Neutral Citation: **[2025] UKUT 00341 (TCC)**

Case Number: UT/2023/000122

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building
London
EC4A 1NL

VALUE ADDED TAX – exemption for medical care – Item 1 Group 7 Schedule 9 VATA 1994 - cosmetic procedures – meaning of medical care – whether test involves identifying the principal purpose of the supply – whether FTT erred in applying the test

Heard on: 5 and 6 June 2025
Judgment date: 13 October 2025

Before

MR JUSTICE THOMPSELL
JUDGE JONATHAN CANNAN

Between

ILLUMINATE SKIN CLINICS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Melanie Hall KC and Ciar McAndrew of counsel, instructed by Azets

For the Respondents: Sarah Black and Susanna Breslin of counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This appeal concerns an important and difficult point. If a registered medical practitioner provides a treatment or intervention that has an aesthetic purpose or effect, under what circumstances might this supply fall within the exemption from VAT for medical care.

2. The appeal is against a decision of the First-tier Tribunal Tax Chamber ("the FTT") released on 23 June 2023 ("the Decision"). The FTT dismissed the appeal of Illuminate Skin Clinics Limited ("the Appellant") against a decision of HM Revenue & Customs to refuse repayment of VAT and against an assessment to VAT. The Appellant runs a private clinic offering a range of aesthetic, skincare and wellness treatments, including treatments for collagen loss, excess fat, Botox and dermal fillers. The issue before the FTT was whether the Appellant was supplying medical care such that its supplies were exempt from VAT. The appeal concerns VAT period 12/16.

3. The exemption for medical care derives from Articles 131 and 132 Principal VAT Directive (2006/112/EC) ("the PVD"), which read as follows:

> **"Article 131**
>
> The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.
>
> **Article 132**
>
> l. Member States shall exempt the following transactions:
>
> …
>
> (b) hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature;
>
> (c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned;"

4. These provisions were implemented into UK law by Item 1 Group 7 Schedule 9 Value Added Tax Act 1994 ("VATA 1994") in the following terms:

> **Item 1 Group 7 Schedule 9**
> "The supply of services consisting in the provision of medical care by a person registered or enrolled in any of the following —
>
> (a) the register of medical practitioners;
>
> (b) either of the registers of ophthalmic opticians or the register of dispensing opticians kept under the Opticians Act 1989 or either of the lists kept under section 9 of that Act of bodies corporate carrying on business as ophthalmic opticians or as dispensing opticians;
>
> (c) the register kept under the Health Professions Order 2001;
>
> (ca) the register of osteopaths maintained in accordance with the provisions of the Osteopaths Act 1993;
>
> (cb) the register of chiropractors maintained in accordance with the provisions of the Chiropractors Act 1994;

(d) the register of qualified nurses, midwives and nursing associates maintained under article 5 of the Nursing and Midwifery Order 2001."

5. The Appellant's services were provided by Dr Sophie Shotter, who is a qualified doctor and registered with the General Medical Council. The issue before the FTT was whether the Appellant's services consisted in the provision of medical care. The FTT concluded that the services did not consist in the provision of medical care and the appeal was dismissed.

6. The Appellant contends on this appeal that the FTT erred in law in reaching that conclusion. In very broad terms at this stage, the issues concern the test for identifying supplies of medical care and whether the FTT correctly applied that test.

7. We understand that this is a lead case with a number of cases stayed pending its outcome. It is also hoped that the decision in this appeal will provide guidance for other businesses in this sector.

8. We are grateful to all counsel, and to the parties' wider legal teams for the quality of their submissions and their constructive approach to the appeal.

THE FTT'S FINDINGS OF FACT

9. We can summarise the FTT's background findings of fact at [43] – [62] of the Decision as follows:

(1) Dr Shotter is a qualified doctor. She was training to become an anaesthetist but in 2012 decided to focus on aesthetic medicine and obtained a postgraduate diploma in aesthetic medicine from Queen Mary University of London. She treated patients in her own home, as well as offering treatments from three independent beauty salons. Initially she combined this work with working in the NHS but in 2014 she left the NHS and set up the Appellant. She is a full member and trustee of the British College of Aesthetic Medicine.

(2) In VAT period 12/16 the Appellant offered treatments including Botox and dermal fillers, Aqualyx injections (which we understand reduce fat cells in specific parts of the body) and treatment for thread veins. Other services were offered including make-up and retail skincare products which, it was accepted, were standard rated for VAT purposes.

(3) In the relevant period, Dr Shotter carried out all treatments herself and in October 2016 she saw about 55 patients. Treatment was not generally offered at a first appointment although it might be on occasion. The FTT records one example of a patient being treated with Aqualyx for a double chin on a first visit.

(4) At least some of the treatment is "client-led" in the sense that a client might specify the treatment they wished to receive. Following a discussion of the risks and benefits, the client could insist on the treatment. The FTT gave two examples: One where a client had been diagnosed with fibromyalgia and had read about the benefits of B vitamins which was what the Appellant provided. Another where a client complained that her lines and wrinkles had not disappeared completely (possibly following a previous treatment, although it is not clear). The client insisted on Botox treatment despite being warned that this was likely to cause a relatively frozen look.

(5) The Appellant does not routinely write to a client's GP following a treatment. It would do so if the client had a health condition being managed by their GP and if the client gave permission.

(6) The majority of the Appellant's clients, some 85-90%, are women. Most are in their mid-thirties or above. The Appellant is not licensed to treat under-18s.

(7) Since 13 August 2018 the Appellant has been registered with the Care Quality Commission. It was inspected on 5 October 2020 and rated as "Good" in terms of being "safe", "effective", "caring" and "responsive". It was "Well-led" at "caring for adults over 65 years" and "caring for adults under 65 years" and latterly at "treatment of disease, disorder or injury", "surgical procedures" and "diagnostic and screening procedures".

10. The FTT also made findings of fact when it came to discuss the issues. It was provided with records completed by Dr Shotter which it regarded as good evidence of what was being done, and why. The FTT's findings at [84] – [89] are particularly relevant for present purposes:

"84. A "Medical History" would be taken, including questions about "Has your appearance ever caused you to lose confidence" and "Have you ever been depressed about your appearance".

85. An A4 page records the "Initial Consultation". It records 5 things: the patient's age; "Patient Concerns"; "Examination"; "Diagnosis"; and "Plan".

86. By way of example, two such "Initial Consultations" read, in full, as follows:

Initial Consultation 1

Age: [redacted]

Patient Concerns: Recently treated for breast cancer - surgery and chemo. Chemo has heavily caused facial ageing.

Examination: Fine lines and wrinkles to upper face. Lower face is heavy and loose skin.

Diagnosis: Collagen loss secondary to chemo.

Plan: 1. 2ml Volume and Vycross to midface to lift and stimulate collagen.

2. 3 areas Botox.

Initial Consultation 2

Age: [redacted]

Patient Concerns: Skin crepiness. Neck - so loose that wattle touches chest. Very upsetting. Excess fat on arms and abdomen despite weight loss, with skin laxity on top.

Examination: Neck - very severe sagging. Solar elestosis ++ to face.

Subcutaneous fat layer is very grabbable.

Diagnosis: Collagen loss. Excess fat.

Plan: 1. Aqualyx under chin

2. CoolSculpting x 8 cycles to arms and stomach

3. Facial volumesetion to stimulate collagen.

87. The "Diagnosis" sections on the various forms which we have seen read collagen loss; excess fat; atrophic scarring; verrucae; filamestous wart; tension headaches; solar elestosis; facial asymmetry; skin excess; volume loss.

88. These capture the scope of the Appellant's work in this period and give a clearer, more reliable, insight into the work of the clinic. None of these are diagnoses of any recognised health disorder.

89. They are very cursory documents. They could not properly be described as scientific documents. It is conspicuous that, apart from age, and except for a very few exceptions, neither they (nor the so-called "Medical History") record anything about the patient's physical attributes such as height, weight, or any measurements at all such as blood pressure. They do not record the administration of any tests. There is nothing in the notes to suggest that any of the patients

had been referred to the Appellant by another doctor, or for diagnosis of a particular condition. There is nothing in the notes to suggest that the Appellant was minded to refer the patient to another professional."

11. The undisputed evidence before the FTT records that intravenous vitamins were administered to treat fibromyalgia, Botox was used to treat collagen loss and headaches, Thermavein was used to treat verrucae and dermal fillers were used to treat collagen loss and sun damage.

LEGAL FRAMEWORK

12. The conditions for exemption for supplies of medical care are deceptively straightforward. For present purposes, supplies are exempt where they consist of the provision of medical care by a registered medical practitioner. It is common ground that Dr Shotter is a registered medical practitioner. The issue which the FTT grappled with is whether some or all of the Appellant's supplies consisted of the provision of medical care.

13. What amounts to medical care for these purposes has been considered in a number of decisions of the Court of Justice of the European Union ("the CJEU"). The scope of the exemption has also been considered by the Upper Tribunal and subsequently the Court of Appeal in *Mainpay Limited v HM Revenue & Customs* [2022] EWCA Civ 1620. The parties' submissions involved a detailed analysis of these decisions. Before we come on to consider those submissions, it is worth setting out how the interpretation of the exemption for medical care has developed in the CJEU and the issues raised in *Mainpay*.

