Neutral Citation Number: [2014] EWCA Civ 773

Case No: A3/2012/3400

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL TAX & CHANCERY CHAMBER
Mr Justice Arnold
FTC272011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2014

Before :

LORD JUSTICE RIMER
LORD JUSTICE McCOMBE
and
LORD JUSTICE BRIGGS

- -

Between :

SUB ONE LIMITED (t/a SUBWAY) (In Liquidation)	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Philipa Whipple QC, Andrew Young and Isabel McArdle (instructed by **Dass Solicitors**) for the Appellant
Melanie Hall QC, Owain Thomas and Ewan West (instructed by **HMRC Solicitors Office**) for the Respondents

Hearing dates: 11-13 March 2014

- -

Approved Judgment

Lord Justice McCombe:

(A) Introduction

1. This is an appeal by Sub One Limited ("the Appellant") from the judgment and order of the Upper Tribunal (Tax and Chancery Chamber) (Arnold J) of 3 October 2012. The Upper Tribunal ("UT") dismissed an appeal from the First-tier Tribunal (Tax) ("FTT"). The FTT on 14 October 2010 had dismissed the Appellant's appeal against the Respondents' decision to treat supplies by the Appellant of toasted sandwiches (known as "Subs") and of a further product called meatball marinara as falling within Schedule 8 Part II Group 1 Note 3(b) of the Value Added Tax Act 1994, and hence as being "standard-rated" rather than "zero-rated" for the purposes of Value Added Tax ("VAT").

2. VAT will usually be charged, where applicable, at no less than a minimum rate specified in the relevant Directive, and the law of the European Union only allows Member States to make exceptions in limited historical cases "for clearly defined social reasons and for the benefit of the final consumer".

3. The broad approach in the United Kingdom ("UK") has been to apply the zero-rate to food, except as supplied in the course of "catering". In broad terms, this has meant food supplied in restaurants or as hot "take away" food is "standard rated"; other food is "zero-rated". The policy seems clear: as Arnold J put it, human beings have to eat, but they don't have to eat in restaurants or to have their food cooked by others. It all seems tantalisingly simple. However, the domestic statute, as interpreted in this court in 1987 (in *John Pimblett & Sons Ltd. v Customs and Excise Commissioners* [1988] STC 358 ("*Pimblett*") and applied by Tribunals over the years, has given rise to disputes, at the margins of take away food supply, as to whether the zero-rate or the standard rate applies. In paragraph 69 of his judgment Arnold J in the UT set out a table of the different decisions, in broadly comparable areas of food supply. Slightly modified, this table was produced to us uncontroversially in Appendix 1 to the Appellant's skeleton argument. I append this table to this judgment.

4. The Appellant submits that the result has been to cause a breach of a principle of EU law, that of "fiscal neutrality", designed to prevent the distortion of competition by discriminatory tax treatment of similar products or services.

5. The Appellant says that, in its case, the differing VAT treatment of its products as compared with that of competitors infringed the fiscal neutrality principle, rendering it unable to compete fairly and contributing significantly to its ultimate liquidation.

6. The Appellant carried on business as a franchisee in the well-known "Subway" chain. The products, with which the FTT was concerned, were toasted sandwiches, called "subs", and meatball marinara. Its appeal to the FTT was one of some 1200 appeals by such franchisees challenging the Respondents' decisions that such products should be standard-rated rather than zero-rated. Those other appeals, we are told, remain stayed, pending the outcome of these proceedings.

7. The appeal is, therefore, of great significance to this individual Appellant and involves very substantial sums of money in the outstanding appeals as a whole.

(B) The Domestic Legislation

8. I think it is convenient to set out first the relevant provisions of the Value Added Tax Act 1994 ("VATA 1994"), before attempting to summarise the facts of the case.

9. Section 30 of the VATA 1994 provides as follows:

> "**Zero-rating**
>
> (1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section –
>
> (a) no VAT shall be charged on the supply, but
>
> (b) it shall in all other respects be treated as a taxable supply;
>
> And accordingly the rate at which VAT is treated as charged on the supply shall be nil.
>
> (2) A supply of goods or services is zero-rated by virtue of this subsection if the goods or services are of a description for the time being specified in Schedule 8 or the supply is of a description for the time being so specified."

Next Schedule 8 Part II says:

> "Schedule 8 Part II provides, so far as relevant:
>
> "**GROUP 1 – FOOD**
>
> The supply of anything comprised in the general items set out below, except –
>
> (a) a supply in the course of catering;
>
> …..
>
> **General items**
>
> **Item No.**
>
> 1. Food of a kind used for human consumption.
>
> …..
>
> *Notes:*
>
> …..
>
> (3) A supply of anything in the course of catering includes -

> (a) any supply of it for consumption on the premises on which it is supplied; and
>
> (b) any supply of hot food for consumption off those premises;
>
> and for the purposes of paragraph (b) above 'hot food' means food which, or any part of which –
>
> (i) has been heated for the purposes of enabling it to be consumed at a temperature above the ambient air temperature; and
>
> (ii) is above that temperature at the time it is provided to the customer"

10. As I will explain later, in 1987 this court decided, or at least has been understood to have decided, that the operation of these provisions turned upon the subjective state of mind of the individual supplier. The result has been a number of cases before the Tribunals, including before the FTT in this case, where the evidence has been directed to ascertaining the subjective state of mind of the supplier in applying the food heating process in the individual case. The Appellant argues that this has led to broadly similar products to theirs being found to be zero-rated while their own products have been found to be subject to the standard rate.

(C) The Facts and the FTT decision

11. It is not necessary for the purposes of the present appeal to embark upon the detailed factual review conducted by the FTT. It suffices, I think, to set out the core statement of the production processes, for Subs and meatball marinara respectively, and the FTT's conclusions on those matters. (The chief factual witness for the Appellant in the FTT was Mrs Kay Mulligan who is referred to in the following passages taken from the FTT's judgment.)

12. So far as Subs were concerned, the FTT described the process in this way:

> "***The Sandwich Building Process***
>
> 23. The Appellant followed exactly the same procedure for the making of every sandwich. The members of staff who constructed the sandwiches were known as sandwich artists. The process for making the sandwich began at one end of the counter, known as the *order point* and finished at the other end of the counter, known as the *payment point.* The Appellant provided its members of staff with scripts for each part of the operation, and written instructions on how the sandwiches were made including the quantities of ingredients.
>
> 24. The first stage in the process was referred to as the *meet & greet* where a customer was greeted by a sandwich artist and asked to choose a sandwich from the menu, a size (six inch or foot long), and a type of bread. A sheet of deli paper was then

> placed on the counter immediately in front of the sandwich artist for the selected bread, which was taken from the bread storage cabinet located immediately behind the artist. The bread was then cut in a prescribed manner. The artist then asked the customer if he wished to have his sandwich toasted.
>
> 25. The next stage involved adding the meat and cheese to the sandwich. The quantity of meat in each sandwich was pre-determined either by slices or weight. The meat was taken from plastic storage containers which were located in the chilled section of the sandwich counter, where food items were held at a temperature of 1 degree to 5 degrees centigrade. The meat slices were placed in the top half of the bread and evenly distributed along its length. The customer was then asked whether he wanted cheese and if requested, four slices of cheese were placed on top of the meat.
>
> 26. If the customer asked for a toasted Sub, the sandwich was placed open in the speed oven using a basket located on a flat metal paddle. The controls on the oven were pre-programmed by means of button presses. Mrs Mulligan used one of the two combo options which toasted the sandwich for 20 seconds for a six inch Sub or 30 seconds for a foot-long Sub. The oven had the facility to toast more than one Sub at any one time. The oven was situated immediately behind the artist. The oven emitted a series of three audible beeps to signify that the Sub had been toasted.
>
> 27. The toasted Sub was returned to the counter where the salad items, sauces and other condiments were stored at the appropriate temperature. The customer was asked which salad vegetables he wished added to the Sub. The artist would suggest a group of three vegetables, the portions of which were predetermined either by weight or by a specific number of slices. Finally the artist offered a choice of sauces which amounted to three passes of a selected sauce on either the meat or the vegetables. The customer could choose more than one sauce. Following the addition of the sauce the two sides of the sandwich were folded together to form the competed Sub, which was then wrapped in thin paper bearing the Subway logo and placed in a plastic bag before being handed to the customer. The process for wrapping and bagging was identical for all sandwiches including toasted ones. No form of insulated packaging was provided.
>
> 28. The customer was then offered extra items, such as drinks, cookies and crisps, to complement his sandwich at additional cost. After which payment was taken either by cash or card."

13. The process with regard to the meatball marinara was found to be as follows:

> "***Marinated Meatballs***
>
> 32. The meatballs were delivered to the stores partially cooked but deep frozen. Mrs Mulligan stored the meat balls in a freezer until required for use when they would be transferred to a refrigerator and allowed to thaw for 24 hours.
>
> 33. At the start of each day the staff prepared the meatballs for sale in the store. This involved mixing the thawed meatballs with chilled marinara sauce to ensure that all the balls were covered in the sauce. At this stage in the process the sauce was thick, glutinous, and unpalatable. The mixture was then heated in a microwave for three successive periods of eight minutes with the mixture being stirred at the end of each period. At the end of the microwaving the temperature of the mixture was in the range of 74 to 76 degrees centigrade, which was confirmed by the insertion of an electronic thermometer probe. The temperature of 74 to 76 degrees centigrade was critical to ensure that the marinara sauce infused the meatballs to create the sandwich filling of meatball marinara.
>
> 34. The heated meatball marinara was transferred to another container, (a bain-marie), in the hot well of the sandwich counter unit. The temperature of the meatball marinara was allowed to cool in the bain-marie to between 63 and 68 degrees centigrade. The meatball marinara was then kept and sold at that temperature. The shelf life of meatball marinara once in the hot well was four hours.
>
> 35. Mrs Mulligan accepted in cross-examination that the marination process was complete once the meatballs and the sauce had been micro-waved. Mrs Mulligan kept the meatball marinara in the bain-marie so that she could sell it straightway as a freshly prepared product which could only be done if she complied with food safety legislation on the sale of hot food. The legislation required the meatball marina [sic] to be maintained at a temperature of between 63 and 68 degrees centigrade. Mrs Mulligan acknowledged that the meatball marinara when cold would not be palatable. The sauce would be thick and glutinous. Cold meatball marinara did not conform to her aim of selling freshly prepared products."

