32TACD2022

Between/

[redacted]

Appellant

V

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

1. Outline of the issues

1. This appeal comes before the Tax Appeals Commission by way of an appeal against a decision by the Respondent that psychotherapy and counselling services provided by the Appellant were liable to VAT at the reduced rate of 13.5%. The Appellant contends that this decision is incorrect, and that the services which she provides are exempt from VAT.

2. Evidence & Factual Background

2. I heard evidence on oath from the Appellant at the hearing of this appeal. I found her evidence to be truthful and consistent and it is appropriate to record that her testimony as to facts was not challenged by the Respondent.

3. The Appellant testified that she had been carrying on the business of providing counselling and psychotherapy services since in or about 2███. She had obtained the qualifications of B.A. and M.A., followed by a post-graduate Diploma in Counselling. The Appellant has at all material times been a member of the Irish Association of Councillors & Psychotherapists. This is the largest professional body representing counsellors and psychotherapists in Ireland, with approximately 4,000 members from student members to accredited members in practice. At the time of the hearing of the appeal, the Association accredited councillors, psychotherapists and supervisors, and also accredited academic courses at Diploma, Degree and Master's levels. To become an accredited member of the Association, an applicant had to attain a minimum level of academic qualification and clinical experience, including post-training experience under supervision, as well as completing a formal process of Garda vetting.

4. The Appellant gave evidence that a significant proportion of her work involved the provision of psychotherapy and counselling to adult survivors of abuse. These patients were initially screened by the HSE and then referred to therapists such as the Appellant. The Appellant gave evidence that she was not a diagnostician and did not diagnose patients. In cross-examination, the Appellant stated that some 20% of her work came through referrals from the HSE.

5. I was also referred in this regard to an announcement by the HSE dated 11 July 2013, regarding the launch of its Counselling in Primary Care Service. The announcement stated that a short-term counselling service would be made available to medical card holders by referral through a GP or Primary Care Team, and would comprise up to eight sessions with "*a professionally qualified and accredited Counsellor Therapist*." The Appellant submitted that this demonstrated that the HSE recognised and utilised Counsellors and Therapists to deliver health care services in the community.

6. In the course of an audit of the Appellant and , the Respondent wrote to the Appellant's agent on 31 March 2015 and stated that psychotherapy services were liable to the charge of VAT at the reduced rate of 13.5% under paragraph 21(1) of Schedule 3 of the Value Added Tax Consolidation Act 2010 as amended (hereinafter referred to as "**VATCA 2010**"), which provided for the application of reduced VAT to:-

> *"Services consisting of the care of the human body, including services supplied in the course of a health studio business or similar business, but not including the exempted activities referred to in Part 1 of Schedule 1 or hairdressing services referred to in paragraph 13(3)."*

The letter further referred to the Respondent's VAT on Medical Services Leaflet.

7. The letter further stated that section 4 of the Health and Social Care Professionals Act 2005 provided a list of "*designated professions*", which included the profession of psychologist but did not include psychotherapists. Section 4 of that Act provided for Ministerial Regulations to be made to designate additional professions but none had as then been made to include psychotherapists as a designated profession. The letter therefore asserted that psychotherapy services were taxable both pre- and post-1 January 2010, with an exemption being given only where psychotherapy services were provided by a qualified psychologist.

8. The Appellant's agent replied by letter dated 22 May 2015 and pointed out that the Respondent's guidance on paragraph 21(1) gave as examples of the type of services comprised therein health studio services, such as personal fitness training and massage services, aerobics and keep fit classes. He submitted that categorising the Appellant's psychotherapy and counselling services with the foregoing activities was patently absurd.

9. The letter further made the point that the Appellant was providing services which amounted to care for the human mind, and not care of the human body. The letter further observed that psychologists offering counselling and psychotherapy services could avail of the VAT exemption, and submitted that it was an illogical distinction to say that the same services were exempt when provided by a psychologist but liable to VAT when provided by a psychotherapist, to whom patients had been referred by the State medical system.

10. The letter accordingly requested that the Respondent issue a formal determination in relation to the Appellant's VAT status in accordance with section 51(1) of VATCA 2010.

11. The Respondent replied by letter dated 23 June 2015, which stated that the Appellant had already been provided with a formal determination under section 51(1) of VATCA 2010, namely the decision contained in the letter of 31 March 2015. It stated that this was a decision which had been made by the Revenue Technical Legislative Section and forwarded to the Appellant's agent.

12. The letter further stated that it was the Respondent's view that the human mind formed part of the human body. The Respondent agreed that psychotherapy services were exempt from VAT when provided by a qualified psychologist, but the Appellant was not able to avail of this exemption because she was not so qualified.

13. By letter dated 26 June 2015, the Appellant's agent stated that the Appellant wished to appeal against the formal determination of 31 March 2015 pursuant to section 51(6) of VATCA 2010.