14. It is well established that exemptions are to be strictly interpreted since they constitute exceptions to the general principle that VAT is to be levied on all goods and services supplied for a consideration by a taxable person. However, they are not to be interpreted restrictively in the sense that the court or tribunal is not required to give the exemption its most restrictive interpretation. An exemption must be construed consistently with its objective.

15. The first case chronologically is *D v W* Case C-384/98 where the CJEU considered medical services provided by a doctor in his capacity as a court expert carrying out genetic tests in the context of a paternity dispute report. The question was whether the doctor was providing medical care. The CJEU stated at [18]:

> 18. Clearly, therefore, the concept of 'provision of medical care' does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders.

16. It is notable that the CJEU interpreted medical care by reference to the purpose of a medical intervention. It did not need to address the question of whether there might be more than one purpose.

17. In *Ambulanter Pflegedienst Kügler Gmbh v Finanzamt für Körperschaften in Berlin* Case C-141/00 ("*Kügler*") the CJEU considered whether the exemption for medical care depended on the legal form of the entity providing the care. It also considered whether the exemption applied to an out-patient service under which home care was provided by qualified nursing staff. The CJEU referred to [18] of *D v W* at [38] and continued:

> 39. Accordingly, services not having such a therapeutic aim must, having regard to the principle that any provision establishing an exemption from VAT is to be interpreted strictly, be excluded from the scope of Art.13(A)(1)(c) of the Sixth Directive.
>
> 40. It follows that only medical care provided in the exercise of the medical and paramedical professions, outside a hospital setting, for the purpose of prevention, diagnosis or treatment qualifies for exemption under Art.13(A)(1)(c) of the Sixth Directive, to the exclusion of other activities relating to general care and domestic help.

18. As far as we are aware, this is the first reference to a "therapeutic aim" which appears to be a shorthand for the test described in *D v W*. The CJEU also appears to extend the meaning of medical care as previously defined to cover the prevention of disease and health disorders.

19. The scope of the exemption was subsequently considered by the CJEU in *d'Ambrumenil and another v Customs and Excise Commissioners;* and *Unterpertinger v Pensionversicherungsanstalt der Arbeiter* Case C-307/01; C-212/01 ("*d'Ambrumenil*"). It is clear from *d'Ambrumenil* and other cases that the purpose of the exemption is to reduce the cost of medical care and to make medical care more accessible.

20. The CJEU in *d'Ambrumenil* was concerned with the following supplies of services provided by doctors:

(1) acting as an expert appointed by a court or financial institution to determine whether an applicant for a pension was suffering from disability, incapacity to work or invalidity;

(2) certifying medical fitness, for example fitness to travel; and

(3) conducting medical examinations of individuals on behalf of insurance companies, including taking samples to test for the presence of viruses, infections or other diseases.

21. The CJEU held that these activities would not fall within the exemption for medical care unless the principal purpose was therapeutic:

> "58. While it follows from that case-law that the provision of medical care must have a therapeutic aim, it does not necessarily follow therefrom that the therapeutic purpose of a service must be confined within an especially narrow compass (see, to that effect, *Commission* v *France*, paragraph 23). Paragraph 40 of the judgment in *Kügler* shows that medical services effected for prophylactic purposes may benefit from the exemption under Article 13A(1)(c). Even in cases where it is clear that the persons who are the subject of examinations or other medical interventions of a prophylactic nature are not suffering from any disease or health disorder, the inclusion of those services within the meaning of provision of medical care is consistent with the objective of reducing the cost of health care, which is common to both the exemption under Article 13A(1)(b) and that under (c) of that paragraph (see *Commission* v *France*, paragraph 23, and *Kügler*, paragraph 29).
>
> 59. On the other hand, medical services effected for a purpose other than that of protecting, including maintaining or restoring, human health may not, according to the Court's case-law, benefit from the exemption under Article 13A(1)(c) of the Sixth Directive. Having regard to their purpose, to make those services subject to VAT is not contrary to the objective of reducing the cost of health care and of making it more accessible to individuals.
>
> 60. As the Advocate General correctly pointed out in paragraphs 66 to 68 of her Opinion, it is the purpose of a medical service which determines whether it should be exempt from VAT. Therefore, if the context in which a medical service is effected enables it to be established that its principal purpose is not the protection, including the maintenance or restoration, of health but rather the provision of advice required prior to the taking of a decision with legal consequences, the exemption under Article 13A(1)(c) does not apply to the service."

22. This is the first reference to establishing the "principal purpose" of a medical service.

23. When the UK first introduced the medical exemption, all services supplied by certain registered medical practitioners within the scope of their registration were exempt from VAT. However, following *d'Ambrumenil* the UK amended Item 1 so as to require that a supply must consist in the provision of medical care.

24. It is also worthy of note that at [67] of *d'Ambrumenil* the CJEU extended the test of what amounts to medical care to include medical checks by employers or insurance companies,

provided that the checks "are intended principally to enable the prevention or detection of illness or the monitoring of the health of workers or insured persons".

25. The purpose test was applied in *Future Health Technologies Limited v HM Revenue & Customs Case* C-86/09 which concerned a private stem cell bank. Clients provided the taxpayer with samples of blood from the umbilical cord following birth. The blood was tested and where appropriate stored for possible future treatment of the child or other persons. HMRC took the view that the principal supply was storing the stem cells, which was not medical care. Analysis and processing the stem cells was ancillary to that activity. The CJEU held at [43] and [44]:

> "43. However, the activities in question in the main proceedings, as carried out by FHT, namely the despatch of a kit for collecting umbilical cord blood and the testing and processing of that blood and, where appropriate, the storage of stem cells contained in it, whether taken together or separately, do not appear to have as their direct purpose any actual diagnosis, treatment or cure of diseases or health disorders, or any actual protection, maintenance or restoration of health.
>
> 44. In that regard, while the detection of illness may admittedly be one of the possible purposes of collecting stem cells from umbilical cord blood, it seems to be clear from the documents in the court file, and particularly from the contract, that the services provided by FHT are intended only to ensure that a particular resource will be available for medical treatment in the uncertain event that treatment becomes necessary but not, as such, to avert, avoid or prevent the occurrence of a health disorder, or to detect such a disorder in a latent or incipient state. If that were the case, which it is for the referring court to determine in the light of all the relevant facts in the proceedings before it, activities such as those in question in the main proceedings could not, by themselves, be regarded as being covered by the expressions 'hospital and medical care' in art 132(1)(b) of Directive 2006/112, on the one hand, or 'medical care' in art 132(1)(c) of Directive 2006/112, on the other."

26. The CJEU in this case was therefore dealing with a supply which had more than one possible purpose. It was left to the referring court to determine what the purpose was in the light of all the relevant facts. Whilst the CJEU referred to *d'Ambrumenil*, it did not use the language of "principal purpose".

27. *Skatteverket v PFC Clinic AB* Case C-91/12 ("*PFC*") is a particularly important case and requires a close analysis. The services supplied by the trader were described at [12] and [13] as follows:

> "12. PFC offers medical services in the field of plastic surgery and cosmetic treatments. At the material time, it provided services involving both cosmetic and reconstructive plastic surgery and also some skincare services.
>
> 13. PFC carries out procedures such as breast augmentation and reduction, breast lifts, abdominoplasty, liposuction, face lifts, brow lifts, eye, ear and nose operations and other plastic surgery. That company also offers treatments such as permanent hair removal and skin rejuvenation by pulsed light, anti-cellulite treatments and botox and restylane injections."

28. The CJEU described the purpose of these interventions as follows:

> "18. According to the order for reference, the purpose of the interventions carried out is, in certain cases, to treat patients who, as a result of an illness, injury or a congenital physical impairment, are in need of plastic surgery. In other cases, the interventions carried out are more as a result solely of the patient's wishes to alter or improve his physical appearance. Irrespective of their purpose, and from a medical point of view, the various interventions are, according to the referring court, comparable services and can be carried out by the same personnel."

29. The questions referred to the CJEU distinguished "plastic surgery" and "cosmetic treatments". The CJEU described the questions which had been referred as follows:

"21. By its questions, which it is appropriate to examine together, the referring court asks essentially whether art 132(1)(b) and (c) of the VAT Directive must be interpreted as meaning that the supply of services such as those at issue in the main proceedings, consisting of plastic surgery and cosmetic treatments, are exempt from VAT.

22. Thus, by its second question, that court asks more specifically whether a preventive or therapeutic purpose for such services has any effect on the issue of whether they are exempt, which is the subject of the first question. If the answer is affirmative that court asks, by its third question, whether, in order to determine the existence of such a purpose, the subjective understanding the recipients of those services have of them must be taken into consideration. The fourth question asks what effect the fact that such services are supplied by licensed medical personnel has on the assessment to be carried out in the main proceedings."

30. In considering the referred questions, the CJEU found as follows:

"25. Accordingly, the concept of 'medical care' in art 132(1)(b) of the VAT Directive and that of 'the provision of medical care' in art 132(1)(c) are both intended to cover services that have as their purpose the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (see *Future Health Technologies*, paras 37 and 38).

26. In that regard, it should be borne in mind that, whilst 'medical care' and 'the provision of medical care' must have a therapeutic aim, it does not necessarily follow that the therapeutic purpose of a service must be confined within a particularly narrow compass (see *Future Health Technologies*, para 40 and the case law cited).