14. From this material the FTT drew its factual conclusions on each product as follows (in paragraphs 177 and 186 of its judgment): first, Subs,

> "***Summary of the Facts Found***
>
> 177. The Tribunal placed weight on the following findings:
>
> > (1) The toasted Sub lost its distinctive characteristics and flavour if allowed to cool. Further the toasting

process was intimately connected with the temperature at which the toasted sandwich was eaten (see paragraphs 144 and 145).

(2) The temperature of the toasted Sub as set out in paragraph 153,and in particular the temperature of the bread in all toasted Subs, and the temperature of the meat and or cheese filling in some Subs were significantly above ambient air temperature at the time they were provided to the customers. Also the finding that the speed oven heated not only the bread but also the meat and or cheese filling to temperatures significantly above ambient air temperature.

(3) The Appellant's ethos of made to order sandwiches, freshly toasted, and giving the customer what he wanted (see paragraphs 157 and 172).

(4) The manner in which the Appellant organised its business and managed its staff which was designed to ensure speed of delivery with the stated aim of getting customers in and out of the store as quickly as possible (see paragraph 157).

(5) The Tribunal was satisfied that delays in service delivery were the exception and kept to a minimum (see paragraph 158).

(6) Mrs Mulligan's use of a powerful hot oven to heat the Subs and her detailed knowledge of its workings. The Tribunal was satisfied that Mrs Mulligan knew that the oven heated both the bread and filling throughout, significantly above ambient air temperature (see paragraph 159).

(7) The controls exercised by the Appellant to ensure adherence by members of staff to the established procedures (see paragraph 163).

(8) Mrs Mulligan's principal reason for adding salad to the Sub was to give the customer a choice of fresh vegetables not to reduce the temperature of the Sub (see paragraph 160).

(9) The significance of the toasted Sub being wrapped in paper which had no insulating qualities was much diminished when viewed in the context of the nature of the product (ready to be eaten from the hand), the speed of service delivery, and no evidence that the business relied on home delivery (see paragraph 161).

> (10) The credibility of Mrs Mulligan's belief that a Sub was only hot if heated in a microwave was undermined by a combination of the franchisor's instructions on the use of the speed oven for making a hot Sub together with Mrs Mulligan's knowledge of the capability of the oven and her awareness of the Manual (see paragraphs 166 and 170).
>
> (11) Although the adverts for toasted Subs did not use the word *hot*, the Tribunal found that the strap-line of *fresh toasted* and the images of browned bread and melted cheese were consistent with the application of heat (see paragraphs 172).
>
> (12) The Appellant's claims regarding the significance of Mrs Pancholi's evidence arising from her status as a witness for HMRC should be treated with caution. The evidence of Mrs Pancholi's intentions for heating the Sub carried no weight when determining the Appellant's dominant purpose (see paragraphs 171 and 176).
>
> (13) Mrs Mulligan's evidence on the non-existence of cold and hot ranges of Subs was irrelevant (see paragraph 173).
>
> (14) The fact of when the Sub was actually consumed had no bearing upon the disputed issue which was concerned with *enabling* the toasted Sub to be consumed hot (see paragraph 162)."

Secondly, meatball marinara production was this:

> "(1) Mrs Mulligan heated a mixture of thawed meat balls and chilled marinara sauce in a microwave for three successive periods of eight minutes with the mixture being stirred at the end of each period. At the end of the microwaving the temperature of the mixture was in the range of 74 to 76 degrees centigrade.
>
> (2) Mrs Mulligan then transferred the meatball marinara to another container, known as a bain-marie, in the hot well section of the sandwich counter unit. In the hot well section the temperature of the meatball marinara was allowed to cool to a temperature between 63 and 68 degrees centigrade. The meatball marinara was then kept and sold at that temperature. The shelf life of meatball marinara once in the hot well was four hours.
>
> (3) The meatball marinara was sold either in a Sub or toasted Sub.

> (4) The temperature of the meatball marinara when put in the Sub would have been between 63 and 68 degrees centigrade, significantly above the ambient air temperature. The Appellant did not dispute that the temperature of the meatball marinara was above ambient air temperature when provided to the customer.
>
> (5) Mrs Mulligan accepted that the marination process was complete once the meatballs and the sauce had been micro-waved.
>
> (6) Mrs Mulligan acknowledged that it was possible to cool down the meatball marinara without putting it in the bain-marie, and without compromising food and safety. This would be done by placing the product in a fridge and leaving it there for 24 hours.
>
> (7) Mrs Mulligan agreed that meatball marinara which had cooled down after being heated would be unpalatable. The sauce would be thick and very glutinous. The meatball marinara in a cold state did not conform to Mrs Mulligan's aim of selling freshly prepared products.
>
> (8) Mrs Mulligan sold freshly prepared products which could only be achieved if the meatball marinara was in a hot state.
>
> (9) Mrs Mulligan deliberately kept the meatball marinara hot after completion of the cooking process.
>
> (10) Mrs Mulligan sold the meatball marinara hot.
>
> (11) Mrs Mulligan could not sell the meatball marinara in a hot state unless she complied with the food safety regulations regarding hot food."

15. On these findings of primary fact, the FTT moved on to determine the subjective state of mind of the Appellant, in the person of Mrs Mulligan, with regard to Subs in these terms:

> "182. When viewed against the factual context found by the Tribunal Mrs Mulligan's stated purpose of not providing a hot product was not credible. The Tribunal concludes from the facts found on the [sic] Mrs Mulligan's knowledge and actions taken as whole demonstrated that the Appellant's dominant purpose in heating the toasted Sub was to enable it to be consumed hot."

As to the meatball marinara, the FTT said this:

> "188. The Tribunal decides on the above facts found on Mrs Mulligan's knowledge and actions that she held two purposes for heating the meatball marinara. Her two purposes were to

> marinate the meatballs with the marinara sauce and to enable the meatball marinara to be consumed above the ambient air temperature.
>
> 189. The Tribunal decides that the Appellant's dominant purpose for heating the meatball marinara was to enable it to be consumed at a temperature above the ambient air temperature because:
>
> (1) Mrs Mulligan deliberately kept the meatball marinara hot in a hot well at temperatures of 63 to 68 degrees centigrade after the marination process had been completed.
>
> (2) Mrs Mulligan did not opt to cool down the meatball marinara immediately after the heating process which she could have done by placing it in a refrigerator for 24 hours without compromising food safety.
>
> (3) Mrs Mulligan sold freshly prepared products which could only be achieved if the meatball marinara was in a hot state.
>
> 190. The Tribunal holds for the reasons set out above that the Appellant's dominant purpose for heating the meatball marinara was to enable it to be consumed at a temperature above the ambient air temperature……."

The FTT found accordingly that both products met the definition of hot food in note 3(b).

16. Permission to appeal to the UT was granted by the FTT on one of a number of grounds advanced in a very lengthy application for permission, namely that having identified the correct legal test, the FTT asked itself the wrong question. On application to the UT for permission to appeal on additional grounds, Judge Sir Stephen Oliver QC granted such permission on two further grounds: first, that the FTT's conclusions were irrational; and secondly, that the FTT's conclusions resulted in a breach of European law because (a) there was inequality of treatment as between the Appellant and other traders making objectively similar supplies and (b) the Appellant's supplies were not of services, but of goods.

17. The Respondents' Notice sought to uphold the FTT decision on the following alternative or additional grounds:

> "4. The Respondents seek to uphold the decision of the FTT on the following alternative and/or additional grounds.
>
> a. The Respondents' primary case is that the Tribunal found that the asserted subjective purpose of Mrs Mulligan in heating the food was not supported by the objective evidence. Since the Tribunal's decision was founded upon its assessment of the objective evidence

it cannot be successfully challenged on the ground that it applied a subjective test.

b. If, contrary to the Respondents' primary case, the Upper Tier Tribunal finds that the Tribunal's decision was founded in whole or in part upon a subjective test, then they will contend as follows:

i. To the extent that the Court of Appeal judgment in the case of *John Pimblett and Sons Ltd-v-CCE* [1988] STC 358 established that the test for determining whether hot food has been supplied within the meaning of Note 3(b) is a subjective test, that case was wrongly decided. A test which determines the liability to VAT and which depends upon the subjective intention of the supplier or any other person is contrary to EU VAT principles.

ii. Regardless of the subjective intention of Mrs Mulligan, the Tribunal's decision can be upheld on the alternative basis that the objective evidence supported the conclusion that the Appellants made supplies of hot food for consumption off the premises on which it was supplied.

Response to the Appellant's third ground of Appeal.