14. Following a holding letter of 9 July 2015, the Respondent replied on 23 July 2015 and stated as follows:-

> *"Firstly, I must apologise for stating that my letter of the 31st of March 2015 included a determination under section 51(1) of the VATCA 2010.* ***This is in fact not the case****. This was only an interpretation provided by our Technical Services.*
>
> *Please see Technical Services reply below*
>
> *…*
>
>> ***The rate of 13.5% applies to the services of*** **[the Appellant]** ***as psychotherapy is not recognised by the Department of Health and Children and is therefore not exempt for VAT purposes. Paragraph 2(3) of Schedule 1 of the VATCA (as amended) clearly sets out that exemption applies to "*****professional medical care services recognised as such by the Department of Health and Children (other than dental or optical services), but only if the services are not supplied in the course of carrying on a business that wholly or partly consists of selling goods.*****" While the Health and Social Care Professionals Act 2005 recognises the profession of psychologist it does not recognise the profession of psychotherapy, and therefore such services are not exempt for VAT purposes. Please see the following link to a Parliamentary Question from January 2015 (Written Answer 487) in relation to this issue asking the Minister for Health if he will include psychotherapy and counselling under***

the Health and Social Care Professionals Act 2005… Until such time as the profession of psychotherapy is recognised by the Department of Health and Children Revenue do not have any statutory basis to allow exemption to apply to such services.

Section 51(4)(b) of the VATCA (as amended) provides that the Revenue Commissioners shall not be required to make a determination if in their opinion the subject matter of the application is sufficiently free from doubt as not to warrant the making and publication of a determination. Revenue is of the view that this* [the Appellant's activities] *matter is sufficiently free from doubt as to not warrant the making and publication of a determination.

…

<u>Please note that the onus remains on the taxpayer to prove that the criteria for exemption are satisfied.</u>" [emphasis in original]

15. The Appellant's agent responded by letter dated 26 August 2015. The response took serious exception to the Respondent's assertion that no formal determination had been issued in relation to the Appellant's VAT status and repeated the request for an appeal of the formal determination communicated in the letter of 31 March 2015.

16. The letter further stated that the Parliamentary Question referred to in the Respondent's letter showed that the then Minister for Health had recognised that psychotherapy services were medical services. The letter further stated that the new Minister for Health had also recognised that psychotherapy services were medical services and intended to ensure that they were formally recognised as such. The letter further informed the Respondent that the Appellant had been informed by the

HSE that she would shortly be classed an employee of the HSE and payments to her from the HSE would be subject to deduction of tax through the PAYE system.

17. The Respondent replied by letter dated 2 October 2015 and stated that any intention by the Minister for Health to recognise psychotherapy as a profession could not have effect for VAT purposes unless and until it was so recognised. It further stated that the taxation at source of Appellant's payments from the HSE would operate prospectively, not retrospectively, and all payments received by the Appellant prior to the commencement of taxation at source by the HSE were taxable as self-employment income under self-assessment and were subject to VAT at 13.5% subject to the VAT services threshold.

18. By letter dated 8 October 2015, the Appellant's agent appealed the formal determination of 31 March 2015 directly to the Office of the Appeal Commissioners.

3. ***Relevant Legislation***

19. The relevant subsections of section 51 of VATCA 2010 provided as follows at the material time:-

> *(1) On receipt of an application in writing from an accountable person, the Revenue Commissioners shall, in accordance with regulations and after such consultation (if any) as may seem to them to be necessary with such person or body of persons as in their opinion may be of assistance to them, make a determination concerning-*
>
> *(a) whether on activity of any particular kind carried on by the person is an exempted activity, or*

(b) the rate at which tax is chargeable in relation to the supply or intra-Community acquisition by the person of goods of any kind, the supply or intra-Community acquisition of goods in any particular circumstances or the supply by the person of services of any kind.

…

(4) The Revenue Commissioners shall not make a determination under the section concerning any matter which has been determined on appeal under this Act or which is for the time being governed by an order under section 46(4) or 52(2), and shall not be required to make such a determination in relation to any of the matters referred to in an application under subsection (1) if-

(a) a previous determination has been published in regard to the matter, or

(b) in their opinion the subject matter of the application is sufficiently free from doubt as not to warrant the making and publication of determination.

…

(6) A person, aggrieved by a determination under subsection (1) made pursuant to an application by him or her, may, on giving notice in writing to the Revenue Commissioners within the period of 30 days beginning on the date of service on him or her of notice of the determination in accordance with subsection (5)(a), appeal to the Appeal Commissioners.

20. Part 1 of Schedule 1 of VATCA 2010 sets out the exemptions for certain activities in the public interest in accordance with Chapter 2 of Title IX of the VAT Directive. Paragraph 2 thereof includes the following medical and related services:-

(1) Hospital and medical care or treatment provided by a hospital, nursing home, clinic or similar establishment.

(2) Services closely related to medical care covered by section 61 or 61A of the Health Act 1970 which are undertaken by or on behalf of the Health Service Executive or by homecare providers duly recognised by that Executive under section 61A of that Act.

(3) 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.

…

(7) Other professional medical care services that, on 1 January 2010, were recognised by the Revenue Commissioners as exempt activities.

21. Schedule 3 of VATCA 2010 provides for goods and services chargeable at the reduced rate of VAT and includes under the miscellaneous services detailed in paragraph 21(1):-

Services consisting of the care of the human body, including services supplied in the course of a health studio business or similar business, but not including exempted activities referred to in Part 1 of Schedule 1 or hairdressing services referred to in paragraph 13(3).

22. Chapter 2 of Title IX of Council Directive 2006/112/EC provides for exemptions from VAT for certain activities in the public interest and provides in Article 132(1)(c) that:-

Member States shall exempt the following transactions:

…

(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;

23. Recital (7) of the Directive further states that:-

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.