27. Accordingly, it is clear from the case law that medical services effected for the purpose of protecting, including maintaining or restoring, human health can benefit from the exemption under art 132(1)(b) and (c) of the VAT Directive (see *Future Health Technologies*, paras 41 and 42 and the case law cited).

28. It follows, in the context of the exemption laid down in art 132(1)(b) and (c) of the VAT Directive, that the purpose of the services such as those at issue in the main proceedings is relevant in order to determine whether those services are exempt from VAT. That exemption is intended to apply to services whose purpose is for diagnosing, treating or curing diseases or health disorders or to protect, maintain or restore human health (*Future Health Technologies*, para 43).

29. Thus, services such as those at issue in the main proceedings, in so far as their purpose is to treat or provide care for persons who, as a result of an illness, injury or a congenital physical impairment, are in need of plastic surgery or other cosmetic treatment may fall within the concept of 'medical care' in art 132(1)(b) of the VAT Directive and 'the provision of medical care' in art 132(1)(c) thereof respectively. However, where the surgery is for purely cosmetic reasons it cannot be covered by that concept."

31. The CJEU then considered and rejected a submission by the tax authority that examination of the purpose of an operation or treatment would be extremely onerous. It noted at [33] that the health problems covered by the exemption could be psychological and then addressed the question of whether the subjective understanding of the recipient of the services must be taken into consideration:

"33. As far as concerns whether the subjective understanding that the recipients of services, such as those at issue in the main proceedings, have must be taken into consideration in the assessment of the purpose of a specific intervention, which is the subject of the third question, it follows from the case law that the health problems covered by exempt transactions under art 132(1)(b) and (c) of the VAT Directive may be psychological …

34. However, the subjective understanding that the person who undergoes plastic surgery or a cosmetic treatment has of it is not in itself decisive for the purpose of determining whether that intervention has a therapeutic purpose.

35. Since that is a medical assessment, it must be based on findings of a medical nature which are made by a person qualified for that purpose.

36. It follows that the fact, referred to in the fourth question, that services such as those at issue in the main proceedings are supplied or undertaken by a licensed member of the medical profession or that the purpose of such interventions is determined by such a professional, may influence the assessment of whether interventions such as those at issue in the main proceedings fall within the concepts of 'medical care' or 'medical treatment' within the meaning of art 132(1)(b) and (c) of the VAT Directive respectively."

32. The CJEU stated its conclusion at [39]:

"39. In light of all of the foregoing considerations, the answer to the questions referred is that art 132(1)(b) and (c) of the VAT Directive must be interpreted as meaning that:

— supplies of services such as those at issue in the main proceedings, consisting in plastic surgery and other cosmetic treatments, fall within the concepts of 'medical care' and 'the provision of medical care' within the meaning of art 132(1)(b) and (c) where those services are intended to diagnose, treat or cure diseases or health disorders or to protect, maintain or restore human health;

— the subjective understanding that the person who undergoes plastic surgery or a cosmetic treatment has of it is not in itself decisive in order to determine whether that intervention has a therapeutic purpose;

— the fact that services such as those at issue in the main proceedings are supplied or undertaken by a licensed member of the medical profession or that the purpose of such services is determined by such a professional may influence the assessment of whether interventions such as those at issue in the main proceedings fall within the concept of 'medical care' or 'the provision of medical care' within the meaning of art 132(1)(b) and (c) of the VAT Directive respectively".

33. The CJEU in *Frenetikexito – Unipessoal Lda v Autoridade Tributária e Aduaneira* Case C-581/19 ("*Frenetikexito")* was concerned with a business managing and operating sports facilities which included promoting and supporting health and nutrition. The supplies included a nutrition monitoring service. The issue was whether there were single or multiple supplies, but the CJEU observed at the outset that the questions appeared to have been referred on the assumption that the supply of a nutrition monitoring service would fall within the exemption in Article 132(1)(c). The CJEU stated as follows:

"

26. … supplies of a medical or paramedical nature carried out with the aim of protecting, including maintaining or restoring, the health of persons may benefit from the exemption provided for in Article 132(1)(c) of Directive 2006/112 (judgment of 5 March 2020, X (VAT exemption for telephone consultations), C-48/19, EU:C:2020:169, paragraph 29 and the case-law cited).

…

30. In that regard, it is not disputed that a nutrition monitoring service provided in a sports facility may, in the medium- and long-term or viewed very broadly, be a tool to prevent certain conditions, such as obesity. However, it must be noted that the same applies to exercise itself, the role of which is recognised, by way of example, as limiting the occurrence of cardiovascular diseases. Such a service therefore, in principle, has a health purpose but not, or not necessarily, a therapeutic purpose.

31. Accordingly, where there is no indication that it is provided for purposes of prevention, diagnosis, treatment of a condition or restoration of health, and accordingly with a therapeutic purpose, within the meaning of the case-law cited in paragraphs 24 and 26 of the present judgment, which it is for the referring court to determine, a nutrition monitoring service, such as that provided in the case in the main proceedings, does not fulfil the criterion of an activity in the public interest common to all the exemptions laid down in Article 132 of Directive 2006/112 and, consequently, does not fall within the scope of the exemption laid down in Article 132(1)(c) of that directive, with the result that it is, in principle, subject to VAT.

> 32. That interpretation does not contravene the fiscal neutrality principle, which precludes in particular two deliveries of goods or 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, and which are therefore in competition with one another, from being treated differently with regard to VAT (see, to that effect, judgment of 17 December 2020, *WEG Tevesstraße*, C-449/19, EU:C:2020:1038, paragraph 48 and the case-law cited), since, in the light of the objective pursued in Article 132(1)(c) of Directive 2006/112, nutrition monitoring services provided with a therapeutic purpose and nutrition monitoring services without such an objective cannot be regarded as identical or similar from the point of view of the consumer and do not fulfil the same needs on the part of that consumer.
>
> 33. Any other interpretation would have the consequence of extending the scope of the exemption laid down in Article 132(1)(c) of Directive 2006/112 beyond the rationale reflected in the wording of that provision as well as the heading of Chapter 2 of Title IX of that directive. Any service performed in the exercise of a medical or paramedical profession, having, even in a very indirect or distant manner, the effect of preventing certain health conditions, would fall within the exemption laid down by that provision, which would not correspond with the intention of the EU legislature and the requirement that such an exemption be interpreted strictly, as recalled in paragraph 22 of the present judgment. As the Advocate General observed in point 61 of her Opinion, a merely uncertain link with a health condition, without a specific risk of health impairment, cannot suffice in that regard."

34. The Court of Appeal decision in *Mainpay* is also an important case on which the FTT placed considerable reliance. Mainpay was an umbrella company providing doctors to agencies which in turn provided doctors to NHS Trusts. The FTT considered that control of the doctors lay with the NHS Trusts and held that Mainpay was making a supply of staff rather than a supply of medical care. This was upheld by the Upper Tribunal. Mainpay's appeal to the Court of Appeal was on the basis that the FTT and the Upper Tribunal had applied the wrong test in determining whether the supply was a supply of medical care or a supply of staff. It argued that the medical exemption extended to a person such as Mainpay, who was facilitating medical services being provided by another person. This was a new argument which had not been pursued before the FTT or the Upper Tribunal. HMRC argued that the real issue was whether the services were supplies of medical care. If not, the appeal failed and it was not necessary to define the services as a supply of staff.

35. Whipple LJ gave the reasoned judgment, with which Green and Nugee LJJ both agreed. She held that the distinction between a supply of staff and a supply of medical care was a valid distinction. In order to distinguish between the two, it was relevant to consider the framework of control over the doctors in carrying out their work. That was described at [59] as "one factor relevant to the commercial and economic reality of the supplies made by Mainpay". The Court of Appeal then went on to consider the meaning of the term "medical care". It endorsed a comprehensive series of propositions identified by the Upper Tribunal at [89]. Insofar as relevant these were as follows:

> "89. The scope of the exemptions for medical care contained in art 132(1)(b) and (c) of the Directive (and its predecessor art 13A(1)(b) and (c) of the Sixth Directive) have been the subject of a number of decisions by the CJEU. The main principles can be summarised as follows:
>
> (1) The exemptions envisaged in art 13 of the Sixth Directive are to be interpreted strictly since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person …
>
> (2) Those exemptions constitute independent concepts of Community law whose purpose is to avoid divergences in the application of the VAT system from one Member State to another …

(3) As regards the place where the services must be supplied, in contrast to art 132(1)(b) which concerns services encompassing a whole range of medical care normally provided on a non-profit-making basis in establishments pursuing social purposes such as the protection of human health, art 132(1)(c) applies to services provided outside hospitals and similar establishments and within the framework of a confidential relationship between the patient and the person providing the care, a relationship which is normally established in the consulting room of that person: *Kügler* at para 35 and *EC Commission v UK* (Case C-353/85) at para 33.

…

(6) The concept of 'provision of medical care' does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders: *D v W (Österreichischer Bundesschatz intervening)* (Case C-384/98) [2002] STC 1200, [2000] ECR I-6795, at para 18.