5. The Respondents accept that the test for determining whether there has been any supply of hot food for consumption off the premises on which it is supplied must be an objective test. An objective test does not contravene the EU principle of equal treatment. For the reasons given above, the Tribunal either applied an objective test or found objectives facts which justified its decision. The Tribunal's decision cannot therefore be set aside on the ground that the principle of equal treatment has been breached."

18. As Arnold J noted in his judgment, the result was that the UT had to consider for the first time the correct approach to Note 3(b)(i) with regard to the developed European law.

(D) The UT Decision

19. In expressing my own decision on this appeal, it will be necessary for me to traverse a great deal of the material considered by Arnold J in his comprehensive and scholarly judgment, to which I respectfully pay tribute. I will not, therefore, rehearse here the full route which led to his conclusion that the appeal should be dismissed. It suffices, I think, to summarise the significant waypoints on that route.

20. In his review of the general principles of European law, the judge made clear and accurate reference to a number of these principles which had a bearing on the present

case. First, "fiscal neutrality" precluded the different VAT treatment of similar goods and services, in a manner calculated to distort competition. Secondly, the requirement of "objective assessment" meant that to impose an obligation on revenue authorities to carry out inquiries to determine a taxpayer's intention would be contrary to the objectives of ensuring legal certainty and facilitating the application of the tax by having regard to the *objective* character of the transaction in question, save in exceptional circumstances. Thirdly, domestic legislation, and in particular legislation specifically enacted or amended to implement a European directive must be construed so far as possible in conformity with, and to achieve the result intended by, the directive: *Marleasing SA v La Commercial Internacional de Alimentacion SA* [1990] ECR 1-4135, as distilled in *Vodafone 2 v Revenue and Customs Commissioners* [2009] STC 1480 at [37]-[38]. Fourthly, the principle of "effectiveness" means that national rules must not render virtually impossible or excessively difficult the exercise of rights conferred by European law. The judge also recited the rules on "domestic procedural autonomy" and "equivalence".

21. The judge noted that the *Pimblett* case had generally been taken as deciding that the test to be applied under Note (3)(b) was a subjective one. He expressed surprise (which, for my part, I share) that there had been no proper attempt since *Pimblett* to re-examine the domestic legislation in the light of European law. He went on to consider whether the Note could be interpreted compliantly with the objectivity which European law required and he held that it could. He held, applying that test, on the facts as found, that the FTT was correct to hold that both products in issue had been heated for the purposes of enabling them to be consumed at above ambient temperature. Thus, both should properly be subject to VAT at the standard rate.

22. The judge then considered the consequences of the inconsistent decisions in respect of broadly similar products and the Appellant's contention that, even if the legislation was capable of being construed as imposing an objective test, a breach of the principle of fiscal neutrality had still occurred because the effect of the other Tribunal decisions had been to put the Appellant in a position of irretrievable fiscal disadvantage vis-à-vis relevant competitors.

23. The judge noted the Appellant's submission that the UK was responsible for this state of affairs in three ways: first, by failing to legislate to overrule *Pimblett*, in the face of a clear observation by Parker LJ (who gave the leading judgment in the case) that "there will inevitably be some degree of unfairness as between trader and trader"; secondly, on the part of the Respondents as litigants to ensure the proper application of European law; and thirdly, again on the part of the Respondents, by failing to issue suitable guidance to the public.

24. The judge commented that it was at least arguable since 1995 (following the decision of the Court of Justice of the European Union ("CJEU") in *BLP Group plc v Commissioners of Customs and Excise* [1995] ECR I-1001) ("*BLP*") that the decision in *Pimblett* was contrary to the principle of objective assessment and that the decision was contrary to the principle of fiscal neutrality since the same court's decision in 2001 in *Commission v France* [2001] ECR I-3369 ("*French Medicines*").

25. As to the consequences of the inconsistent decisions and the application of the legislation, I think I should set out the final paragraphs 104-106 of the learned judge's judgment expressing his conclusion on the matter. They were as follows:

> "104. It is important to note, however, that counsel for the Appellant accepted that the decisions which HMRC failed to appeal are only *res judicata* with regard to the tax years in question: see *Matalan Retail Ltd v Revenue and Customs Commissioners* [2009] EWHC 2046 (Ch), [2009] STC 2638 at [105]-[116]. In my view it follows that, subject to the applicable limitation period and any argument of abuse of process, it would be open to HMRC to argue that supplies of the same products in subsequent tax years should be standard-rated.
>
> 105. It is also important to appreciate that counsel for the Appellant did not go so far as to suggest that it had always been clear that *Pimblett* was contrary to European law. In my view it was at least arguable that *Pimblett* was contrary to the principle of objective assessment following the decision of the CJEU in *BLP* in 1995, and at least arguable that it was contrary to the principle of fiscal neutrality following the decision of the CJEU in *Commission v France* in 2001; but that does not mean that it was, or should have been, clear to all concerned that *Pimblett* could no longer stand as good law. That has only become clear as a result of the spotlight that has been shone on the matter in the present appeal.
>
> 106. In these circumstances, I am not persuaded that HMRC's failure to appeal the adverse decisions in question combined with its support for the Tribunal's decision in the present case has placed the United Kingdom in breach of the principles of fiscal neutrality or effectiveness. Once it became clear that *Pimblett* was contrary to European law, the correct interpretation of Note (3)(b)(i) was open to re-consideration. That has now happened, and without the need even for the issue to be considered by the Supreme Court, let alone referred to the CJEU. Accordingly, I do not consider that the UK's superior courts and tribunals can be said to have adopted an entrenched interpretation of the legislation in defiance of European law in the way that the Italian Supreme Court had in *Commission v Italy*. It follows that it was not incumbent on the UK legislatively to overrule *Pimblett*."

26. The judge added that he did not find the Respondents' published guidance on the subject to be a promotion of a subjective approach to the legislation as opposed to "acquiescing in certain tribunal decisions". Moreover, it did not appear that the Respondents' guidance had been a factor in any of the six decisions favouring the Appellant's competitors.

27. On the Appellant's contention that the Appellant's supplies were of "goods" rather than "services", after considering the CJEU's decision in *Finanzamt Burgdorf v Bog* [2011] ECR I-0000, the judge shortly upheld the submission of counsel for the Respondents that the exception (a) to Group 1 in Schedule 8 Part II of the VATA 1994 was not of "catering services" but of supplies "in the course of catering".

Therefore, classification of the supplies as goods rather than services was still consistent with the supplies falling within Note (3)(b).

28. In relation to the "irrationality" ground of appeal (which arose out of the FTT's rejection of Mrs Mulligan's evidence as to her subjective intention in heating the food products) the judge noted that he had found such evidence to be legally irrelevant, in the light of the proper objective reading of the statute. However, the FTT had also tested Mrs Mulligan's evidence having regard to objective factors. There was nothing irrational in the FTT's approach to the evidence and it had been entitled to reach the conclusions that it did.

29. There was in addition an application by the Appellant before the UT to admit fresh evidence. The judge rejected it. There is a similar application before us and I will address it at the appropriate point in my consideration of the grounds of appeal to this court.

30. In respect of each of the products in issue (Subs and meatball marinara) the judge held that the FTT had reached the correct decision that they were standard rated even on the application of an objective test.

(E) The Grounds of Appeal

31. On the present appeal, it is argued that the UT was wrong to hold that there had been no breach of the principle of "fiscal neutrality". It is submitted that the UT was wrong to hold that the legislation could and should properly have been interpreted in an objective fashion. If however, the UT was right to find that the legislation was to be construed objectively, then the history of its application by the Courts and Tribunals demonstrated that it had been applied consistently in a manner contrary to EU law and the UT was wrong to deprive the Appellant of a remedy. It is submitted that the UT was wrong to decide against the Appellant that the distinction between their supplies as supplies of "goods" rather than of "services" made no difference. Finally, we are invited to refer a number of questions to the CJEU.

(F) The arguments and my own conclusions

32. The arguments were very wide ranging and I hope that I do not pay them inadequate respect if I confine my assessment to the significant "waypoints" that have led to my own conclusions. We are after all concerned with the question of whether hot toasted sandwiches and types of meat ball mix are or are not to benefit from the zero-rate of VAT – a problem which ought to be capable of a non-complex resolution. Having said that, I should perhaps reflect upon the fact that we have been provided with no fewer than eleven volumes of legislation and case law to enable us to reach our decision on this apparently straightforward point. Such complexity in determining the fiscal status of business transactions of a common place nature does the law, and particularly the law of the European Union, no credit. Business men and women should be able to prepare for and go about their business with more clarity as to the fiscal burden incurred than sadly has been afforded to the Appellant in this case.

The construction of the statute and Pimblett

33. I have set out the relevant provisions of the VATA 1994 above. These provisions, then in the 1983 Act, were considered by this court in *Pimblett*.

34. In *Pimblett* the taxpayer company operated a central bakery and eight retail shops. It sold pies with cooked fillings enclosed in pastry. The fillings were cooked at the central bakery and the pastry coverings were put on. The pies were then taken to the shops where the pastry coverings were cooked. This second baking was done in two batches. The first batch was done before the shops opened in the mornings and were stacked on trays. When cool enough to handle they were re-stacked on wooden racks from which they were sold. They were not re-heated again but remained warm for about an hour. A second batch was baked shortly before lunchtime when demand would be at its highest.

35. It was accepted by the VAT Tribunal that the main purpose of baking in the shops was not to enable the pies to be eaten hot but to provide a pleasant aroma in the shops and to make it plain that freshly baked pies were on offer. The evidence also showed that some customers bought pies at lunchtime for the purpose of eating them while hot.