24. The Health and Social Care Professionals Act 2005 was enacted to establish the Health and Social Care Professionals Council as well as Registration Boards for certain designated health and social care professions. This Act provided in section 3 that a "*designated profession*" was a health or social care profession that was designated in section 4(1) or designated by regulation under section 4(2).

25. The relevant subsections of section 4 provided as follows:-

(1) For the purposes of this Act, the following health or social care professions are designated:

(a) clinical biochemist;

(b) dietitian;

(c) medical scientist;

(d) occupational therapist;

(e) orthopaedist;

(f) physiotherapist;

(g) podiatrist;

(h) psychologist;

(i) radiographer;

(j) social care worker;

(k) social worker;

(l) speech and language therapist.

(2) After consulting the Council, the Minister may, by regulation, designate for the purposes of this Act any health and social care profession not already designated under subsection (1), but only if-

(a) the fitness of the members to practice their profession is not regulated by or under another Act of the Oireachtas,

(b) the Minister has given interested persons, organisations and other bodies an opportunity to make representations to him or her concerning the proposed designation,

(c) the Minister considers that it is appropriate and in the public interest that the profession be designated under this Act, and

(d) the steps in subsection (8) have been taken.

(3) A health or social care profession is any profession in which a person exercises skill or judgement relating to any of the following health or social care activities:

(a) the preservation or improvement of the health and well-being of others;

(b) the diagnosis, treatment or care of those who are injured, sick, disabled or infirm;

(c) the resolution, through guidance, counselling or otherwise, of personal, social or psychological problems;

(d) the care of those in need of protection, guidance or support.

26. For the sake of completeness, I should record that by the Health and Social Care Professionals Act 2005 (Section 4(2)) (Designation of Professions: Counsellors and Psychotherapists and Establishment of Registration Board) Regulations 2018 (S.I. 170/2018), the Minister for Health designated the health and social care professions of counsellor and psychotherapist as "*designated professions*" for the purposes of the 2005 Act. However, these Regulations were not in force at the times material to this appeal.

4. Submissions of the Appellant

27. The submissions made on behalf of the Appellant at the hearing of the appeal largely mirrored the arguments made to the Respondent in the course of the correspondence outlined above.

28. The Appellant's agent referred me to the decision of the European Court of Justice in ***Dornier* Case C-45/01**. In that case, Dornier was a charitable foundation governed by private law which maintained an out-patient facility in which patients were given psychotherapeutic treatment by qualified psychologists employed by the foundation. The qualified psychologists employed by the foundation were not doctors but they were licensed to practise under the relevant German legislation and had received further education to qualify as psychotherapists. The German Revenue authorities decided that the psychotherapeutic services provided by the foundation were not exempt from VAT and the foundation challenged this decision.

29. One of the questions considered by the Court was whether the psychotherapeutic treatment provided by Dornier should be exempted from VAT under Article 13A(1)(c) of the Sixth Directive [now Article 132(1)(c)], having regard, first, to the principle of neutrality inherent in the common system of VAT and, second, to the fact that the same treatment could have been provided on a tax-exempt basis by psychotherapists employed by Dornier if they had provided it not as employees but as self-employed taxable persons.

30. The Court noted at paragraph 19 that:-

"It is apparent from both the wording of the question and the observation submitted to the Court in this connection that it is common ground that if the psychotherapeutic treatment had been provided by self-employed psychotherapists, it would been exempt from tax as provided for in Article 13A(1)(c)."

31. The Court noted that it had previously held in ***Kügler*** **Case C141/00** that the exemption envisaged in Article 13A(1)(c) was not dependent on the legal form of the taxable person supplying the medical or paramedical services, and therefore psychotherapeutic treatment provided by a foundation governed by private law and given by psychotherapists employed by the foundation could benefit from VAT exemption.

32. The Appellant's agent referred me in particular to paragraphs 42 to 47 inclusive of the judgment, where the Court stated as follows:-

"According to the Court's case-law, 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 taxable person (see in particular Case C-2/95 SDC*, paragraph 20; and* Kügler*, cited above, paragraph 28). However, the interpretation of the terms used in that provision 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.*

It is apparent from the case-law that the objective of reducing the cost of medical care and making that care more accessible to individuals is common to both the exemption provided for in Article 13A(1)(b) of the Sixth Directive and that in

letter (c) of the same provision (see Commission v France, *cited above, paragraph 23; and* Kügler, *cited above, paragraph 29).*

*It must also be borne in mind that 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 (*Kügler, *cited above, paragraph 30).*

As is clear from the answer given by the Court to the third question, the exemption provided for in Article 13A(1)(c) of the Sixth Directive applies to psychotherapeutic treatment given by qualified psychotherapists when that treatment is given outside bodies governed by public law and other establishments contemplated by Article 13A(1)(b).

As regards the question of whether psychotherapeutic treatment given by qualified psychologists in a hospital environment is covered by the term 'medical care' in Article 13A(1)(b) of the Sixth Directive, it is clear, first, that only some language versions of the Directive, including the German and French versions, seem to draw a distinction between the nature of the care exempted under that provision and that of the care exempted under letter (c) of the same provision.

