services. Furthermore, there was a supply of a doctor from the Appellant to ZZ, and a supply of medical services from ZZ to the patients. On the evidence of Dr. AA, the Appellant did nothing, the services of Dr. AA and the Appellant are conflated.

76. In accordance with *Cablelink*, the fact that every supply is separate and distinct and that it is obvious here that the supply from the Appellant to ZZ is separate and distinct in terms of the time at which it is supplied, in terms of the invoice that it raised which was separate, in terms of the amount of money which was charged and that was different to the amount that is charged in patient and in terms of the substance of that transaction.

77. The Respondent accepted that Dr. AA was providing the direct medical service to the patient but ZZ put the additional framework in place, put in place the policies, the handbook, the guidelines and the administrative staff. ZZ issued the invoices to the patients, and that was for a different amount of money and for a different service, done at a different point in time to the service supplied by the Appellant to ZZ. If any corporate entity has an argument as to an entitlement to exemption, it was ZZ.

78. The Respondent also accepted that it is possible for a corporate entity to provide medical services. However, there was also a distinction between providing that service and fulfilling the substantive criteria, putting in place that framework, organisation and taking responsibility of insurance. There is a difference between fulfilling the criteria in substance and simply handing over a doctor. It is possible for a corporate entity to provide those services. Medacy was found to have done it. In *Rapid Sequence* it did not, but it was acknowledged that it was possible.

79. Therefore, against the background of the general principles found in *Cablelink,* ZZ satisfied the substantive criteria while the Appellant merely provided the doctor to ZZ. In light of the foregoing, it was submitted that the supply of services by the Appellant by the provision of a doctor is subject to the standard rate of VAT and that the assessment should stand accordingly.

Analysis

80. The issue for determination is whether the services supplied by the Appellant qualify for exemption from VAT pursuant to VATA, Schedule 1, paragraph 2(3) with regard to:

    "Professional medical care services recognised as such by the Department of Health and Children (other than dental or optical services), but only if those services are not supplied in the course of carrying on a business that wholly or partly consists of selling goods"

81. From a review of the jurisprudence of the CJEU, the following principles apply in the interpretation and application of the VAT exemption associated with the provision of medical care:

    (a) the exemption is not dependent on the legal form of the taxable person providing the medical services (*Kugler* (Case C-141/00) at paragraph 27) and (*Christoph-Dornier-Stiftung* (Case C-45/01) at paragraph 21);

    (b) medical services must be involved and provided by persons possessing the necessary professional qualifications; (*Kugler* at paragraph 27)

    (c) the exemption of medical services supplied by legal persons is consistent with the objective of reducing the cost of medical care (*Kugler* at paragraph 28), and

    (d) the principle of fiscal neutrality precludes economic operators carrying on the same activities from being treated differently as far as the levying of VAT is concerned (*Kugler* at paragraph 29).

82. Furthermore, as both parties acknowledged, the settled law confirms that the terms used to specify exemptions are required to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person and summarised as follows in *Future Health Technologies (*C-86/09) at paragraph 30:

    "It also follows from the case-law relating to the Sixth Directive that the terms used to specify the exemptions in Article 132 of Directive 2006/112 are to be interpreted strictly, since they constitute exceptions to the general principle, arising from Article 2(1)(a) and (c) of Directive 2006/112, that VAT is to be levied on all goods and services supplied for consideration by a taxable person. Nevertheless, the interpretation of those terms must be consistent with the objectives pursued by those

exemptions and comply with the requirements of the principle of fiscal neutrality inherent in the common system of VAT."

83. There is no dispute between the parties that the Appellant employed Dr AA and that Dr AA provided medical care to the patients attending the clinics of ZZ. Furthermore, the Appellant was paid by ZZ based on the numbers of shifts worked by Dr AA in treating patients. However, it is the additional layers of commercial and legal structures imposed between the patient and Dr AA that gives rise to the divergence between the parties.

84. Therefore, in considering the contractual arrangements and the appropriate tax treatment, recourse can be made to the following passage in *Customs & Excise Commissioners v Reed Personnel Services Ltd* [1995] STC 588 where Laws J. at page 595 said:

    "Whether and to what extent the tax falls to be exacted depends, as with every tax, on the application of the taxing statute to the particular facts. Within those facts, the terms of contracts entered into by the taxpayer may or may not determine the right tax result. They do not necessarily do so. They will not do so where the contract, though it tells all the parties everything that they must or must not do, does not categorise any individual party's obligation in a way which inevitably leads to the conclusion that he makes certain defined supplies to another. In principle, the nature of a VAT supply is to be ascertained from the whole facts of the case. It may be a consequence, but is not a function, of the contracts entered into by the relevant parties."