36. The Tribunal held that tax at the standard rate was payable on a proportion of the pies since, taking into account the various categories of customers purchasing the pies, a material part of the company's purpose was to supply the pies at a temperature above ambient temperature. On appeal to the High Court, Taylor J (as he then was) allowed the taxpayer's appeal, deciding that the Tribunal had given too much weight to the customers' purpose in effecting the purchases rather than to the purposes of the company.

37. This court (Parker and Ralph Gibson LJJ and Caulfield J) dismissed the Commissioners' appeal. The Commissioners' argument, which was rejected, appears from the passage in the judgment of Parker LJ at p.360 e-h of the report:

> "Before the tribunal, and before the judge at first instance, it was common ground that the test was a subjective test, and must be applied solely to the purposes of the seller; in other words, it had to be determined whether the purpose of the taxpayers was to enable the pies to be consumed at a temperature above the ambient air temperature.
>
> Before this court, and without objection, counsel for the Crown submits firstly that the test is not truly a subjective test but an objective test; secondly, that even if it is a subjective test, that the subjective test is satisfied in the present case on the basis that it was clear to the knowledge of the taxpayers that some at least of the pies which were supplied during the lunch-hour would in fact be consumed at or above the ambient temperature, and would leave the premises in that condition. He submits that since the taxpayers were aware that some of their pies would be so eaten and because it was part of their purpose to increase their sales, they were meeting the objective of increasing their sales by supplying pies which were capable of

> being consumed – and I use the word 'hot' from now on although its meaning is somewhat doubtful."

Parker LJ went on to record that the evidence given by the taxpayers' witnesses as to their purpose had not been rejected and that it had not been suggested that they were other than totally honest. Addressing the Commissioners' argument, the learned Lord Justice said this,

> "The evidence was that it was not part of the purpose of the taxpayers to enable the pies to be consumed hot, but it is said that they must have had, unconsciously or consciously, a direct or indirect purpose that, to some extent at any rate, the heat was applied for that purpose.
>
> For my part, I am unable to accept that that is the position. These pies were pies which were not capable of being sold at all until they had received their second baking. Having received their second baking, they would then be sold and no doubt, during the course of the lunch-hour, some people would buy them for their own purpose, namely, consumption hot. But I am unable to accept that, because that was the position, it must be regarded as the taxpayers' purpose to enable the pies so to be consumed."

38. Parker LJ considered that the argument advanced implied that words should be read into the statute,

> "Instead of reading "has been heated for the purpose of enabling it to be consumed at a temperature above the ambient air temperature", there should be added these words also –
>
> > "or which, to the knowledge of the supplier, would or might be consumed at a temperature above ambient air temperature." "

The Lord Justice said that he could see no warrant for reading in such words because it was a clear principle of revenue law that the subject is only to be taxed by clear words. On the substance of the matter, he also said that he could not see that what was being done by the taxpayer in that case came anywhere near the ordinary meaning of "catering". For later purposes of this case, it is perhaps important to quote in full this further passage from the judgment:

> "On the drafting of the provisions as they stand, I have however no doubt that whatever the meaning of the words is, there will inevitably be some degree of unfairness as between trader and trader and customer and customer. It may well be that the provision should be re-drafted so as to make it clearer what is covered and what is not covered. However, I have no doubt that the words do not cover the supply of pies by the taxpayers in this case."

39. Ralph Gibson LJ and Caulfield J agreed that the appeal should be dismissed for the reasons given by Parker LJ. For my part, I have no doubt that this was a decision that the words of the statute, which we are considering in the present appeal, imported a subjective test as to the purposes of the supplier. I think this is made entirely clear from one further concluding passage of Parker LJ's judgment as follows:

> "The tribunal were perfectly entitled, as I see it, to look at the facts for one purpose and for one purpose only, and that is for the purpose of considering the validity of the evidence given by the taxpayers as to their purpose. It might well be that the facts were such that a tribunal in one case might come to the conclusion that the asserted purpose could not be accepted – as, for example, while stoutly asserting that it was no part of their purpose in heating the pies to enable them to be consumed hot, evidence was given that there were extensive heating cabinets in the shop which kept pies hot. Given such facts, I can well see that a tribunal might conclude that the assertion that it was no part of the sellers' purpose to enable them, or some of them, to be consumed hot was unacceptable. But it goes simply to the weight of the evidence and to nothing else."

40. It is, therefore, not at all surprising to my mind that from 1995 onwards the Tribunals have seen it as their task to ascertain the effect of these statutory provisions in any individual case by reference to inquiring into the subjective intentions of the taxpayer. That, of course, is what the FTT did in the present case and reached the conclusion that the Appellant's subjective intention, when tested by objective criteria, was not as its witness asserted. That finding cannot sensibly challenged on appeal and there was no such challenge before us.

41. Moving on from *Pimblett*, there is no doubt that, subject to the impact of European law, we would be bound by that decision to hold that this statute, properly construed, creates a subjective test of the supplier's intentions. However, Article 4(3) of the Treaty of the European Union ("TEU") requires Member States, including their courts, to respect the primacy of European law and they must refuse to apply domestic legislation (and previous decisions of their courts) in any manner which conflicts with it. Arnold J cited the relevant authority in paragraph 16 of his judgment. The rules have gone on to provide that domestic legislation, and in particular legislation designed to implement a directive, must be construed to achieve the result intended by the directive: see *Marleasing SA v La Commercial Internacional de Alimentacion SA* [1990] ECR I-4135 at [8].

42. For the purposes of the effect of this developed rule in our present law, I need go no further than this court's decision in *Vodafone 2 v Revenue and Customs Commissioners* [2009] STC 1480 and the judgment of Sir Andrew Morritt C in that case at [37]-[38], where (adopting submissions of counsel) he said the principles are that,

> "In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching, in particular:

(a) It is not constrained by conventional rules of construction (see *Pickstone* [1988] 2 All ER 803 at 817, [1989] AC 66 at 126 per Lord Oliver);

(b) It does not require ambiguity in the legislative language (*Pickstone* [1988] 2All ER 803 at 817, [1989] AC 66 at 126 per Lord Oliver; *Ghaidan* [2004] 3 All ER 411 at [32], [2004] 2 AC 557 at [32] per Lord Nicholls);

(c) It is not an exercise in semantics or linguistics (see *Ghaidan* [2004] 3All ER 411 at [31] and [35], [2004] 2 AC 557 at [31] and [35] per lord Nicholls; per Lord Steyn at [48]-[49]; and Lord Rodger at [110]-[115]);

(d) It permits departure from the strict and literal applications of the words which the legislature has elected to use (*Litster* [1989] 1 All ER 1134 at 1138, [1990] 1 AC 546 at 577 per Lord Oliver; *Ghaidan* [2004] 3 All ER 411 at [31].[2004] 2 AC 557 at [31] per Lord Nicholls);

(e) It permits the implication of words necessary to comply with Community law obligations (see *Pickstone* [1988] 2 All ER 803 at 184-815, [1989] AC 66 at 120-121 per Lord Templeman; *Litster* [1990] 1 AC 546 at 577, [1989] 1 All ER 1134 at 1138 per Lord Oliver); and

(f) The precise form of the words to be implied does not matter (*Pickstone* [1988] 2 All ER 803 at 807, [1989] AC 66 at 112 per Lord Keith; *Ghaidan* [2004] 3 All ER 411 at [122], [2004] 2 AC 557 at [122] per Lord Rodger; and *IDT Card Services Ireland Ltd* [2006] STC 1252 at [114] per Arden LJ).

[38] Counsel for HMRC went on to point out, again, without dissent from counsel for V2, that:

'The only constraints on the broad and far-reaching nature of the interpretative obligation are that:

(a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed." (*Ghaidan* [2004] 3 All ER 411 at [33], [2004] 2 AC 557 at [33] per Lord Nicholls; Dyson LJ in *EB Central Services* [2008] STC 2209 at [81]). An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (See *Ghaidan* at [33] and [110]-[113] per Lord Nicholls and Lord Rodger respectively; Arden LJ in *IDT Card Services* at [82] and [113] and

> (b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See *Ghaidan* per lord Nicholls at [33]; Lord Rodger at [115]; Arden L (sic) in *IDT Card Services* at [113]).”

43. Within those principles then, can this legislation now be re-construed as to achieve an obligation to determine fiscal liability according to objective, rather than subjective, criteria, as required by *BLP*?

44. Mrs Hall QC for the Respondent argued that such a construction is possible, or indeed that, *Pimblett* apart, the legislation properly construed required an objective construction. Mrs Hall invited us to cast our attention rather wider than indent (i) of Note (3)(b) (importing the “purposes” element of the test) to the wording of the exception as a whole. She argued, as I understood it, that the focus should be on the supply which in fact is effected at above ambient air temperature and must have been heated for the purposes of enabling consumption above that temperature. She said, looked at as a whole, a toasted sandwich supplied in a state in which in fact it could be eaten “hot”, and had been heated in a manner which achieved that result, could and should be taken to have been heated for those purposes.

45. My Lord, Briggs LJ, in argument invited Mrs Hall to comment on whether the distinction was to be found in the objective assessment of whether the temperature of the food, enabling consumption of it “hot”, was or was not the essential nature of the “deal” between supplier and customer. In other words, was the deal that the supplier was selling and the customer was buying a sandwich which could be eaten “hot” Her answer was, I think, a qualified “yes” and she referred us to paragraph 28 of her skeleton argument, which was in these terms: [1]:

> “28. Note 3 applies to supplies, which can only be a reference to supplies made in exchange for consideration. See section 5 of the VAT Act 1994. A customer who has paid for the privilege of having food heated for his own purposes, (so that he can consume it hot), will have a keen interest in whether food has been heated for him and a keen interest in whether it is hot when it is provided to him. Thus, even if the *Rank* approach to fiscal neutrality is applied, the test is clearly met. Heated-to-order food meets a different consumer need to food which is fortuitously hot, such as hot bread, not sold or advertised as such. It is because those are the very qualities for which consumers of hot takeaway food pay, that Parliament has excluded them from the benefit of the zero-rate. They do not fall within the clearly defined social reason for zero-rating everyday food.”