(7) Although the provision of medical care must have a therapeutic aim, it does not necessarily follow that the therapeutic purpose of a service must be confined within an especially narrow compass. Thus, medical services effected for prophylactic purposes may benefit from the exemption under art 132(1)(c). Even in cases where it is clear that the persons who are the subject of examinations or other medical interventions of a prophylactic nature are not suffering from any disease or health disorder, the inclusion of those services within the meaning of provision of medical care is consistent with the objective of reducing the cost of health care, which is common to both the exemption under art 132(1)(b) and that under (c) of that Article: *D'Ambrumenil v Customs and Excise Comrs* (Case C-307/01) EU:C:2003:627, [2005] STC 650, [2004] QB 1179 ('d'Ambrumenil'), at para 58.

(8) It is the purpose of a medical service which determines whether it should be exempt from VAT. Therefore, if the context in which a medical service is effected enables it to be established that its principal purpose is not the protection, including the maintenance or restoration, of health but rather the provision of advice required prior to the taking of a decision with legal consequences, the exemption under art 132(1)(c) does not apply to the service: *d'Ambrumenil* at para 60…"

36. Whipple LJ also recorded the following propositions:

"61. … I record three basic propositions of law which are not in dispute:

(i) First, the exemptions constitute independent concepts of Community law which must be placed in the general context of the common system of VAT (*Kügler* para 25).

(ii) Secondly, the exemptions are to be interpreted strictly (but not restrictively) since they constitute exceptions to the general principle of taxation (*Kügler* para 28).

(iii) Thirdly, the analysis of what is being supplied depends, in any given case, on economic realities of the transaction, that being a 'fundamental criterion' for the application of the common system of VAT (see *Revenue and Customs Comrs v Airtours Holidays Transport Ltd* [2016] UKSC 21, [2016] STC 1509, [2016] 4 WLR 87, at [48], citing *Revenue and Customs Comrs v Loyalty Management UK Ltd*, *Baxi Group Ltd v Revenue and Customs Comrs* (Joined cases C-53/09 and C-55/09) EU:C:2010:590, [2010] STC 2651, [2010] ECR I-9187, at paras 39–40); the contracts are the most useful starting point in that exercise, but not necessarily the end point: see *WHA Ltd v Revenue and Customs Comrs* [2013] UKSC 24, [2013] STC 943, [2013] 2 All ER 907. The UT recognised this approach in terms at UT [96], see para [33] above, and their encapsulation of the approach was not subject to any challenge in this appeal."

37. Mainpay's argument was that the legal form through which services were provided did not matter and that "mere involvement in a supply of medical services by qualified personnel" was sufficient to qualify for exemption. It relied on what was said by the CJEU in *Kügler*. The Court of Appeal rejected that argument.

38. The Court of Appeal then considered various other cases relied on by Mainpay in its argument that exemption could extend to "supplies higher up in a chain of transactions which ends in the delivery of care to a patient". As part of that argument, Mainpay had relied on the principle of fiscal neutrality, contending that if a consultant had provided the same services on a self-employed basis then that supply would have been exempt. The Court of Appeal held that the cases relied on by Mainpay all turned on their own facts:

> "76. The answer given by Mr Singh [counsel for HMRC] to all of these cases is that the outcome in each turns on its own facts; together, these cases beg the question to be answered in this case, which is whether Mainpay's supplies were indeed of medical care so as to come within the medical exemption, or not. None of these cases provides a strong analogy on the facts. Further, Mr Singh relied on *Klinikum Dortmund* to emphasise that there are limits to the medical exemption, even where therapeutic medical supplies are involved, where fiscal neutrality is engaged and where there is a risk of increasing the cost of healthcare if exemption is not available…
>
> …
>
> 78. I accept [HMRC's] answer on the CJEU cases. None of them carries Mainpay home. The facts of each are important to the CJEU's confirmation that the medical exemption applied (or, in the case of *Klinikum Dortmund,* did not). It is the facts of this case, judged through the lens of commercial and economic reality, which determines whether Mainpay was making supplies of medical care, or not. It is to that issue which I now turn."

39. In looking at the commercial and economic reality, the Court of Appeal rejected various arguments put forward by Mainpay as to how it had control over the doctors. Whipple LJ concluded at [83]:

> 83. I return to the findings by the FTT. The FTT concluded, based on the contractual arrangements and the circumstances in which the consultants worked, that the consultants were under the control, direction and supervision of the NHS Trusts for the duration of the assignment; they effectively became part and parcel of the NHS Trusts which themselves provided medical care to patients (FTT [115]). In consequence, and after detailed consideration of Mainpay's submissions, it found that the essence of the supply was that of staff, rather than medical services (FTT [119]). The UT held that that was a conclusion to which the FTT was entitled to come, on the evidence before it and on the facts as found; as a matter of commercial and economic reality, Mainpay provided consultants (staff) to A&E, which consultants were on-supplied by A&E to the NHS Trusts, which Trusts used the consultants to provide medical care to their patients (UT [115]). I can find no fault in the approach of either the FTT or the UT. The short answer to Mr Firth's case is that it does not fit the facts as they have been found by the FTT. The commercial and economic reality is that Mainpay provides supplies of staff, not medical care, to A&E. It follows that this case is different from LuP and Peters, in which medical care was provided at each stage in the chain of supplies, leading to the delivery of medical care to the patient."

40. With these authorities in mind, we turn to the Decision.

THE FTT'S DECISION

41. The FTT set out the law at [6] to [36] of the Decision. This included reference to what the Court of Appeal had said in *Mainpay*, including at [61] and the Upper Tribunal's summary at [89] which had been endorsed by the Court of Appeal. The judgment of the Court of Appeal in *Mainpay* was handed down after the FTT hearing and the FTT therefore invited the parties to make further written submissions on *Mainpay*. The FTT noted that the Appellant expressly agreed with and adopted the Court of Appeal's reasoning at [76] and [78], quoted above. The FTT then stated:

"27. We agree. Those paragraphs of the Court of Appeal's decision endorse (unsurprisingly) a decision-making approach which should be informed by a strong focus on the facts of the case. The Court of Appeal accepted a submission that the outcome of many of the reported decisions can be seen to have been influenced by the particular facts, judged (as the Court of Appeal said) "through the lens of commercial and economic reality" so as to determine whether the appellant is making supplies of medical care or not.

28. We are bound by the Court of Appeal's analysis of Item 1 (as well as, so far as adopted by the Court of Appeal, the Upper Tribunal's analysis). We remind ourselves that we (as a fact-finding Tribunal) must focus on the facts, and that, as part of our overall evaluative exercise, we should not forget to look at the facts through the lens of commercial and economic reality (which is an approach regularly encountered in relation to VAT). That is what we have done."

42. The FTT went on to consider a number of previous decisions of the FTT on the exemption for medical care.

43. The FTT discussed the issues at [63] – [118] and concluded with "no hesitation" that the Appellant's services were not exempt. We summarise the FTT's reasoning in reaching that conclusion as follows, with appropriate references to paragraphs in the Decision.

44. It is worth quoting [63] – [70] in full because the FTT was heavily influenced by its view as to what diagnosis involves:

"63. Dr Shotter holds a number of medical degrees, beginning with an MBChB in medicine and surgery from the University of Leeds. HMRC accept that Dr Shotter is a skilled and ethical professional. We agree. She is committed to her work and the business which she directs. She is a determined and competent business person. She established the Appellant, has applied a clear-eyed business vision to it, and has been the driver of its growth and success.

64. But we have no hesitation in deciding that the services which the Appellant offers are not exempt within the proper meaning and effect of the legislation.

65. We do not accept that what is being done is "diagnosing, treating and, in so far as possible, curing diseases or health disorders".

66. According to the Oxford English Dictionary, "diagnosis" is "determination of the nature of a diseased condition; identification of a disease by careful investigation of its symptoms and history; also, the opinion (formally stated) resulting from such investigation."

67. There is very little evidence of diagnosis in the above sense. Diagnosis in the above sense did not invariably take place even in relation to the small number of clients for whom we were provided with details.

68. The weight of the evidence - written and oral - is that people are not using the Appellant's services because of diagnoses - arrived at following careful investigation of symptoms and history, by an appropriately qualified medical practitioner, in an appropriate setting - but rather simply because they want to use the Appellant's services.

69. Put differently, the catalyst for use of the Appellant's services is not "diagnosis", but is something else instead. Although we perhaps do not need to go further, the evidence is that people are actuated to use the Appellant's services because they want to - not because they are encouraged to do so by a medical practitioner.

70. This is very important to the overall analysis because diagnosis is the starting point of medical care, and the backdrop against which medical treatment takes place. Without diagnosis, "treatment", in the sense captured by the exemption, is not something which is being done responsively to a disease or a health disorder. It is an activity which is being done 'untethered' from an anterior diagnosis."

45. The FTT made some observations at [71] – [82] in relation to the quality of the documentary evidence before it, describing it at [78] as "sparse and unrevealing". We have

quoted at [10] above what the FTT said at [84] – [89] based on the documentary evidence it did have.

46. The FTT went on to consider the contemporary documentary records of consultations and concluded at [96] in terms of "documentary product" that it would not describe the clinic as a healthcare setting or its activities as healthcare activities.

47. Dr Shotter's training and experience was considered at [100] – [102], including her experience of psychiatry and psychology. Her evidence as to dealing with clients suffering from depression or anxiety who wished to feel better about their appearance was considered at [106] – [111]. It was not suggested before us that the Appellant's case was or had been that its treatments amounted to medical care because they either improved the mental health of clients or prevented clients from suffering more serious mental health issues.