Next, as correctly pointed out by the Advocate General in points 44 to 46 of her Opinion, the criterion for drawing a clear distinction between the two tax exemptions provided for in Article 13A(1)(b) and (c) is less the nature of the service than the place where it is provided. The Court has held that, under Article 13A(1)(b), it is appropriate to exempt services encompassing a whole range of medical care in establishments pursuing social purposes such as the protection of human health, whereas letter (c) of the same provision exempt services

*provided outside hospitals and within the framework of the confidential relationship between the patient and the person providing the care (*Commission v United Kingdom*, cited above, paragraph 33). Whilst it is true that the Court in that case found that the exemption of supplies of goods effected in connection with the provision of medical care envisaged in Article 13A(1)(c) could not be justified under letter (b) of the same provision, that interpretation follows inter alia from the fact that the latter provision covers duly recognised establishments pursuing social purposes and provides expressly for exemption of activities which are closely linked to medical care; the same cannot be said of Article 13A(1)(c).”*

33. The Appellant’s agent further referred me to the linked decisions of the ECJ in ***Solleveld*** **Case C-443/04** and ***van den Hout – van Eijnsbergen*** **Case C-444/04**, where the Court had to consider the lawfulness of decisions of the Dutch Revenue authorities refusing to exempt from VAT medical care provided by a physiotherapist and a psychotherapist respectively in the exercise of their respective professional activities. The psychotherapist in the latter case was self-employed, had a teaching diploma in the field and had been duly entered in the Register of Psychotherapists maintained by the Dutch medical authorities. The Dutch Supreme Court (*Hoge Raad*) observed that it was beyond reasonable doubt that the purpose of treatment provided by self-employed psychotherapists was therapeutic but noted that psychotherapists did not appear on the list of health and social care professions exempted from VAT. The question referred to the ECJ was whether the exhaustive list of the medical professions in the Dutch VAT legislation could be sufficient to exclude the medical care at issue from the exemption laid down by Article 13A(1)(c) of the Sixth Directive.

34. The ECJ noted that, according to a literal interpretation of Article 13A(1)(c), the practitioner must satisfy two conditions to benefit from the exemption laid down in

that provision, which are, first, that he must provide "*medical care*" and, second, that this must be carried out "*in the exercise of the medical and paramedical professions as defined by the Member State concerned*". The Court noted that it was common ground that the treatment given by the psychotherapist constituted medical care within the meaning of Article 13A(1)(c), since those treatments were carried out for the purpose of diagnosing, treating and, insofar as possible, curing diseases or health disorders, thus pursuing a therapeutic aim, and referred to ***D'Ambrumenil and Dispute Resolution Services*** **Case C-307/01**.

35. The Court then went on to state as follows:-

> "[I]*t is apparent from the orders for reference that, in Case C-444/04, the treatments in question were given by a provider who did not belong, at the time of the facts in the main proceedings, to one of the paramedical professions defined by the national legislation for the purposes of exemption from VAT…*
>
> *It follows that, by its question in Case C-444/04, the referring court seeks in particular to determine to what extent the Member States may, for the purposes of the exemption from VAT laid down in Article 13A(1)(c) of the Sixth Directive, exclude certain professions from the definition of paramedical professions adopted by the national legislation…*
>
> *In that respect, it is clear from the wording of Article 13A(1)(c) of the Sixth Directive that that provision does not itself define the concept of 'paramedical professions', but refers instead to the definition adopted by the national legislation of the Member States.*
>
> *Under these circumstances, it is for each Member State to define, in its own domestic law, the paramedical professions in the context of which medical care*

*is exempt from VAT, pursuant to Article 13A(1)(c) of the Sixth Directive. The Court has already held that that provision confers discretion on the Member States in this respect (*Dornier*, paragraph 81).*

That discretion covers not only the power to define the qualifications required to carry out the said professions, but also the power to define the specific medical-care activities which are covered by such professions. In fact, since the various qualifications acquired by the service providers do not necessarily prepare them to provide all types of care, a Member State is entitled to take the view, in the exercise of its discretion, that the definition of paramedical professions would be incomplete if it were limited to imposing general requirements as to the qualifications of providers, without specifying the care in respect of which they are qualified in the context of those professions.

However, the discretion enjoyed by the Member States in this respect is not unlimited.

Admittedly, as the Netherlands Government states, the Member States are entitled, pursuant to the first clause of Article 13A(1) of the Sixth Directive, to lay down the conditions for granting exemptions to ensure their correct and straightforward application.

Thus, contrary to the submission of the Commission of the European Communities, it must be accepted that the Member States' discretion in defining the paramedical professions authorises them not to consider as such and, therefore, to exclude from the exemption from VAT laid down by Article 13A(1)(c) of the Sixth Directive a particular profession such as that of

psychotherapist in Case C-444/04, even if certain aspects of that profession are governed by specific rules under national law.

Similarly, it is correct, as the Netherlands Government submits, that the correct and straightforward application of the exemption from VAT laid down in Article 13A(1)(c) of the Sixth Directive is ensured where, as in Case C-443/04 in respect of physiotherapy services, the said exemption is granted only to providers with the professional qualifications specified in the national legislation on the paramedical professions and only in connection with the specific medical-care activities in respect of which those qualifications were acquired, as those activities are defined in the said legislation.