46. The answer to this from Miss Whipple QC for the Appellant was that it is not possible to apply this legislation objectively in a manner which respects the requirement of legal certainty and fiscal neutrality. She submitted that what we were being invited to

[1] The reference to *Rank* is to *Rank Group plc v Revenue and Customs Commissioners* [2012] STC 23 (“*Rank*”).

do was to import into the 1994 legislation the sort of words that have ultimately been introduced into domestic legislation by section 196 of, and Schedule 26 to, the Finance Act 2012[2]. The fact that Parliament has legislated showed that the Respondents' suggested construction of the VATA 1994, as unamended, crossed the line that marks out permissible interpretation of legislation and impermissible amendment of it, as drawn in the principles quoted in [38] of the judgment of Morritt C in *Vodafone 2* (supra). She drew our attention to the requirement that the legislation must be objective in character in that the activity in question must be "considered per se and without regard to its purpose or results" (*Optigen Ltd. v Customs and Excise Commissioners* [2006] STC 419 (CJEU) at [43]. She emphasised that the legislation must be sufficiently certain and foreseeable in application by those subject to it – i.e. "legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them": see *Revenue and Customs Commissioners v Isle of Wight Council* [2008] STC 2964 at [47] (CJEU). Finally, the boundary had to be drawn so as to respect fiscal neutrality so as to be determined from "the point of view of the typical consumer, avoiding artificial distinctions based upon insignificant differences…[which]…do not have a significant influence on the decision of the average consumer to use one such service or another": see *Rank* (supra) at [43] – [44].

47. Miss Whipple submitted that the Respondents' proposed construction simply transposed the focus from the subjective intention of the supplier to the subjective intentions of the consumer. Further, with regard to the *Marleasing* approach, it was argued that this court did not see such an approach as possible in *Pimblett* and that, in effect, in all Tribunal cases for the last 26 years the focus has remained on the subjective intentions of the suppliers. The proposed construction has never been advanced in the period since 1984 and it is now too late to apply it.

48. I confess readily that my own mind has wavered as to the correct answer to this aspect of the case. In this respect, I have wondered whether the Respondents' proposed construction could really be spelled out of the words, in particular because that construction did not clearly emerge at all, even in argument before us, until the pithy question asked by my Lord, Briggs LJ, to which I have already referred.

49. In the end, however, I conclude that this provision can be "read down" in accordance with the *Marleasing* principle to supply an objective test, as advanced (in the end) by the Respondents, which I have sought to summarise in paragraph 44 and 45 above, with the assistance of Briggs LJ's pithy question. This approach to the matter searches for the assumed common intention of the supplier and the consumer as to whether it is a term of the bargain that the product be supplied in order to be eaten hot. By this entirely objective enquiry, the court derives the terms of the bargain from what each party to the contract says and does (including the presentation of the supply in the shop and in any advertising).

50. It seemed sensible to me to address these points of construction first, before looking at the formal grounds of appeal asserting that there has been a breach of fiscal neutrality in this case. I turn now, therefore, to the fiscal neutrality issues.

[2] …which I reproduce in Annex 2 to this judgment.

Fiscal Neutrality

51. The issues divide up in this way. Has the principle of fiscal neutrality been broken on the facts? If so, did the breach stem from a failure of *implementation* of EU law, either by legislation which was defective on its face or because of erroneous or conflicting interpretation of it by the courts/tribunals? If EU law was properly implemented, has any breach of fiscal neutrality arisen from a non-compliant *application* of EU law? On either of these hypotheses, what are the consequences for this Appellant? I believe that these questions largely follow the approach adopted by Miss Whipple for the Appellant in her helpful "routemap" of her submissions, as countered by Mrs Hall for the Respondents.

52. As a preliminary to answering these questions, I must set out some of the fundamental EU legislative provisions, quite correctly appearing at the forefront of the UT's judgment.

53. I have already referred to Article 4(3) of the TEU requiring the fulfilment of obligations arising out of the Treaties or from the acts of the institutions of the Union ("primacy of EU law"). Article 113 of the Treaty on the Functioning of the European Union ("TFEU") provides:

> "The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition."

54. The Principal VAT Directive (2006/112/EC, 28 November 2006), includes the following recitals:

> "(4) The attainment of the objective of establishing an internal market presupposes the application in Member States of legislation on turnover taxes that does not distort conditions of competition or hinder the free movement of goods and services. It is therefore necessary to achieve such harmonisation of legislation on turnover taxes by means of a system of value added tax (VAT), such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level.
>
> (5) A VAT system achieves the highest degree of simplicity and of neutrality when the tax is levied in as general a manner as possible and when its scope covers all stages of production and distribution, as well as the supply of services. It is therefore in the interests of the internal market and of Member states to adopt a common system which also applies to the retail trade.

> (6) It is necessary to proceed by stages, since harmonisation of turnover taxes leads in Member States to alterations in tax structure and appreciable consequences in the budgetary, economic and social fields.
>
> (7) 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."

Article 110 of that directive provides the following:

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

55. In "demurrer" to the Appellant's case on the first question ("Has there been a breach of fiscal neutrality?"), the Respondents raised two preliminary points.

56. The first point was that the Appellant sought to go further than the scope of the permission to appeal to the UT that had been granted to it. The argument on this aspect of the case was that the Appellant was trying to go beyond the findings of the FTT. Objection was taken to references to systematic inconsistent application of the tax and to references in the Appellant's skeleton argument to the UT to public statements by HMRC, debates and statements in Parliament and to a Treasury consultation document. Mrs Hall submitted to us that her clients would have wished to "trawl" through the various public statements and Parliamentary debates to present a comprehensive assessment of the facts. However, we have not been given the slightest hint of any further material of this character that the Respondents would have wished to deploy in this respect.

57. The second point was a point of law, namely that the EU principle of fiscal neutrality cannot have the effect of overriding the UK's socio-political decision to exclude certain hot take away food from the zero-rate exemption. The decision taken by the UK could only be supervised at an EU level in so far as the measures taken fell outside the scope of a concept of a clearly defined social reason: see the Respondents' skeleton argument paragraphs 18 and 19.

58. In my judgment, the first of these points can be disposed of relatively shortly. The additional permission to appeal granted by Judge Sir Stephen Oliver clearly substantially widened the ambit of the appeal to the UT by bringing in the EU point

on fiscal neutrality. In their Respondents' Notice to the UT, the Respondents fully engaged with the nature of the test properly to be applied under the legislation and EU law and sought an order that the case be sent for decision directly to this court, by-passing the UT. In doing so, they acknowledged (as stated expressly in the Respondents' Notice) that since *Pimblett*

> "…there is a significant risk that the confusion that exists in the current case law will continue. That confusion has caused a situation in which objectively similar products are given different fiscal treatment by Tribunals on the basis of the subjective evidence of individual witnesses":
>
> (paragraph 7 of the Respondents' Notice before the UT)

59. Subsequent correspondence to which we were taken, exchanged between the parties' solicitors in January and February 2012 (Appeal Bundle 3/5 and 6/125-8), clearly demonstrates that the Respondents were fully engaged as to the potential consequences for the appeal of the differing results actually achieved in the various Tribunal decisions and the application of the *Pimblett* decision in practice. As Miss Whipple submitted, the issue arising was purely one of law that could readily be tested (and was tested in the UT) on the materials deployed. There was no suggestion that the Respondents were in any way taken by surprise as to the course of the arguments before the UT, which were fully addressed by both parties and by the learned judge in his judgment. I can see no objection at all to the scope of the appeal as it actually turned out before the UT and I would reject the Respondents' objection on this issue.

60. On the second point, in my judgment, the short answer is that the learned judge's rejection of it, in paragraphs 79 and 80 of his judgment, was correct. In those paragraphs, the judge said this:

> "79. Counsel for HMRC pointed out that zero-rated supplies falling within Article 110 were not harmonised. She submitted that it was for the UK to determine the boundary between zero-rated supplies and standard-rated supplies in accordance with its own social policy, and that the principle of fiscal neutrality could not be relied upon to challenge the UK's decision as to where to draw the line. She further submitted that this proposition was supported by the judgments of the CJEU in a series of cases, in particular *Idéal Toursime* at [35]-[39], *Talacre* at [24]-[25], *Rank* at [53]-[54] and *Isle of Wight* at [44].
>
> 80. I accept counsel for HMRC's submission to the extent that the starting point is that it is for UK to determine the boundary between zero-rated supplies and standard-rated supplies. I also accept that the CJEU's judgments in *Rank* and *Isle of Wight* demonstrate that the principle of fiscal neutrality cannot be relied upon as depriving the UK as [sic: of?] its discretion in this respect. It does not follow that the UK can draw the line in such a way as to discriminate between objectively similar

> supplies. On the contrary, Article 110 is explicit that exemptions must be in accordance with Community law. In my judgment *Commission v France* and *Marks and Spencer II* make it clear that the maintenance of the exemption is only permissible in so far as it complies with the principle of fiscal neutrality. As in *Idéal Tourisme* and *Commission v France*, the UK can distinguish between supplies with [sic] are different from the point of view of the consumer; but, as in *Rank*, it cannot distinguish between supplies which are the same from the point of the consumer.[3]."