48. The broad thrust of the FTT's conclusions is set out at [104], [105], [112] and [113]:

> "104. Standing back, people are going to the clinic intending to have a cosmetic procedure done there. Even if they are unhappy with their appearance, they are not going to the clinic to see, or expecting to see, a psychiatrist, a counsellor or a therapist. The service being provided is and remains a cosmetic procedure even if (for example) it is being done by a person who is a good listener, or has the training and/or experience to engage with people's psychological or emotional needs.
>
> 105. The cosmetic treatments are not being provided essentially for medical purposes, but are for non-medical - cosmetic - purposes. The fact that people go to the clinic feeling unhappy with some aspect of their appearance, and (at least sometimes) are happier when something is done at the clinic about that aspect of their appearance, does not mean that the treatment is medical, or has a therapeutic aim. So, by way of example, the so-called 'localised fat reduction' - a technology-led targeting of fat pads which (in Dr Shotter's words) "can cause all sorts of problems confidence-wise and in terms of comfort" - is not the same as a weight-loss service.
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> …
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> 112. Helping someone to achieve goals in relation to their appearance - which is what this clinic does - is not treating someone's mental health status, but is going to their self-esteem and self-confidence. It is a misuse of language to say that this is healthcare in the sense that it would fall within Item 1.
>
> 113. We do not regard what is being done as "medical care", "coming within the established meaning of that term". Although what is done is being done with care, it is not, in our view, "medical". Nor do we accept that the services "have a therapeutic aim, that they consist of the diagnosis, treatment or cure of disease or ill-health." We agree with HMRC that clients sought the clinic's services primarily for aesthetic reasons, and in order to improve their appearance."

49. The FTT concluded that the Appellant's supplies did not constitute medical care and that HMRC had been correct to refuse repayment of VAT and to make the assessment for period 12/16.

THE GROUNDS OF APPEAL

50. The Upper Tribunal granted permission to appeal on four grounds and refused permission to appeal on two other grounds. We shall re-number the grounds on which the Appellant has permission to appeal as follows:

> **Ground 1** - The FTT considered itself bound to make its assessment by reference to the "commercial and economic reality" of the Appellant's supplies. This was an error of approach. The correct approach was to ask whether the services in question fell within the concept of 'purely cosmetic' services and therefore fell outside the concept of medical care.

Ground 2 - The FTT's decision was based upon its view of the purpose or the primary purpose of the Appellant's services without distinction and without addressing the Appellant's argument that the primary purpose approach was incorrect. The correct and conceptually distinct approach was to ask whether the purpose was purely cosmetic.

Ground 3 - The FTT confined its assessment of the therapeutic purpose of the care provided by the Appellant within a particularly narrow compass, contrary to the relevant case law.

Ground 4 - The FTT failed to address or record its response to the Appellant's submission that HMRC were effectively seeking to override the decision made by Parliament not to implement Article 131 of the PVD by excluding cosmetic care (which was not purely cosmetic) from the scope of the exemption.

Consideration of Grounds 1 and 2

51. It is convenient to consider Grounds 1 and 2 together. These grounds essentially allege that the FTT applied the wrong legal test in deciding whether the Appellant's services consisted of the provision of medical care. There are two aspects to the Appellant's case on this point which we shall consider in the following order:

(1) **The FTT applied the wrong test:** The Appellant submits that the FTT wrongly sought to identify the principal purpose of the supplies, when it ought to have considered whether the Appellant's supplies were purely cosmetic. That is because it is only if the supplies were purely cosmetic that they would fall outside the exemption. The Appellant argues that if the supplies had any therapeutic purpose then they fall to be treated as exempt.

(2) **The relevance of commercial and economic reality:** The Appellant submits that the FTT erred in law in seeking to identify the commercial and economic reality of the Appellant's supplies.

(1) Did the FTT apply the wrong test?

52. In considering the test to be applied it is important to note the following matters which are common ground:

(1) We are concerned with an exemption, which is an exception to the general principle that VAT is chargeable on all supplies for a consideration by a taxable person. The exemption is therefore to be given a strict interpretation, but not the most restrictive or narrow interpretation. It must be interpreted consistently with the purpose of the exemption which is to reduce the cost of medical care thus making medical care more accessible.

(2) There is a supplier condition which means that it is only supplies by certain qualified medical practitioners which are exempt. However, it is not all supplies by such practitioners which are exempt. It is only supplies of medical care.

(3) Medical care is an independent autonomous concept of EU law with the same meaning throughout all member states.

53. The FTT clearly had regard to the legal principles summarised by the Upper Tribunal in *Mainpay* at [89] which were endorsed by the Court of Appeal in that case. In particular, the Upper Tribunal stated at [89(8)] that if the principal purpose for which the medical service is effected is not the protection, maintenance or restoration of health but rather the provision of advice required prior to taking a decision with legal consequences, then the exemption does not apply. *D'Ambrumenil* was cited in support of that principle.

54. The FTT stated as follows at [78] in the context of its observations on the documentary evidence:

> 78. The second problem is that the written evidence which we have seen, even taken as a representative sample, is quite sparse and unrevealing in content, especially in terms of corroborating the Appellant's core position that the primary purpose was the protection, maintenance or restoration of the health of the person concerned.

55. It is clear therefore that the FTT was looking for the primary or principal purpose for which the supplies were effected. Hence, at [105] the FTT held that the treatments were "not being provided essentially for medical purposes, but are for non-medical – cosmetic-purposes" and at [113] the FTT agreed with HMRC's submission "that clients sought the clinics services primarily for aesthetic reasons, and in order to improve their appearance".

56. The Appellant says that the FTT was wrong in looking for the principal purpose of the supply and that identifying the principal purpose had not been its "core position". It is said that the FTT not only applied the wrong test but that it also failed to deal with the Appellant's submissions as to the right test.

57. Those submissions were recorded in the Appellant's skeleton argument for the FTT and are based on the CJEU decision in *PFC*. It is only if a supply of cosmetic treatment is made for purely cosmetic reasons that it will fall outside the exemption. The submission was made at various points in the Appellant's skeleton argument in the FTT, including at [21] and [42]:

> "21. … So far as material to this appeal, it is not a condition of exemption that the relevant purpose must be the primary or the principal purpose.
>
> 42. … if the doctors engaged by the Appellant provide cosmetic treatments for a purpose which they consider to be a medical purpose, the only question that remains is whether the doctors were treating a health disorder."

58. In other words, and this was the submission before us, where there is an underlying health disorder that is being treated, then the exemption is available even if the client also has a cosmetic purpose. The point can be illustrated by the diagnoses identified in the Appellant's initial consultation documents and referred to at [87] of the Decision. One diagnosis identified is a filamentous wart, which it is common ground is a medical condition. The client may wish to have the wart removed for the sake of their appearance. If the Appellant conducts a procedure to remove the wart then it says that it is treating a medical condition and the services are exempt.

59. The Appellant submitted that identifying the principal or essential purpose of a supply is the wrong approach in cases concerning cosmetic care.

60. In support of this proposition in its skeleton argument at [43] it submitted that because all cosmetic treatments are provided at least in part for cosmetic reasons, a principal purpose test would lead to a conclusion that all cosmetic treatments fall outside the scope of the exemption – and such a conclusion would be contrary to the position accepted by HMRC that plastic surgery or cosmetic treatment may fall within the concept of the provision of medical care where its purpose or principal purpose is to treat or provide care for persons who, because of illness, injury, or a congenital physical impairment, need such treatment.

61. We see no logic to this submission. In a case where both a cosmetic aim and a therapeutic aim can be identified, there are three ways the law could seek to apply the exemption:

> (1) That it is enough that there is a therapeutic purpose and immaterial that there is also a cosmetic purpose, whichever is the principal purpose. This is the Appellant's case, based on its argument that it is only if the treatment is "purely cosmetic" that it is excluded from exemption;

(2) That the presence of any cosmetic purpose or aim, whether or not there is also a therapeutic purpose, excludes exemption. This proposition would be open to the criticism made at [43] of the Appellant's skeleton argument, but is not the position adopted by the FTT or HMRC; and

(3) That, as the FTT found, it is necessary to identify a principal purpose and only if a therapeutic purpose can be established as being the principal purpose will the exemption apply. This argument is perfectly compatible with the position accepted by HMRC that some treatments with a cosmetic purpose can fall within the exemption.

62. The Appellant's submission that the identification of any therapeutic purpose alongside a cosmetic purpose is essentially based on references in *PFC* to the exemption not being available where the purposes are "purely cosmetic". In particular the Appellant relies on *PFC* at [29] (reproduced at [30] above) and argues that cosmetic services will fall within the scope of the exemption if any part of their purpose is therapeutic, in the sense that it is for the purpose of diagnosing, treating or so far as possible, curing health diseases or disorders, including psychological disorders, or protecting, maintaining or restoring human health.

63. At the heart of the Appellant's submissions is that the CJEU did not adopt a principal purpose test in *PFC*, and that test has only been applied in a particular line of cases including *d'Ambrumenil*. That line of cases concerns the provision of expert medical reports where the principal purpose of the supply was not to protect, maintain or restore health but to provide advice or evidence in connection with a commercial decision or court proceedings. Any contribution to the protection of health was indirect. When the Court of Appeal in *Mainpay* considered the term "medical care", it was not looking to set out a comprehensive description of the medical care exemption or for an exhaustive definition of medical care by reference to *D v W*. It was looking to understand what the CJEU meant in *Kügler* at [27] that "medical services must be involved".