However, it follows from the Court's case-law that the requirement of a correct and straightforward application of the exemptions does not allow the Member States to prejudice the objectives of the Sixth Directive or the principles of Community law, in particular the principle of equal treatment, which is reflected, in the field of VAT, by the principle of fiscal neutrality (see Dornier*, paragraphs 42 and 69; Case C-498/03* Kingscrest Associates and Montecello*, paragraphs 29 and 52; and Case C-246/04* Turn- und Sportunion Waldburg*, paragraphs 44 to 46).*

Consequently, where a taxable person requests that his medical-care activities be recognised as coming within the ambit of the exercise of paramedical professions, for the purpose of benefiting from the exemption from VAT laid down in Article 13A(1)(c) of the Sixth Directive, it is for the national courts to examine whether the competent authorities have observed the limits of the discretion granted by this provision, having regard to the objective pursued by the latter and the principle of fiscal neutrality inherent in the common system of

VAT (see, to that effect, Kügler, *paragraph 56;* Dornier, *paragraph 69; and* Kingscrest Associates and Montecello*, paragraph 52).*

*In this respect, concerning, first, the objective pursued by Article 13A(1)(c) of the Sixth Directive, it should be noted that the condition laid down by that provision, that medical care must be provided in the exercise of the paramedical professions as defined by the Member State concerned, is to ensure that the exemption applies only to medical care provided by practitioners with the required professional qualifications (*Kügler, *paragraph 27). Consequently, not all medical care falls within the scope of such an exemption, the latter concerning only that of sufficient quality having regard to the professional training of the providers.*

It follows that the exclusion of a particular profession or a specific medical-care activity from the definition of the paramedical professions adopted by the national legislation for the purpose of the exemption laid down by Article 13A(1)(c) of the Sixth Directive must be capable of justification on objective grounds based on the professional qualifications of the care providers and, therefore, by considerations relating to the quality of the services provided.

As regards, secondly, the principle of fiscal neutrality, which is inherent in the common system of VAT, it must be remembered that, according to case-law, that principle precludes treating similar supplies of services, which are thus in competition with each other, differently for VAT purposes (Case C-109/02 Commission v Germany*, paragraph 20; and* Kingscrest Associates and Montecello*, paragraph 54).*

In order to determine whether medical care is similar, it is appropriate to take into account, concerning the exemption laid down in Article 13A(1)(c) of the Sixth Directive and having regard to the objective pursued by that provision, the professional qualifications of the care providers. In fact, where it is not identical, medical care can be regarded as similar only to the extent that it is of equivalent quality from the point of view of recipients.

It follows that the exclusion of a profession or specific medical-care activity from the definition of the paramedical professions adopted by the national legislation for the purpose of the exemption from VAT laid down in Article 13A(1)(c) of the Sixth Directive is contrary to the principle of fiscal neutrality only if it can be shown that the persons exercising that profession or carrying out that activity have, for the provision of such medical care, professional qualifications which are such as to ensure a level of quality of care equivalent to that provided by persons benefiting, pursuant to that same national legislation, from an exemption. It is therefore for the referring court to determine whether, having regard to all of these factors, the exclusion, in Case C-444/04, of the profession of psychotherapist and, in Case C-443/04, of activities in the area of disturbance field diagnostics carried out by a physiotherapist, from the field of the exercise of the paramedical professions for the purpose of the exemption from VAT laid down in Article 13A(1)(c) of the Sixth Directive exceeds the limits of the discretion granted to the Member States by that provision.

In that respect, as regards Case C-444/04, it should at the outset be pointed out that, contrary to the line of argument put forward by the Netherlands Government, the fact that all psychotherapists have been treated in the same way in respect of VAT, whatever their legal status, is not relevant. On the other hand, it should be examined whether, as Ms van den Hout-van Eijnsbergen

submits, the Member State concerned, during the tax years at issue in the main proceedings, made the activities of psychotherapists with a teaching diploma subject to a VAT regime which was different from that applied to psychiatrists and psychologists carrying out the same activities.

If that were the case, it would be for the referring court to examine whether psychotherapists with a teaching diploma, such as the applicant in the main proceedings, actually have, like psychiatrists and psychologists, the professional qualifications required to carry out the psychotherapy treatments practised by the applicant and, if so, whether they benefit, in respect of such activities, from the exemption from VAT.

If so, the national legislation at issue in the main proceedings would exceed the discretion enjoyed by the Member States under Article 13A(1)(c) of the Sixth Directive only if the quality of the treatments carried out by psychotherapists could be regarded, having regard to their professional qualifications, as equivalent to that of similar treatments carried out by psychiatrists, psychologists or any other medical or paramedical profession, a matter which it is for the referring court to determine in the light of all of the relevant circumstances of the case before it.

In that respect, the referring court will be able to take into account, in particular, the fact that the applicant in the main proceedings has a teaching diploma and that the psychotherapy treatments which she carried out during the relevant tax years took place within a statutory framework, under the control of the Public Health Inspectorate and in accordance with conditions set out in specific legislation, respect of which is attested to by entry in a register provided for that

purpose, these circumstances being such as to ensure that she had, for the exercise of her activities, the required professional qualifications."

36. The Court therefore concluded as follows:-

"Article 13A(1)(c) … must be interpreted as meaning that it confers on the Member States the discretion to define the paramedical professions and the medical care coming within the scope of such professions for the purpose of the exemption laid down by that provision. However, the Member States must, in the exercise of that discretion, comply with the objective pursued by the said provision, which is to ensure that the exemption applies solely to services provided by persons with the required professional qualifications, and the principle of fiscal neutrality.