61. Mrs Hall submitted that the decision of the CJEU in *Finanzamt Frankfurt am Main V Hoechst v Deutsche Bank AG* [2012] STC 1951 (CJEU), a decision published only two days before the UT hearing and not referred to Arnold J, threw additional light on the matter.

62. In that case the German Federal Finance Court applied to the CJEU for an answer to the questions:

> "1. Is the management of security holdings (portfolio management), where a taxable person determines for remuneration the purchase and sale of securities and implements that determination by buying and selling the securities, exempt from tax
>
> - only in so far as it consist in the management of investment funds for a number of investors collectively within the meaning of art 135(1)(g) of EC Directive 2006/112 or also
>
> - in so far as it consists in individual portfolio management for individual investors within the meaning of art 135(1)(f) of EC Directive 2006/112 (transactions in securities or the negotiation of such transactions)?
>
> 2. For the purposes of defining principal and ancillary services, what significance is to be attached to the criterion that the ancillary service does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied, in the context of separate reckoning for the ancillary service and the fact that the ancillary service can be provided by third parties?
>
> 3. Does art 56(1)(e) of EC Directive 2006/112 cover only the services referred to in art 135(1)(a) to (g) of EC Directive 2006/112 or also the management of security holdings (portfolio management), even if that transaction is not subject to the latter provision?"

[3] The additional cases referred to in this extract, not so far identified in the present judgment are *Ideal Tourisme v Belgium* [2001] STC 1386 (CJEU); *Talacre Beach Caravan Sales Ltd. v Customs and Excise Commissioners* [2006] STC 1671 (CJEU) ("*Talacre"*) and *Marks & Spencer plc v Revenue and Customs Commissioners* [2008] STC 1408 (CJEU) ("*M&S 2*").

63. The Advocate-General and the Court decided that the exemption provided by article 135(1)(f) of the Principal VAT Directive did not require individual portfolio management services to be included in the scope of the exemption from VAT for which that article provided. The Advocate-General said this in paragraph 60 of her opinion:

> "…..while the principle of fiscal neutrality in VAT may explain the relationship between the explicit exemptions for both direct investment and the management of joint investment funds, I do not accept that it can extend the scope of an express exemption in the absence of clear wording to that effect. As the German government observed at the hearing, it is not a fundamental principle or a rule of primary law which can condition the validity of an exemption but a principle of interpretation, to be applied concurrently with – and as a limitation on – the principle of strict interpretation of exemptions."

The court endorsed that conclusion in paragraph 45 of its judgment in these terms:

> "45. Lastly, it must be stated that that conclusion is not called into question by the principle of fiscal neutrality. As the Advocate General stated at point 60 of her opinion, that principle cannot extend the scope of an exemption in the absence of clear wording to that effect. That principle is not a rule of primary law which can condition the validity of an exemption, but a principle of interpretation, to be applied concurrently with the principle of strict interpretation of exemptions."

64. The Respondents seek to extend those comments in the *Deutsche Bank* case to the national legislation here. However, I accept Miss Whipple's submission that the case was concerned with a "black letter line" setting the boundaries of an exemption to be found in the Directive itself. The exemption had to be construed strictly and fiscal neutrality principles could not flex those boundaries. Here we are not concerned with such boundaries. We are concerned with a differentiation in treatment between traders supplying similar goods within the same national exemption category. The Appellant submits that if an exemption is in principle permitted in national law by the VAT Directive it must be applied consistently with the principle of fiscal neutrality. I think that Miss Whipple's submission in this respect is supported by the authorities cited in paragraph 60 of the Appellant's skeleton argument, i.e. *Christoph-Dornier-Stiftung v Finanzamt Giessen* [2005] STC 228 at [42] and *Copy-Gene A/S v Skatteministeriet* [2010] STC 1799 at [64].

65. I also consider that the Appellant's submission accords with my understanding of the general principle of the fiscal neutrality rules as found in the more general cases on the subject to which I must now turn.

66. In the course of Miss Whipple's helpful submissions, she referred to a number of cases in the CJEU addressing the principle of fiscal neutrality. Among those were: *M&S 2, Rank, Talacre* and *French Medicines*. I think it suffices, on the first question arising, to turn to only two of these: *M&S 2* and *Rank*.

67. In *M&S 2*, the problem was that Marks & Spencer plc ("M&S") had marketed chocolate covered teacakes which the Commissioners had treated as "chocolate biscuits" which were taxed at the standard rate (outside the general zero-rate for food) rather than at the zero-rate applicable to cakes. Zero-rating had been applied to teacakes marketed by other suppliers. M&S sought a refund of the tax paid. Five questions were referred to the CJEU by the House of Lords, including whether the national zero-rate exemption gave to the taxpayer a directly enforceable EU right to be taxed at the zero-rate on the relevant supplies, and, if not, whether the general principles of law, including fiscal neutrality, gave a trader a right to repayment of sums mistakenly paid, and whether the rules permitted or required a court to remedy the difference in treatment by upholding the trader's claim to repayment or otherwise.

68. The court held that no directly enforceable EU right to be taxed at a zero-rate arose where the result arises from the provisions of national law. Turning to the second question posed, the court said this:

> "32. The second question asks, in essence, whether a trader has a right, under the general principles of Community law, including the principle of fiscal neutrality, to claim a refund of the VAT which was wrongly levied, when the rate which should have been applied stems from national law.
>
> 33. It must be noted at the outset that the actual wording of art 28(2)(a) of the Sixth Directive, in the version resulting from Directive 92/77, states that the national legislation which may be maintained must be 'in accordance with Community law' and satisfy the conditions stated in the last indent of art 17 of Directive 67/228. Although the addition relating to being 'in accordance with Community law' was made only in 1992, such a requirement, which forms an integral part of the proper functioning and the uniform interpretation of the common system of VAT, applies to the whole of the period of erroneous taxation at issue in the main proceedings. As the court has had occasion to point out, the maintenance of exemptions or of reduced rates of VAT lower that the minimum rate laid down by the Sixth Directive is permissible only in so far as it complies with, inter alia, the principle of fiscal neutrality inherent in that system (see, to that effect, *Gregg v Customs and Excise Comrs* (Case C-216/97)[1999]STC 934, [1999] ECR I-4947, para 19, and *EC Commission v France (Republic of Finland intervening)* (Case C-481/98)[2001]STC 919, [2001] ECR I-3369, para 21).
>
> 34. It thus follows that the principles governing the common system of VAT, including that of fiscal neutrality, apply even to the circumstances provided for in art 28(2) of the Sixth Directive and may, if necessary, be relied on by a taxable person against a national provision, or the application thereof, which fails to have regard to those principles.

> 35. As regards, more specifically, the right to a refund, as is apparent from the settled case law of the court, the right to obtain a refund of charges levied in a member state in breach of rules of Community law is the consequence and the complement of the rights conferred directly on individuals by Community law (see in particular, to that effect, *Marks & Spencer* (para 30 and the case law cited)). That principle also applies to charges levied in breach of national legislation permitted under art 28(2) of the Sixth Directive.
>
> 36. The answer to the second question must therefore be that where, under art 28(2) of the Sixth Directive, both before and after the insertion of the amendments made to that provision by Directive 92/77, a member state has maintained in its national legislation an exemption with refund of input tax in respect of certain specified supplies but has misinterpreted its national legislation, with the result that certain supplies which should have benefited from exemption with refund of input tax under its national legislation have been subject to tax at the standard rate, the general principles of Community law, including that of fiscal neutrality, apply so as to give a trader who has made such supplies a right to recover the sums mistakenly charged in respect of them."

69. In that case, it appeared that the trader could be "unduly enriched" by receiving a repayment, in that the impact of the higher tax rate had been passed on to the consumer. The court, however, said this as to the remedy for any breach of fiscal neutrality:

> "58. By this question, the national court is essentially asking the court whether Community law requires or permits a national court to remedy the infringement of the principle of equal treatment referred to in paras 52 to 54 of this judgment by ordering that the tax which was wrongly levied be repaid in its entirety to the trader adversely affected by that infringement, even if such a repayment enriches him unjustly, or whether it requires or permits a court to grant some other remedy in respect of that infringement of the principle of equal treatment.
>
> 59. In that regard, according to settled case law, it is, in the absence of Community legislation, for the internal legal order of each member state to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law (see *Rewe-Zentralfinanz GmbH v Landwirtschaftskammer für Saarland* (Case 33/76)[1976] ECR 1989, para 5, and *Köbler v Austria* (Case C-224/01) [2004] QB 848, [2003] ECR I-10239, para 46).
>
> 60. It is thus the task of the national court itself to draw any conclusions with respect to the past from the infringement of

> the principle of equal treatment referred to in parras 52 to 54 of this judgment.
>
> 61. However, it is for the court to indicate certain criteria or principles of Community law which must be complied with when that assessment is being made.
>
> 62. In the course of that assessment, the national court must comply with Community law and, in particular, with the principle of equal treatment, as stated in para 51 of this judgment. The national court must, in principle, order the repayment in its entirety of the VAT payable to the trader who has suffered discrimination, in order to provide compensation for the infringement of the general principle of equal treatment, unless there are other ways of remedying that infringement under national law.
>
> 63. In that regard, as the Advocate General observed in point 74 of her opinion, the national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the person in the favoured category."