85. As such "*the nature of a VAT supply is to be ascertained from the whole facts of the case."*

86. As observed by the CJEU in *Kulger* at paragraph 40 the definition of "*medical care"* for the purposes of the exemption from VAT entails the "*prevention, diagnosis or treatment"* of patients. That judgement also confirmed that the medical services exemption also applied to a company where the medical services are actually performed "*by persons who possess the necessary professional qualifications*." Therefore, and contrary to the Respondent's submissions, the settled law requires that the medical services exemption is defined by reference to the nature of the service and not by reference to the legal form of the supplier. To determine otherwise would be to undermine and disregard the clear jurisprudence of the CJEU in *Kugler* and *Christoph-Dornier-Stiftung* at paragraphs 27 and 21 respectively.

87. Furthermore, as noted in *Kugler* at paragraph 28, no impediment should be imposed that would increase the cost of providing medical care. Correspondingly, the principle of fiscal neutrality mandates that economic operators carrying on the same activities should not be treated differently as far as the levying of VAT is concerned (*Kugler* at paragraph 29).

88. Therefore in light of the evidence and in conformity with the settled law of the CJEU, I have found that the Appellant through its employee, Dr AA, a registered medical practitioner licensed to practice medicine in the State, provided medical care to the patients attending the clinics of ZZ and that the only services provided by ZZ was the provision of the infrastructure and the backup administrative and financial functions. Furthermore, as the Respondent acknowledged it was "*the patient who sits in the chair receives …. medical care from Dr AA*" and therefore it is irrelevant that ZZ put in place the additional framework, policies, the handbook, the guidelines and the administrative staff.

89. While ZZ employed a medical director, it is clear from the evidence that that director was engaged at a macro level and was the point of liaison, certainly from Dr AA's perspective, for locum doctors engaged by ZZ. The Appellant or indeed its employee, Dr AA, were not directed by any representative from ZZ in the manner in which medical services were performed. Furthermore, it is also significant that the Dr AA effected professional indemnity insurance which was partly paid by the Appellant which would not have been necessary if the Appellant was purely supplying staff rather than providing medical care services. As such the Appellant provided medical care to the patients who were treated by the Appellant's employee, Dr AA.

90. As the Appellant provided medical care through the services provided by its employee, Dr AA, to the patients presenting at the clinic of ZZ, it would be contrary to the principle of fiscal neutrality and therefore unlawful to distinguish the Appellant's services from the medical services performed by a natural person performing medical services. Furthermore, as noted in *Kugler* at paragraph 28, to impose VAT on the provision of medical care would increase the cost of treating patients and therefore the interpretation as impressed upon me by the Respondent would have an unlawful and unwarranted effect.

UK Jurisprudence

91. While not binding in this jurisdiction, the latest decision of the UK First Tier Tax Tribunal (FTT) in *Medacy Ltd v Revenue and Customs Commissioners* [2019] UKFTT 576 (TC) provides a useful summary of three earlier decisions in *Sally Moher t/a Premier Dental Agency v HMRC* [2012] UKUT 260 (TCC), *Rapid Sequence Limited v HMRC* [2013] UKFTT 432 (TC) and *City Fresh Services Limited v HMRC* [2015] UKFTT 0364 (TC) in the interpretation and application of the equivalent of VATA, Schedule 1, paragraph 2. The Respondent relied on *Sally Moher* and *Rapid Sequence* and distinguished *City Fresh* and *Medacy*. It is therefore not surprising that the Appellant took a diametrically opposed view in the interpretation and application of those decisions.

92. In *Medacy,* the FTT had to consider whether the appellant company was supplying exempt medical services through its pharmacists to various GP practices or the supply of staff. In determining the matter in favour of the Appellant company the FTT distinguished previous cases and concluded at paragraph 84:

> *"Turning to control and supervision, there is no doubt in our minds that Medacy has much more involvement in what its pharmacists are doing and how they do it than was the case in either Moher or Rapid Sequence."*

93. As such the FTT concluded that control and supervision were important components in determining whether there was a supply of medical services or indeed the supply of staff. Correspondingly, in this appeal, the evidence clearly showed that ZZ did not control or supervise the activities of the Appellant in the provision of medical care to patients. If anything, it could be argued that it was ZZ that operated in an agency capacity by procuring a doctor to treat patients attending its clinics.

Determination

94. The Appellant through its employee, Dr AA, provided medical care to patients presenting at the clinics of ZZ and that the only services provided by ZZ was the provision of the infrastructure and the backup administrative and financial functions. I have therefore found that the Appellant provided medical care services to the patients and as such those services constitute "*Professional medical care services recognised as such by the Department of Health and Children"* pursuant to VATA, Schedule 1, paragraph 2(3) and therefore exempt from VAT.

95. In this regard and in accordance with TCA, section 949AK, the assessment raised on 22nd December 2015 should be reduced to nil.

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Conor Kennedy
Appeal Commissioner
14th May 2020

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.