National legislation which excludes the profession of psychotherapist from the definition of the paramedical professions is contrary to the said objective and principle only to the extent that psychotherapeutic treatments would, if carried out by psychiatrists, psychologists or any other medical or paramedical profession, be exempt from value added tax, whereas, carried out by psychotherapists, they can be regarded as being of equivalent quality having regard to the professional qualifications of the latter, a matter which it is for the referring court to determine."

37. The Appellant's agent further referred me to the decision in ***Rank Group plc*** **Case C-259/10**, where the ECJ had to determine whether it was in breach of the principle of fiscal neutrality to treat different types of gaming and slot machines differently for the purposes of exemption from VAT although they were comparable, and indeed identical, from the consumer's point of view. The Court concluded *inter alia* that:-

"The principle of fiscal neutrality must be interpreted as meaning that the difference in treatment for the purposes of value added tax 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."

38. The Appellant's agent submitted that the Appellant was providing exactly the same services as those which would be provided by a psychologist offering psychotherapeutic or counselling treatment, and that accordingly the Irish tax treatment of the Appellant was in breach of the principle of fiscal neutrality.

5. *Submissions of the Respondent*

39. Again, the submissions made on behalf of the Respondent at the hearing of the appeal mirrored those made in the correspondence detailed above. In essence, the Respondent submitted that because psychotherapists were not among the designated professions detailed in or under section 4 of the Health and Social Care Professionals Act 2005, the Appellant did not provide professional medical care services recognised as such by the Department of Health and Children within the meaning of paragraph 2(3) of Part 1 of Schedule 1 of VATCA 2010. Accordingly, the Appellant's services were not exempt from VAT and were instead liable at the reduced rate pursuant to paragraph 21(1) of Part 4 of Schedule 3 of the Act.

6. ***Analysis and Findings***

40. A preliminary issue which must be determined is whether there is, in fact, a valid appeal before me. It was submitted on behalf of the Respondent that because no formal determination had been issued under section 51 of VATCA 2010, no right of appeal pursuant to section 51(6) could be invoked by the Appellant.

41. I am satisfied that there is such a valid appeal. The Respondent informed the Appellant's agent by its letter of 23 June 2015 that its previous letter of 31 March 2015 was a formal determination. On being informed of this, the Appellant's agent invoked her right of appeal pursuant to section 51(6) by letter dated 26 June 2015. It was only after this notice of appeal had been received by the Respondent that it informed the Appellant's agent that the letter of 31 March 2015 did not in fact contain a formal determination.

42. In circumstances where the Appellant's agent had expressly requested a formal determination from the Respondent, and had been informed by the Respondent that such a determination had been given, and had then exercised the statutory right of appeal against the determination, I believe that there has been a valid invocation of the right of appeal conferred by the legislation. I do not believe that a subsequent purported reclassification by the Respondent of the contents of the letter of 31 March 2015 can operate to deprive the Appellant of a right of appeal which had already been properly invoked. I will therefore proceed to consider and determine this appeal on its merits.

43. I believe that the appropriate manner in which to approach the issues in this determination is firstly to consider whether the Appellant is providing services which are exempt from VAT because they fall within the exempt activities detailed in Part 1 of Schedule 1 of VATCA 2010, or whether, as the Respondent contends, they are instead liable to VAT at the reduced rate under Part 4 of Schedule 3 of that Act. If I find that the services provided by the Appellant are not exempt from VAT under the domestic legislation, I will then consider whether the failure to exempt psychotherapeutic and counselling services from VAT is contrary to the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and/or in breach of the principle of fiscal neutrality.

44. It is clear that the Appellant in this appeal asserts that she is entitled to an exemption from liability to VAT by reason of the nature of the services which she provides to her patients. I believe that the appropriate approach to take when determining whether the Appellant is entitled to the exemption claimed is that given by the Supreme Court in ***Revenue Commissioners –v- Doorley* [1933] IR 750** at p765, where Kennedy CJ stated:-

> *"I have been discussing taxing legislation from the point of view of the imposition of tax. Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without*

doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as applicable."

45. Furthermore, in considering the proper interpretation of the legislation relevant to this appeal, I have applied the judgment of the Supreme Court given by McKechnie J in ***Dunnes Stores -v- Revenue Commissioners*** **[2019] IESC 50**, where he stated:-

> *"As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. 'The words themselves alone do in such cases best declare the intention of the lawmaker' (Craies on Statutory Interpretation, 7th ed., Sweet & Maxwell, 1971 at pg. 71). In conducting this approach '… it is natural to enquire what is the subject matter with respect to which they are used and the object in view' – Direct United States Cable Company –v- Anglo-American Telegraph Company [1877] 2 App. Cas. 394. Such will inform the meaning of the words, phrases or provisions in question – McCann Limited –v- O'Culachain (Inspector of Taxes) [1986] 1 I.R. 196, per McCarthy J at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.*

Where however the meaning is not clear, but rather is imprecise or ambiguous, further rules of construction come into play. Those rules are numerous both as to their existence, their scope and their application. It can be very difficult to try and identify a common thread which can both coherently and intelligibly explain why, in any given case, one particular rule rather than another has been applied, and why in a similar case the opposite is also occurred. Aside from this however, the aim, even when invoking secondary aids to interpretation, remains exactly the same as that with the more direct approach, which is, insofar as possible, to identify the will and intention of Parliament.

When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many aspects to such method of construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker."