70. In *Rank* the CJEU was concerned with the application in this country of the exemption from VAT required by Article 13 of the Sixth VAT Directive for

> "…(f) betting lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State…"

An issue arose as to the different tax treatment imposed by the Commissioners in respect of different types of gaming machine. In the course of answering questions posed by this court, the CJEU said this,

> "31. By this question the Court of Appeal (England and Wales) (Civil Division) seeks to know, essentially whether the principle of fiscal neutrality must be interpreted as meaning that a difference in treatment for VAT purposes of two supplies of services which are identical or similar from the point of view of the consumer and which meet the same needs of the consumer is sufficient to establish an infringement of that principle or whether such an infringement requires in addition that the actual existence of competition between the services in question or distortion of competition because of the difference in treatment be established.
>
> 32. 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, *European Commission v France (Finland intervening)* (Case C-481/98)

> [2001] STC 919, [2001] ECR I-3369, para 22; *Kingscrest Associates Ltd v Customs and Excise Comrs* (case C-498/03) [2005] STC 1547, [2005] ECR I-4427, paras 41 and 54; *Marks and Spencer plc v Revenue and Customs Comrs* (Case C-309/06) [2008] STC 1408, [2008] ECR I-2283, para 47, and *European Commission v Netherlands* (Case C-41/09) (3 March 2011, unreported), para 66).
>
> 33. 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.
>
> 34. 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, *European Commission v Germany* (Case C-109/02) [2006] STC 1587, [2003] ECR I-12691, paras 22 and 23, and *Finanzamt Gladbeck v Linneweber; Finanzamt Herne-West v Akritidis* (Joined cases C-453/02 and C-462/02) [2008] STC 1069, [2005] ECR I-1131, paras 19 to 21, 24, 25 and 28).
>
> 35. 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, *European Commission v France* (Case C-404/99) [2001] ECR I-2667, paras 46 and 47, and *JP Morgan Fleming Claverhouse Investment Trust plc v Revenue and Customs Comrs* (Case C-363/05) [2008] STC 1180, [2007] ECR I-5517, paras 47 to 51).
>
> 36. 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."

The court continued at paragraphs 40-44 as follows:

> "40. It is apparent from the actual wording of art 13B(f) of the Sixth Directive that that provision leaves a broad discretion to the member states as regards the exemption or the taxation of

> the transactions concerned since it allows those states to fix the conditions and the limitations to which entitlement to that exemption may be made subject (*Leo-Libera*, para 26).
>
> 41 However, when the member states exercise their power under that provision to lay down the conditions and limitations of the exemption and, therefore, to determine whether or not transactions are subject to VAT, they must respect the principle of fiscal neutrality inherent in the common system of VAT (see *Fischer v Finanzamt Donaueschingen* (Case C-283/95) [1998] STC 708, [1998] ECR I-3369, para 27, and *Finanzamt Gladbeck v Linneweber; Finanzamt Herne-West v Akritidis* (joined cases C-453/02 and C-462/02) [2008] STC 1069, [2005] ECR I-1131, para 24).
>
> 42. As observed in para 32 of the present judgment, that principle precludes treating similar goods and supplies of services differently for VAT purposes.
>
> 43. In order to determine whether two supplies of services are similar within the meaning of the case law cited in that paragraph, account must be taken of the point of view of a typical consumer (see, by analogy, *Card Protection Plan Ltd v Customs and Excise Comrs* (Case C-349/96) [1999] STC 270, [1999] ECR I-973, para 29), avoiding artificial distinctions based on insignificant differences (see, to that effect, *European Commission v Germany* (Case C-109/02) [2006] STC 1587, [2003] ECR I-12691, paras 22 and 23).
>
> 44. Two supplies of services are therefore similar where they have similar characteristics and meet the same needs from the point of view of consumers, the test being whether their use is comparable, and where the differences between them do not have a significant influence on the decision of the average consumer to use one such service or the other (see, to that effect, *European Commission v France (Finland intervening)* (Case C-481/98) [2001] STC 919, [2001] ECR I-3369, para 27, and, by analogy, *FG Roders BV v Inspecteur der Invoerrechten en Accijnzen, Amsterdam* (Joined cases C-367/93 to C-377/930 [1995] ECR I-2229, para 27, and *European Commission v France* (Case C-302/00) [2002] ECR I-2055, para 23)."

71. There are some further paragraphs of this judgment to which I must return on a later aspect of the case. Was there then any breach of the principle of fiscal neutrality here?

72. I did not detect in the submissions for the Respondents any contention that the toasted sandwich "subs" supplied by the Appellant could be significantly distinguished in character, for present purposes, from the products that were the subject of the "zero-rate" findings of the Tribunals in the cases identified in Section A of the appendix. The two types of supplies were, it seems to me, "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" (the *Rank* judgment paragraph 36). In that sense, there appears to have been a breach of fiscal neutrality. However, that I think could not be said of the Appellant's meatball marinara, and I did not take the Appellant so to contend.

73. I have no doubt, however, that, looked at apart from any question of fiscal neutrality, and simply testing the proper VAT treatment of the products in issue by the objective construction of the legislation on the facts as found by the FTT, both clearly fell to be taxed at the standard rate. That competitors of the Appellant have been held to be entitled to the zero-rate is undoubtedly a significant misfortune for the Appellant. What are the consequences?

74. As a result of the conclusions already drawn, I find that the legislation when construed objectively (in compliance with the *Marleasing* principle) does not fail properly to implement EU law. However, there has been a failure in practice to implement and/or apply EU law as a result of the decision of this court in *Pimblett* and by the test consistently applied in Tribunals from 1985 right up to the appeal to the FTT in the present case in 2010. Further, in spite of the developing case law, there was no attempt by government or legislature to clarify the legislation until perhaps 2012, although the possibility (or even the probability) of non-compliance must have been readily apparent. I leave aside for the moment any question of the role of the Respondents themselves, in the administration of the tax, which the Appellant contends has compounded the misinterpretation and misapplication of EU law since the *Pimblett* decision.

75. Does this mean that this Appellant, which in my judgment was making supplies which, on the facts as found in the FTT, were clearly taxable at the standard rate is entitled to a refund of tax paid in the relevant periods?

76. The Appellant argues that it is the result of the cases already referred to, in particular in the light of the decision of the CJEU in *Commission v Italy* [2003] ECR I-14637. In that case, at issue was an Italian law which provided that:

> "Customs import duties, manufacturing taxes, consumption taxes, the tax on sugar and State duties levied under national provisions incompatible with Community legislation shall be repaid unless the amount thereof has been passed on to others" (Article 29(2) of Law No.428/1990).

77. The predecessor of that provision was Article 19 of Decree-Law No.688 of 30.9.82 in these terms:

> "Any person who…has paid customs import duties [etc.]...which were not due shall be entitled to repayment of the sums paid if he provides documentary evidence that the charge in question was not passed on, in any manner whatsoever, to other persons, except in the case of clerical error."

78. In a decision in 1988 the CJEU had held that the 1982 law infringed Community law in so far as it made it,

> "…virtually impossible or excessively difficult to secure repayment of charges levied contrary to Community law; that is particularly so in the case of presumptions or rules of evidence intended to place on the taxpayer the burden of establishing that the charges unduly paid have not been passed on… " (See *Commission v Italy* [1988] ECR 1799.)

79. The amended law, expressed of course far more neutrally than the 1982 legislation, gave rise to references for preliminary rulings in *Dilexport* [1999] ECR I-579. In that case, according to the referring national court, the law was being applied by courts in Italy to the effect that, in order to resist repayment of customs duties or taxes, the administration might rely on the presumption that such duties and taxes normally are passed on to third parties. In *Dilexport*, the court held this:

> "52 If, as the national court considers, there is a presumption that the duties and charges unlawfully levied or collected when not due have been passed on to third parties and the plaintiff is required to rebut that presumption in order to secure repayment of the charge, the provisions in question must be regarded as contrary to Community law.
>
> 53. If, on the other hand, as the Italian Government maintains, it is for the administration to show, by any form of evidence generally accepted by national law, that the charge was passed on to other persons, the provisions in question are not to be considered contrary to Community law.
>
> 54. The answer to the questions must therefore be that Community law precludes a Member State from making repayment of customs duties and taxes contrary to Community law subject to a condition, such as the requirement that such duties or taxes have not been passed on to third parties, which the plaintiff must show he has satisfied."

80. In the 2003 case the Commission argued that, as interpreted and applied by the Italian administrative authorities and the courts (including the Italian Supreme Court), the provisions of the new law of 1990 were leading to the same result as those of the 1982 law, by assuming that, save in exceptional circumstances, commercial undertakings pass on indirect taxes to their customers. The conclusion of the CJEU, expressed in paragraph 41 of the judgment, was this:

> "41. In the light of the foregoing considerations, it must be declared that, by failing to amend Article 29(2) of Law No 428/1990, which is construed and applied by the administrative authorities and a substantial proportion of the courts, including the Corte suprema di cassazione, in such a way that the exercise of the right to repayment of charges levied in breach of Community rules is made excessively difficult for the taxpayer, the Italian Republic has failed to fulfil it obligations under the EC Treaty."