64. *PFC* was concerned with two types of supplies which were described at [18] (reproduced at [28] above). Firstly, interventions where the purpose was to treat patients who, as a result of an illness, injury or a congenital physical impairment, were in need of plastic surgery. Secondly, interventions carried out "more as a result solely of the patient's wishes to alter or improve his physical appearance". It is the second type of supply which the CJEU described at [29] as surgery "for purely cosmetic reasons". There is something of a contradiction between the use of the word "more" and the word "solely". The word "solely" suggests that the CJEU was considering circumstances where the patient's cosmetic purpose was the sole purpose to be considered whereas the word "more" suggests that the CJEU was considering circumstances where there might be some degree of medical purpose but this was subsidiary to the patient's wish for a cosmetic improvement. Whilst the opinion perhaps could have been expressed more clearly, in our view the use of the word "more" can be seen as supporting the view that where there is both a medical purpose and a therapeutic purpose, a principal purpose test does apply. Clearly if there is only a cosmetic purpose, there is no medical purpose and the supply does not fall within the exemption. However, in our view PFC is not authority that where both a medical and a cosmetic purpose can be discerned the exemption applies even if the medical purpose is clearly subsidiary to the cosmetic purpose.

65. We can see that the Appellant placed considerable reliance on *PFC* before the FTT. It is not clear why the FTT did not cite the case or address the Appellant's submissions to the effect that it is only purely cosmetic procedures which are excluded from exemption. Be that as it may, we can now address those submissions to see whether the FTT applied the right test.

66. The Appellant submitted that in *PFC*, the CJEU concluded that the first category of supply may fall within the concept of the provision of medical care. It did not decide that the

exemption required the supply to meet a condition of "need". We accept that submission. Indeed HMRC did not suggest that there was any requirement that the medical treatment was "needed" for the supply to be exempt, although at least one recent FTT decision has suggested that is a requirement. In our view, a consideration of whether the supply is "needed" is unhelpful to the analysis. It begs the question - needed for what end? It would be a very high standard indeed if this would be taken to mean "needed" in the sense of being necessary to cure a medical condition, since many interventions seek to manage symptoms rather than curing a medical condition and many medical conditions may over time be cured without medical intervention. If "need" is to be taken as meaning necessary to cure or manage an ailment, it still would be too narrow a test since it would exclude many medical interventions that were useful, proper and/or usual as a response to medical conditions since there might often be an argument that the intervention was not necessary as there were alternatives. If the concept of "need" is watered down any more than that then it really does not add anything to what should be the relevant question: is the treatment for a therapeutic purpose.

67. The Appellant submitted that if a doctor makes a clinical assessment that a client has a health disorder, and makes a further clinical assessment to treat that health disorder, then the treatment cannot be described as purely cosmetic. Such a supply would have a therapeutic aim and would be exempt. Whilst *PFC* did not say this in terms, the Appellant submitted that there is no principled basis to treat such a supply differently to the first type of supply described in *PFC*.

68. We note that in *D v W* at [18] the CJEU referred to the purpose of a supply, but not to the principal purpose. It excluded from exemption "medical interventions" carried out for a purpose other than that of diagnosing and treating diseases or health disorders. It therefore contemplated that a medical intervention might have a different purpose. In that case the context was a doctor carrying out genetic testing for court proceedings, but [18] contains a broad statement of principle which has been quoted numerous times in subsequent cases.

69. Ms Hall KC submitted that one cannot "flip the fact the principal purpose test is embedded in an exclusionary class and put it in the class that is included". We understood this to mean that *d'Ambrumenil* was concerned with what would otherwise be an excluded class of cases, which were saved by the existence of a principal purpose which was therapeutic. It is not a test of what supplies would be included in the meaning of medical care.

70. The Appellant submits that a principal purpose test is inapt for cases of cosmetic care. A purely cosmetic purpose test is more apt because it is consistent with the objective of the exemption and more straightforward to apply in practice, which is a requirement of Article 131 PVD. Any procedure with a therapeutic purpose would be exempt but the following procedures would be purely cosmetic and fall outside the exemption:

(1) Where the reason for providing the service is something other than the diagnosis, treatment or insofar as possible, cure of a disease or health disorder or the protection, maintenance or restoration of human health. We take that to mean where there is no therapeutic purpose.

(2) Where the supplier is not, or is not directly supervised by, a registered healthcare professional within the meaning of Item 1. This would include beauticians not working under the supervision of a registered healthcare professional.

(3) Where the supplier is not using any of the medical skills or qualifications for which they are registered within the meaning of Item 1.

(4) Where the client has no physical or physiological impairments which could be classified as a disease or health disorder; or is not at risk of developing any such impairments so that prophylactic care would not be required.

(5) Where there is no direct functional link between the services supplied and a disease or health disorder.

71. We agree that these procedures would fall outside the exemption because there is no therapeutic purpose or because the supplier condition in Item 1 would not be satisfied. However, identifying what falls outside the exemption does not help us to identify what falls within the meaning of medical care and therefore within the exemption. In particular, is it sufficient to have a therapeutic purpose, in the opinion of a medical practitioner and/or as viewed objectively, even though the client is more concerned, perhaps exclusively concerned, with improving her or his appearance rather than with having treatment for a health disorder?

72. We consider that the CJEU's reply to the questions referred in *PFC* was framed by the specific facts of the questions referred. The CJEU was not called upon to consider supplies which might be said to have both a therapeutic purpose and a cosmetic purpose, although it did appear to regard the supplies of plastic surgery as being a "cosmetic treatment". Hence, it referred at various points to "plastic surgery and other cosmetic supplies". However, in answering the questions referred at [39] (reproduced at [32] above), it made no reference to "purely cosmetic supplies". We agree with HMRC's submission that if the CJEU considered that only purely cosmetic supplies were excluded from exemption then one would expect that to be stated in the answer.

73. Following the hearing, the parties considered whether we might be assisted by the French language version of *PFC*. In the event, we do not consider that any assistance can be gained from that version.

74. The Appellant submitted in its skeleton argument that the client's understanding of the procedure was irrelevant to the question of whether a procedure amounted to a supply of medical care. However, that submission is inconsistent with *PFC*. The third question referred to the CJEU was whether, in order to determine the existence of a therapeutic purpose, the subjective understanding of the client must be taken into consideration. The CJEU's answer to that question at [33] and [34] was not that it was irrelevant, but that it was not in itself decisive. We infer that the CJEU considered that the subjective understanding of the client is at least relevant in determining whether a treatment has a therapeutic purpose. It does not appear that this was limited to cases where a cosmetic procedure was being performed as a response to a psychological disorder. The CJEU also considered at [35] and [36] that the purpose of the service determined by the medical professional may be a relevant factor.

75. Ms Hall later accepted that the subjective understanding of the client could be used to help determine the purpose of the services. It was part of the evidential matrix together with the status and purpose of the supplier, the intrinsic characteristics of the supply and the nature of the underlying health disorder.

76. We accept Ms Hall's later submission on this point. It is difficult to see on the facts of *PFC* why the subjective understanding of the person who undergoes the procedure would be relevant in identifying a supply of medical care if a therapeutic purpose is all that is required for exemption.

77. Even if, as the Appellant submitted, the CJEU in *PFC* was simply saying that it is necessary to exercise caution when taking into account the client's subjective understanding of the treatment, that understanding remains relevant to the question. Whilst the CJEU did not say in terms that it was necessary to exercise caution, we acknowledge that at [35] the CJEU said

that since identifying a therapeutic purpose is "a medical assessment, it must be based on findings of a medical nature which are made by a person qualified for that purpose". Having said that, the CJEU went on to say at [36] that the fact the services are undertaken by a medical practitioner or that their purpose is determined by that practitioner "may influence the assessment of whether interventions … fall within the concepts of 'medical care'…". It did not say that those facts are determinative.

78. Whilst the reasoning in *PFC* is not easy to understand, in our view it is tolerably clear that the subjective understanding of the client as to the purpose of the procedure is relevant, but a more significant factor in determining whether a procedure has a therapeutic purpose may be a medical assessment by an appropriately qualified person.

79. This analysis of the CJEU judgment in *PFC* is entirely consistent with the approach described in *d'Ambrumenil* which requires consideration of the principal purpose of a supply. It is also consistent with the requirement to give the exemption a strict construction. However, it is inconsistent with the Appellant's case that any therapeutic purpose is sufficient, without regard to the purpose or understanding of the client.

80. The Advocate General in *d'Ambrumenil* made clear at [66] – [68] in general terms, endorsed by the CJEU at [60], that the "crucial issue" in determining exemption is "the aim of the medical intervention":

> "66. As regards the question whether a medical procedure is exempt from VAT, then, neither the nature of the medical intervention nor its centrality in terms of the functions of the medical profession is decisive; as the court's case law on the words 'provision of medical care' and art 13A(1)(c) to date makes clear, the crucial issue is, rather, the aim of the medical intervention
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> 67. In its decision in the case of *D v W* the Court found, on the basis of a comparison of the various language versions of Article 13A(1)(c), that the term –
>
> > 'does not lend itself to an interpretation which includes medical interventions carried out for a purpose other than that of diagnosing, treating and, in so far as possible, curing diseases or health disorders'.
>
> Therefore services 'not having a therapeutic aim' must, in view of the principle that any provision establishing an exemption from VAT is to be interpreted strictly, be excluded from the scope of Article 13A(1)(c) of the Sixth Directive. The Court of Justice has confirmed that case-law in its judgments in the cases of *Commission v France* and *Kügler*.
>
> 68. It may therefore be concluded from the case law that, when determining whether a medical procedure is to be exempted from VAT, it is the purpose of the procedure that is decisive. Not all activities carried out by a doctor are exempt – only those having a therapeutic aim."