46. The foregoing passage was cited with approval by O'Donnell J giving the Supreme Court's decision in ***Bookfinders Ltd –v- Revenue Commissioners* [2020] IESC 60** where, having found that section 5 of the Interpretation Act should not be applied in the interpretation of taxation statutes, he went on to state in paragraph 54:-

> *"However, the rest of the extract from the judgement* [of McKechnie J] *is clearly applicable and provides valuable guidance. It means, in my view, that it is a mistake to come to a statute - even a taxation statute - seeking ambiguity. Rather, the purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the court is to seek to*

ascertain their meaning. The general principles of statutory interpretation are tools used to achieve a clear understanding of the statutory provision. It is only if, after the process has been concluded, a court is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language."

47. I believe it is clear that the services provided by the Appellant do not fall within subparagraph (1) of paragraph 2 of Schedule 1 (hospital and medical care or treatment provided by hospital, nursing home, clinic or similar establishment), nor do they fall within subparagraph (2), which covers homecare services. Accordingly, the Appellant can only succeed in an argument that she is exempt from VAT if I am satisfied that she provides "*professional medical care services recognised as such by the Department of Health and Children*" within the meaning of subparagraph (3).

48. Considering first the question of whether the services provided by the Appellant are professional medical care services, I believe it cannot be denied that the psychotherapy and counselling which the Appellant offers her patients amount to medical care within the plain and ordinary meaning of those words. It is relevant in this regard that the Respondent did not seek to argue that the Appellant did not provide medical care services; rather, its argument was premised on the fact that the Appellant's profession was not recognised by the Department of Health and Children. Equally, I think it relevant to note that it is clear from the decisions of the European Court of Justice in ***Dornier*** and ***van den Hout – van Eijnsbergen*** that it was common case between the parties in those cases that the provision of psychotherapy services constituted the provision of medical care, and nothing in the judgements can be read as supporting a contrary finding.

49. I am further satisfied on the evidence before me that the medical care services provided by the Appellant are professional medical care services. The word "*professional*" is not defined in the VAT legislation and so I must give it its plain and ordinary meaning. In the context of medical care services, I understand it to mean services provided by somebody who has undergone specialist training or education in relation to the provision of those services.

50. I note in this regard that the Appellant, having attained an undergraduate and then a Master's degree, studied for and obtained a postgraduate Diploma in Counselling. She was also a member of the Irish Association for Counselling and Psychotherapy, which is a body established in 1981 "*to identify, develop and maintain professional standards of excellence in Counselling and Psychotherapy.*"

51. I have also had regard to the fact that the Health Service Executive made reference to "*professionally qualified and accredited Counsellor Therapists*" when launching its Counselling in Primary Care Service and to the fact that two Ministers for Health made reference to "*the profession or professions of counsellor and psychotherapist*" in response to questions about the regulation of those occupations under the Health and Social Care Professionals Act 2005.

52. I also believe it is relevant to note that section 4(3) of the 2005 Act provides *inter alia* that "*A health … profession is any profession in which a person exercises skill or judgement relating to … the resolution, through guidance, counselling or otherwise, of personal, social or psychological problems…*"

53. Having regard to all of the foregoing, I am satisfied as a matter of law and I find as a material fact that the counselling and psychotherapy services provided by the

Appellant constitute professional medical care services within the meaning of paragraph 2(2) of Schedule 1 of VATCA 2010.

54. The next question therefore is whether those professional medical care services are "*recognised as such by the Department of Health and Children.*" I confess to finding the wording used by the legislature in this phrase to be somewhat curious. Prior to 2010, paragraph (ii) of the First Schedule to the Consolidated VAT Acts 1972-2009 exempted from VAT "*professional services of a medical nature, other than services specified in paragraph (iiib), but excluding such services supplied in the course of carrying on a business which consists in whole or in part of selling goods*." It is clear therefrom that there was then no requirement for the professional services to be recognised by the Department of Health.

55. A new Schedule 1 was inserted by section 130 of the Finance Act 2010 with effect from 3 April 2010, and this introduced for the first time the requirement for recognition by the Department of Health.

56. The Respondent effectively submits that the phrase "*recognised as such by the Department of Health and Children*" should be interpreted in the case of the Appellant as meaning "*provided by a member of a designated profession within the meaning of the Health and Social Care Professionals Act 2005.*" As the Respondent's Technical Services put it in their letter of 23 July 2015, "*While the Health and Social Care Professionals Act 2005 recognises the profession of a psychologist it does not recognise the profession of psychotherapy, and therefore such services are not exempt for VAT purposes.*"

57. I believe this to be an overly narrow interpretation, and one that cannot be reconciled with the literal meaning of paragraph 2(2) of the First Schedule. I further believe that it is founded upon a misinterpretation of the 2005 Act; that Act does not "*recognise*"

any professions, but rather provides for their being made "*designated professions*" for the purposes of the Act. Recognition by the Department of Health is not in my view synonymous with designation under the 2005 Act, and I believe that the Respondent has fallen into error in seeking to treat them as meaning the same for VAT purposes.

58. In this regard, I believe it is significant that at the time the legislature amended Schedule 1 and introduced a requirement that exempt professional medical care services be "*recognised as such by the Department of Health and Children*", the Health and Social Care Professionals Act 2005 had been enacted. It would have been possible for the Oireachtas to make reference to that Act in delimiting the professional medical care services which are exempt, but it chose not to do so.