81. The principles declared by the CJEU in this case can be found in paragraphs 29-33 of the judgment where the following is stated:

> "29. A Member State's failure to fulfil obligations may, in principle, be established under Article 226 EC whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution (Case 77/69 *Commission v Belgium* [1970] ECR 237, paragraph 15).
>
> 30. The scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (see, particularly, Case C-382/92 *Commission v United Kingdom* [1994] ECR I-2435, paragraph 36).
>
> 31. In this case what is at issue is Article 29(2) of Law No 428/1990 which provides that duties and charges levied under national provisions incompatible with Community legislation are to be repaid, unless the amount thereof has been passed on to others. Such a provision is in itself neutral in respect of Community law in relation both to the burden of proof that the charge has been passed on to other persons and to the evidence which is admissible to prove it. Its effect must be determined in the light of the construction which the national courts give it.
>
> 32. In that regard, isolated or numerically insignificant judicial decisions in the context of case-law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account. That is not true of a widely-held judicial construction which has not been disowned by the Supreme Court, but rather confirmed by it.
>
> 33. Where national legislation has been the subject of different relevant judicial constructions, some leading to the application of that legislation in compliance with Community law, others leading to the opposite application, it must be held that, at the very least, such legislation is not sufficiently clear to ensure its application in compliance with Community law."

82. The Appellant submits that the principles there set out have been clearly infringed in the present case: a) by the legislation as interpreted in *Pimblett*; b) and by the Tribunals in every comparable case since 1985; and c) by the Respondents in their published statements and guidance.

83. Again, I readily acknowledge that, like the first point on the appeal, I have not found this part of the case straightforward.

84. Parker LJ in *Pimblett* gave, what were to my mind (with respect), compelling reasons why the language of the domestic statute imposed a subjective test of the supplier's purpose for determining the relevant question. The Tribunals thereafter applied that

test, with the results as summarised in the Appellant's helpful schedule (which I have annexed). There has been no endorsement of a type of judicial "subterfuge", seeking to undermine earlier rulings of the CJEU, such as that court found had occurred in reality in *Commission v Italy*.

85. However, as I have already noted, it must have been obvious for some time to HM Government and to the Respondents that, in the light of developing law of the European Union, the *Pimblett* decision showed that the statutory provisions, as interpreted in the courts, were likely to be incompatible with that developing law. Yet nothing was done either to amend the legislation or to take a suitable decision to the higher courts. I am not sure that I share the view of Arnold J (paragraph 105) that the problem only became clear as a result of the spotlight shone by the present appeal. The problem was not tackled by Government or legislature until the 2012 Act. I agree with the Respondents, however, that they cannot be blamed (in the material sense) for having produced information literature (and the like) which correctly told the public what the law, as interpreted by this court, was.

86. In the end, however, I consider that the Appellant should not succeed on this aspect of the case for two reasons.

87. First, I agree with Arnold J that it cannot be said that the UK courts and tribunals have adopted the type of entrenched attitude to the legislation of the type considered by the CJEU in *Commission v Italy*.

88. There has been only one decision of a superior court in which the relevant legislation has been considered. On application of the "wrong" test the results on the facts of individual cases have varied, as the Appellant's schedule demonstrates. Neither taxpayer nor tax collector has sought to take these cases higher until the present case and the related pending appeals.

89. While in the hierarchy of our courts, the decision in *Pimblett* was a significant one, it seems to me that the varying decisions, on the facts of individual cases decided in the tribunals, should properly be regarded as "isolated or numerically insignificant judicial decisions in the context of the case law…": see again the *Italy* case, paragraph 32. Further, even applying an objective test, the decision in *Pimblett* on its facts would have been the same: it was not part of the "deal" between supplier and customers in that case that the pies should be sold hot. The Appellant's schedule lists nine cases involving products similar to its own. Six have favoured the taxpayer and three have favoured the Respondents. There has been no confirmation of the *Pimblett* construction either in the House of Lords or in the Supreme Court. Further, as Arnold J pointed out, decisions which the Respondents failed to contest on appeal are only *res judicata* with regards to the tax years in question and, therefore, subject to limitation and any argument on abuse of process, it would be open to the Respondents to argue that supplies in later years should be standard rated.[4] When squarely raised in the present proceedings, it has been recognised by the UT and now in this court that the statute must be construed in accordance with the necessary objective criteria.

90. Secondly, I accept the submission of the Respondents, summarised in paragraph 46 of their skeleton argument, that there is no EU law right in a taxpayer, at least none that I

[4] See paragraph 104 of the UT judgment.

observe in the case law, to be treated in the same way as other taxpayers who have secured an historic windfall due a misapplication of the law. As the CJEU put it in paragraphs 62 - 64 of the *Rank* judgment,

> "…the fact remains that the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act in favour of a third party…
>
> 63. It follows that a taxable person cannot demand that a certain supply be given the same tax treatment as another supply, where such treatment does not comply with the relevant national legislation.
>
> 64. …the principle of fiscal neutrality must be interpreted as meaning that a taxable person cannot claim reimbursement of the VAT paid on certain supplies of services in reliance on a breach of that principle, where the tax authorities of the member state concerned have, in practice, treated similar services as exempt supplies, although they were not exempt from VAT under the relevant national legislation."

91. This seems to me to be the reverse of the situation that arose in *M&S 2* where the taxpayer had been wrongly taxed under domestic law whereas others had not.

92. As the Respondents argue in their paragraph 46, on the Appellant's own case those who have secured a zero-rate, on supplies similar to those of the Appellant, as a consequence of the application of a subjective test of purpose, have done so in breach of the domestic statute when properly construed objectively in accordance with EU law. If the supplies were truly similar and an objective test had been applied, then it should have followed that the supplies of the other traders should have been held also to be subject to tax at the standard rate. Miss Whipple accepted in argument[5] that, if the cases in favour of persons making supplies similar to those of the Appellant were wrongly decided, then the Respondents should succeed. In my judgment, these two factors are decisive in distinguishing the present case from *Commission v Italy*.

93. As noted above, it was argued for the Appellant that we should consider making a reference to the CJEU. In my judgment that is not required. We have had the privilege of extensive argument on the EU legislation and case law and I do not consider that a reference is necessary to enable us to decide this appeal.

94. For all these reasons I would dismiss the appeal,

Outstanding Points

95. There are three outstanding points. The first is the Appellant's argument that it should succeed because the supplies made in this case were of food as goods and not food as services. The second is the appeal on the basis of the UT's refusal to admit the refresh

[5] Shortly after the midday adjournment on 11 March 2014.

evidence and the application to admit that evidence on the appeal to this court. The third concerns a short point as to a proposed revised ground of appeal.

96. Dealing with the first point, we were referred to two cases: *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* [1996] ECr I-2395 and *Finanzamt Burgdorf v Bog* [2011] ECR I-0000. It was submitted for the Appellant that the statutory provisions, allocating a zero rate to a supply of food unless it amounts to "supply in the course of catering", give an implicit classification of the supply as a supply of services. It is then argued (in paragraph 178 of the skeleton argument) that:

> "This classification is obviously incorrect, since in EU law the relevant supplies are supplies of goods and not of services. There is no or virtually no service element at all. "

It is submitted that the domestic legislation is inconsistent with EU law and it is said that the UT was in error in concluding otherwise.

97. I do not follow this argument, with respect. It seems to me that the UK legislation has simply adopted a definition of its zero rate in this area well within the ambit of its national discretion under Article 110 of the Principal VAT Directive. It was entitled, in my view, to decide that food supplied in the course of catering should be standard rated. I can detect no authority of the European court that holds the contrary. The two cases cited required a decision as to whether the particular supplies were in fact supplies of goods or services. I do not read them as deciding that "catering" or, more precisely in this case, a supply of take-away food could not properly be classed by a member state as falling outside the zero rate applied to supplies of other food for human consumption.

98. I also agree with the learned judge that for the purposes of the definition in the UK legislation it matters not whether the supply in question is of goods or services, provided that the supply is "in the course of catering". Reading his judgment, there does not appear to have been any issue on that aspect of the matter below.

99. On the second point, the refusal to admit the new evidence, I do not consider that the UT erred in the exercise of its discretion in the matter. The fresh evidence simply went to the availability of the zero rate to the broadly comparable supplies made by the Appellant's competitors and the extent to which the requirement to apply the standard rate to its supplies contributed to/caused the Appellant's liquidation. The judge took the view that the evidence would not have materially assisted the Appellant's case, if it had been admitted. It seems to me that he was entitled to take that view. The case proceeded on the basis of accepted fact that different rates of tax had been applied to supplies of a similar character in the various cases. Further, it was known that the Appellant was in liquidation and it might easily be inferred that an unexpected higher rate of VAT applied to the Appellant might well have given it considerable difficulties in the market. I would not, therefore, have admitted this additional material on the appeal to this court.

100. The third point is this, since distribution of the draft judgments to the parties, the Appellant has invited us to deal in the judgments with its application for permission to appeal on its amended ground 2, as appears in paragraph 30A of its draft amended grounds dated 31 January 2013, as follows:

> "The relative definition of "hot food" by reference to ambient air temperature is inherently uncertain and it too results in the possibility of inconsistent application of the legislation, in breach of fiscal neutrality, equality and legal certainty."

This point was expanded upon in paragraph 117 of the Appellant's skeleton argument thus:

> "The point is a simple one: the test of ambient air temperature cannot possibly be applied in an objective or legally certain fashion, or in a manner which achieves fiscal neutrality. The "ambient air temperature" will vary from place to place, and day to day. The result is that supplies will arbitrarily be above or below ambient air temperature, depending upon the temperature on the day, in that place…"

The point was only very briefly addressed in oral argument by the Appellant before us (towards the end of the hearing on 11 March 2014.)

101. In my judgment, the issue raised in this respect is so far away from the facts of this case, as presented before both Tribunals below, that we should not grant permission to appeal on the amended ground.

(G) Conclusion

102. I would, therefore, dismiss the appeal.

Lord Justice Briggs:

103. I agree.

Lord Justice Rimer:

104. I also agree.