81. It is no answer to say, as the Appellant submitted, that a principal purpose test would be unworkable in the context of a medical practitioner consulting with a client. We do not see why that should be the case. Records can easily be maintained as to the circumstances in which the client consulted the medical practitioner and as to the diagnosis and reasons for the treatment being supplied. The CJEU in PFC rejected objections to a purpose test on the basis that it would be difficult to identify the purpose of a supply. We agree with Ms Black's submission that supplies potentially falling within the exemption are on a spectrum. At one end of the spectrum are supplies with no cosmetic purpose at all. At the other end of the spectrum are purely cosmetic supplies with no therapeutic purpose. There is nothing objectionable in a principal purpose test which requires consideration of where on that spectrum a supply sits. In most cases the answer will be clear.

82. It is not the case that there must be a public interest in exempting supplies of medical care where there is a very minor therapeutic purpose in making the supply, but the principal

purpose of the supply is cosmetic and the supply falls towards the purely cosmetic end of the spectrum.

83. In light of the authorities, we are satisfied that the FTT was right to consider that it should seek to identify the principal or primary purpose of the Appellant's supplies. We do not consider that this aspect of Grounds 1 and 2 establishes any error of law by the FTT.

84. The discussion of the authorities above also illustrates the approach to be taken in identifying what is meant by the "purpose" or "principal purpose". This is not determined decisively either by an examination of the motives of the client or the views of the medical professional providing the services, in each case ascertained by objective evidence. Both will be relevant, in particular the latter. This point is discussed further below under Ground 3.

(2) The relevance of commercial and economic reality

85. Having identified the legal principles to be applied by reference to *Mainpay*, the FTT stated at [28]:

> 28. We are bound by the Court of Appeal's analysis of Item 1 (as well as, so far as adopted by the Court of Appeal, the Upper Tribunal's analysis). We remind ourselves that we (as a fact-finding Tribunal) must focus on the facts, and that, as part of our overall evaluative exercise, we should not forget to look at the facts through the lens of commercial and economic reality (which is an approach regularly encountered in relation to VAT). That is what we have done.

86. The Appellant says that the FTT was not bound by *Mainpay* or any other authority to look at the question of whether the Appellant was making supplies of medical care through the lens of commercial and economic reality. It is said that this led the FTT to disregard or misapply established principles. The Appellant submitted that the FTT should have distinguished the scope of the exemption from whether the particular taxpayer is actually making supplies which meet the requirements of the exemption. That distinction was also identified by the Court of Appeal in *Mercy Global Consult Limited (in liquidation) v Adegbuyi-Jackson* [2023] EWCA Civ 1073 at [28]. It is said that the appeal before the FTT was concerned with the first exercise whereas *Mainpay* was principally focussed on the latter exercise. That was why the Court of Appeal was concerned with the commercial and economic reality.

87. The Appellant says that it was the focus on commercial and economic reality that led the FTT to consider the nature of the supplies from the perspective of a typical consumer. Hence the FTT's conclusions at [68], [69] and [104], quoted above, that clients of the Appellant wanted a cosmetic procedure rather than the diagnosis and treatment of a medical disorder.

88. The Appellant submitted that the perspective of a typical consumer was relevant in relation to taxable supplies where questions of fiscal neutrality arise and where the issue is single or multiple supplies. In those cases the actual purpose of the consumer in a specific transaction is irrelevant. The concept of a typical consumer cannot be applied to questions of whether a supply falls within an exemption. In relation to the exemption for medical care, it is the actual therapeutic purpose of specific supplies which is relevant.

89. We accept that it is the actual purpose in relation to a specific supply which is relevant to the principal purpose test. The perspective of a "typical consumer" is not relevant. However, we do not consider that the FTT did consider the perspective of a typical consumer. The FTT did not rely on the perspective of a typical consumer in its reasoning, although it is fair to say that at [35] it did refer to another decision of the FTT in *Window to the Womb Limited v HM Revenue & Customs [2020] UKFTT 201 (TC)* where it had been common ground that the FTT should seek to identify the principal purpose for which a typical consumer was purchasing the supply.

90. What the FTT was doing at [68], [69] and [104] was making findings as to the Appellant's supplies as a whole and what the Appellant's clients actually wanted by way of those supplies. It is notable that the FTT did not embark on an analysis of the circumstances of specific transactions to see whether those specific transactions consisted of supplies of medical care. It is not clear why that is the case, or whether the parties invited the FTT to make findings in relation to specific sample transactions. There was a suggestion before us that the FTT had been invited to deal with the appeal in principle, setting out a "guiding test", although that would not explain the absence of any findings in relation to specific supplies.

91. The Appellant submits that there is no authority on the medical care exemption, either in the CJEU or elsewhere, which requires the scope of the exemption to be determined through the lens of commercial and economic reality.

92. The FTT was concerned with both the scope of the exemption and whether the Appellant's supplies fell within that scope. As far as the scope of the exemption is concerned, the principles set out by the Upper Tribunal in *Mainpay* at [89] were endorsed by the Court of Appeal. Those principles were not controversial in the Court of Appeal on the facts of that case. What was controversial was the question of control and the nature of the supplies. We agree with the Appellant that it was not necessary in the present case to look at the issues through the lens of commercial and economic reality. Commercial and economic reality had a particular role to play on the facts of *Mainpay*, where the issue concerned the question of control and the legal relationships between Mainpay, its agency clients and the NHS Trust end-users. That is the sort of situation envisaged in *HM Revenue & Customs v Airtours Holidays Transport Ltd* [2016] UKSC 21 where Lord Neuberger stated at [47] in the context of tri-partite contractual arrangements:

> "[47] This approach [of looking at the economic realities of the transaction as a whole] appears to me to reflect the approach of the Supreme Court in the subsequent case of WHA Ltd v Revenue and Customs [2013] UKSC 24, [2013] STC 943, [2013] 2 All ER 907 where at [27], Lord Reed said that '[t]he contractual position is not conclusive of the taxable supplies being made as between the various participants in these arrangements, but it is the most useful starting point'. He then went on in paras [30]–[38] to analyse the series of transactions, and in para [39], he explained that the tribunal had concluded that 'the reality is quite different' from that which the contractual documentation suggested. Effectively, Lord Reed agreed with this, and assessed the VAT consequences by reference to the reality. In other words, as I said in Secret Hotels2 Ltd (formerly Med Hotels Ltd) v Revenue and Customs Comrs [2014] UKSC 16, [2014] STC 937, [2014] 2 All ER 685 (at [35]), when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts."

93. It was submitted that the FTT misunderstood the Appellant's submissions on the relevance of *Mainpay*. We cannot see that the FTT did misunderstand those submissions. It appears that the FTT was encouraged to look at the facts through the lens of commercial and economic reality by the Appellant's own written submissions on *Mainpay* following the hearing. In those submissions at [10] and [11], the Appellant expressly adopted what the Court of Appeal said at [76] and [78] (reproduced at [38] above):

> "10. The Court of Appeal accepted counsel for HMRC's submission that whether or not Mainpay's supplies fell within the scope of the medical care exemption fell to be determined on the facts of the case, judged through the lens of commercial and economic reality (CoA, §78).
>
> 11. The Appellant respectfully agrees with and adopts paragraphs 76 and 78 of the Court of Appeal's judgment. In particular, the Appellant agrees that the question of whether the medical care exemption is engaged in any given case will turn on the particular facts."

94. In any event, whilst the FTT said that it was going to look at the facts through the lens of commercial and economic reality it seems to us that it meant nothing more than that it would take a realistic view of the evidence. That is something any fact-finding tribunal should do and is unobjectionable. It is notable that the FTT made no further reference in the Decision to commercial and economic reality. Further, if a tribunal is applying the correct test, we cannot see that looking at the facts through a lens of commercial and economic reality should make any difference. For the reasons given above we are satisfied that the FTT was not misleading itself in looking at the facts through a lens of commercial and economic reality.

95. The Appellant says that the lens of commercial and economic reality led the FTT to misapply established principles governing the scope of the exemption. We consider the Appellant's specific criticisms in that regard under Ground 3. More generally, the Appellant says that in looking at the facts through a lens of commercial and economic reality the FTT wrongly analysed the services by reference to the client's understanding of what was being provided. For the reasons given above, the FTT was entitled to take into account the client's understanding of what was being supplied

96. The Appellant also says that the FTT overlooked the well-established principle that Item 1, in contrast to Item 4 concerning hospital and other care, covers relationships normally established in the consulting room of the person providing the care, and not via formal contractual structures. As we have said above, the question of commercial and economic reality is relevant when analysing contractual relationships. However, the FTT here was taking a realistic view of the evidence. Indeed it did not refer to the contractual relationships at all. It considered the circumstances in which the supplies were made, albeit looking at the supplies as a whole rather than individual supplies

97. In the circumstances, we do not consider that this aspect of Grounds 1 and 2 establishes any error of law by the FTT.