59. The legislation in this jurisdiction can be contrasted with the position in England and Wales, where Paragraph 1 of Group 7 (Health and Welfare) of Part II of Schedule 9 of the Value Added Tax Act 1994 exempted from VAT:-

The supply of services by a person registered or enrolled in any of the following-

(a) the register of medical practitioners or the register of medical practitioners with limited registration;

(b) either of the registers of ophthalmic opticians or the register of dispensing opticians kept under the Opticians Act 1989 or either of the lists kept under section 9 of that Act or bodies corporate carrying on business as ophthalmic opticians or as dispensing opticians;

(c) the register kept under the Healthcare Professions Order 2001;

(ca) the register of osteopaths maintained in accordance with the provisions of the Osteopaths Act 1993;

(cb) the register of chiropractors maintained in accordance with the provisions of the Chiropractors Act 1994;

(d) the register of qualified nurses and midwives maintained under article 5 of the Nursing and Midwifery Order 2001;

(e) the register of dispensers of hearing aids or the register of persons employing such dispensers maintained under section 2 of the Hearing Aid Council Act 1968.

60. It is clear from the English legislation that exemption from VAT was only available in respect of health and welfare services provided by persons registered or enrolled in the statutory registers detailed in Paragraph 1 of Group 7. An equivalent provision could have been inserted in the Irish legislation by limiting the exemption from VAT to registered medical professionals and registered members of designated health and social care professions; instead, however, the Oireachtas chose a significantly different formula of words which, in my view, must be interpreted as extending the exemption from VAT under paragraph 2(3) to professional medical care services provided by persons not registered on a statutory professional register, provided those services are recognised as professional medical care services by the Department of Health.

61. In the instant appeal, such recognition is in my view clearly and unambiguously demonstrated by the fact the Health Service Executive, the statutory body under the aegis of the Department of Health charged with operating the public health services in Ireland, referred patients to the Appellant for health care services, namely counselling and therapy, and paid the Appellant for providing those services.

62. My views in this regard are supported by the fact that the HSE announced in 2013 that it was offering counselling from professionally qualified and accredited Counsellor Therapists as part of its Primary Care Service, as well as by the recognition by two Ministers for Health in response to Parliamentary Questions that counsellors

and psychotherapists were health professionals who should be a designated profession(s) under the Health and Social Care Professions Act 2005.

63. The Appellant's agent further argued that the fact that the Appellant was, from November 2015 onwards, treated as an employee of the HSE and had payroll taxes deducted at source was further evidence that her services were recognised by the Department of Health. However, in my view the employment classification of the Appellant by the HSE is not material to the issue of the Department's recognition of her services as professional medical care services.

64. Having regard to the foregoing factors, I am satisfied and find as a material fact that the psychotherapy and counselling services provided by the Appellant were recognised as professional medical care services by the Department of Health within the meaning of paragraph 2(2) of Part 1 of Schedule 1 to VATCA 2010.

65. I therefore find that the psychotherapy and counselling services provided by the Appellant were exempt from VAT.

66. Having so found, it is not necessary for me to consider whether the provisions of Paragraph 2(2) of Part 1 of Schedule 1 are contrary to the provisions of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax and/or in breach of the principle of fiscal neutrality. I am satisfied that I would have had jurisdiction, and indeed been obliged, to consider these issues in accordance with the decision of the ECJ in **Case C-378/17 *Minister for Justice and Equality –v- Workplace Relations Commission***.

67. While it is not necessary for me to reach any settled conclusion on the arguments advanced by the Respondent in this regard, I would observe for the sake of completeness that I believe that the decision in ***van den Hout – van Eijnsbergen*** **Case**

C-444/04 makes it clear that the legislature had a discretion to exclude psychotherapists or counsellors or the services they provided from the exemption from VAT on medical and related services provided that it did so to ensure that the exemption applied solely to services provided by persons with the required professional qualifications, and provided that the exclusion did not breach the principle of fiscal neutrality.

68. Furthermore, national legislation which excludes the profession of psychotherapist from the definition of the paramedical professions is contrary to the principle of fiscal neutrality only to the extent that psychotherapeutic treatments would, if carried out by psychiatrists, psychologists or any other medical or paramedical profession, be exempt from VAT, whereas, carried out by psychotherapists, they could be regarded as being of equivalent quality having regard to the professional qualifications of the latter.

69. The evidence given before me by the Appellant was that, having regard to her education, training and qualifications, the psychotherapy and counselling services she provided were of equivalent quality to the psychotherapy and counselling services provided by registered psychologists, and this evidence was not challenged by the Respondent. Accordingly, had I been required to reach a determination on this issue, I would have required the Respondent to satisfy me at a further hearing, whether by evidence or submissions or both, that the Appellant's services were of a lesser quality than those provided by psychologists, and that consequently the principle of fiscal neutrality had not been breached.

TAX APPEALS COMMISSION

7. ***Conclusion***

69. For the reasons outlined above, I find that find that the psychotherapy and counselling services provided by the Appellant were recognised as professional medical care services by the Department of Health within the meaning of paragraph 2(2) of Part 1 of Schedule 1 to VATCA 2010, and were therefore exempt from VAT.

70. I therefore determine pursuant to section 949AL(1) that the determination made by the Respondent pursuant to section 51 of the Value Added Tax Consolidation Act 2010 as amended and communicated to the Appellant by letter dated 31 March 2015 should be varied accordingly.

Dated the 10th of February 2022

MARK O'MAHONY
APPEAL COMMISSIONER