Ground 3

98. Ground 3 is that the FTT confined its assessment of the therapeutic purpose of the care provided by the Appellant within a particularly narrow compass, contrary to the relevant case law. It also failed to recognise that the term medical care does not call for a narrow interpretation because the objective of the exemption is to reduce healthcare costs. The Appellant also submits that a strict interpretation must still comply with the principle of fiscal neutrality. This ground essentially alleges that the FTT erred in the way it applied the principal purpose test.

99. The meaning of the term medical care in the context of cosmetic procedures has not previously been considered by the Upper Tribunal. Different approaches have been taken by the FTT. The present case will no doubt be important as to how the principal purpose of a cosmetic treatment falls to be identified in practice. However, we can only consider that question against the background of the specific facts found in this case and the Appellant's specific criticisms of the Decision.

100. The CJEU authorities are clear that what amounts to medical care for the purposes of the exemption must not be confined within a particularly narrow compass. For example, the CJEU in *d'Ambrumenil* at [58] (reproduced at [21] above) stated that was why supplies for prophylactic purposes fell within the meaning of medical care.

101. HMRC accept that a procedure can have a therapeutic purpose as well as a cosmetic purpose and that the therapeutic purpose may be the principal purpose. In those circumstances, the supply will be exempt. However, if the cosmetic purpose is the principal purpose then the

supply will not be exempt. It seems to us that in some cases it may be difficult in practice to differentiate a therapeutic purpose from a cosmetic purpose.

102. The purpose of a supply may be different depending on whether it is viewed from the perspective of a client or a medical practitioner. The client may simply be concerned about their appearance and wish to improve their appearance. They may have little interest in any underlying medical cause. Indeed that was the conclusion of the FTT at [113], that clients sought the Appellant's services in order to improve their appearance. However, a medical practitioner may diagnose a specific disease or health disorder and recommend a specific treatment. Assuming the diagnosis is within the competence of the medical practitioner, that will be relevant to the question of whether the purpose of the supply is to treat the disease or health disorder.

103. Identifying the principal purpose of a supply necessarily involves a consideration of all the circumstances in which the supply takes place. We know from *PFC* that this will include the client's understanding of the intervention but importantly it must be based on findings of a medical nature by a qualified medical practitioner. Where there is evidence of diagnosis of a disease or health disorder by a medical practitioner, treatment of the condition and its symptoms will involve a therapeutic aim. It is then necessary to consider whether that is the principal purpose of the procedure.

104. Clearly, for the exemption to operate at all there must be objective evidence of the existence or suspected existence of either a current disease or health disorder to be treated or the treatment must be aimed at preventing a future risk to health. This may include dealing with the side effects of the treatment of a disorder. Generally, if a medical practitioner has identified or suspects a disease or health disorder, or a future specific risk to health, this will be an important factor in what is a multifactorial assessment. The diagnosis by a medical practitioner of the existence, or possible existence, or specific potential future likelihood of a disease or medical disorder will usually be necessary to support the existence of a therapeutic purpose, but, that diagnosis need not be elaborately recorded.

105. Where the therapeutic purpose is accompanied by a cosmetic purpose (or indeed any other purpose) it is necessary to decide whether the therapeutic purpose is the primary purpose. In the case of some supplies, it may be difficult to identify a principal purpose. If a client has a facial wart removed, is the principal purpose to treat the health disorder or to improve the appearance of the client? It seems to us that identifying the principal purpose will involve a multi-factorial analysis which is likely to include consideration of:

(1) any diagnosis made by the medical practitioner making the supply for the purposes of Item 1;

(2) the nature of the disease or medical disorder which has been diagnosed;

(3) the symptoms exhibited by the client;

(4) the intrinsic nature of the procedure;

(5) the circumstances in which the client consulted the medical practitioner, including the context in which the supply is made and how the supply is marketed;

(6) the client's understanding as to the aim of the procedure; and

(7) the medical practitioner's understanding as to the aim of the procedure, including any prophylactic aim.

106. Against that background, the Appellant's criticisms of the FTT's approach can usefully be considered under the following headings.

(1) Prophylactic treatments

107. The Appellant says that the FTT's definition of medical care at [65] was narrowly confined. It failed to recognise that the concept also includes protecting, maintaining or restoring human health and includes the protection and maintenance of health which does not require a diagnosis.

108. It is true that the FTT does not specifically refer to prophylactic or preventative care. It does not acknowledge that medical care can encompass services which are intended to prevent illness in the first place, as long as the link is sufficiently direct. However, Ms Hall confirmed to us that the Appellant's supplies did not include prophylactic care so it is hardly surprising that the FTT did not consider such care.

109. We had assumed on reading the Decision that prophylactic care was potentially relevant in relation to clients who might be at risk of a mental health disorder, which the FTT described at [105] – [113]. In these paragraphs it was the absence of a diagnosis of an existing mental health disorder, and the fact that Dr Shotter was not fully qualified to diagnose a mental health disorder, which led the FTT to its conclusion that what was being supplied was not medical care. The FTT does not say so in terms, but it seems to us that it did not consider that Dr Shotter was qualified to identify a treatment as appropriate to prevent a mental health disorder from arising.

110. The CJEU in *PFC* found that treating psychological disorders can amount to medical care. It would be necessary for the Appellant to satisfy the burden on it of establishing that there was a recognised psychological disorder for which the procedure it was performing was an appropriate treatment. The FTT was clearly not satisfied that the Appellant had satisfied that burden in relation to one example referred to at [106] where a client had been diagnosed with clinical depression by another medical practitioner and had a treatment with the Appellant for skin tightening. The FTT stated at [107]:

> "107. This is a good example, because it captures several of the features which we have been discussing. The procedure is skin tightening. It is being done because the client has lost facial tone. But the client has not been diagnosed by his GP or another medical professional with loose skin. It is recorded that he has been diagnosed with depression, but that diagnosis was not made at this clinic, but was made by someone else, elsewhere. It could not have been made by Dr Shotter because that is not her job. We do not know what the prescribed treatment, if any, for this client's depression was. But it is not said that the prescription or even recommended treatment for his depression included skin tightening. A procedure for tightening skin is available, and the client desires that it be done. The client wants it to be done because the client thinks that it may make him feel better about his appearance, and so happier overall. So, and even though skin tightening may perhaps end up making the client happier, and may even end up alleviating his depression, it is not medical treatment within the exemption. The same perhaps goes for talking about it to a sympathetic interlocutor - Dr Shotter - in a confidential environment. But the client is at the clinic to have his skin tightened: not to undertake counselling. He was just lucky to have encountered a compassionate individual."

111. This is one of only two specific supplies where the FTT made findings as to the circumstances of the consultation and the nature of the treatment. We are satisfied that the FTT would have been entitled to conclude for the reasons it gave that those particular supplies were not medical care.

112. The Appellant says that the FTT wrongly concluded at [111] that helping people feel better about their appearance cannot in itself amount to medical care. The FTT said as follows at [110] – [112]:

> "110. Even absent a formal diagnosis of depression, the basic picture is the same. As Dr Shotter said at another point in her oral evidence:

> "...I'm not there to diagnose a patient with depression. And bear in mind this is the patient's perception of depression. It doesn't actually mean that they've ever had a clinical diagnosis of depression by a GP or other health professional. This is the patient saying 'I'm a bit depressed about my appearance'."
>
> 111. This is also telling. It clearly differentiates, in Dr Shotter's own words, what the clinic does from what a GP or other health professional does. It also highlights the general trend or purpose of the clinic's activity - helping people to feel better about their appearance, in contexts where their appearance is not itself a health condition, or threatening to their health in a way which mandates treatment of their appearance by a GP or another health professional.
>
> 112. Helping someone to achieve goals in relation to their appearance - which is what this clinic does - is not treating someone's mental health status, but is going to their self-esteem and self-confidence. It is a misuse of language to say that this is healthcare in the sense that it would fall within Item 1. There are important shades of meaning between what amounts to healthcare (or to adopt the language of the cases a therapeutic purpose, and the broader idea of promoting wellness as may be seen from the discussion of *Frenetikexito* at [33] above."

113. We see nothing objectionable in what the FTT said in these paragraphs. In the absence of a diagnosis or any other indication that a procedure is preventing or treating a mental health condition, a supply could not fall within the exemption.

114. We are not satisfied that the FTT erred in relation to its approach to prophylactic treatments.

(2) Diagnosis

115. The Appellant submits that the FTT's approach wrongly involved a definition of diagnosis which was too exacting.

116. We agree with the FTT that where a health professional is treating a health condition one would expect to see the diagnosis of a disease or health disorder. Medical care generally follows a diagnosis, although we accept the Appellant's submission that there may be circumstances where a medical practitioner might provide treatment without a diagnosis, or at least without going through the steps of making and recording a formal diagnosis. Whether or not there is a diagnosis, the question of whether an individual has a disease or health disorder which is being treated is a matter of objective fact.

117. We acknowledge the Appellant's submission that not all treatment follows a diagnosis because it may not be possible to diagnose a specific disease or health disorder or because the diagnosis is obvious. However, there is no suggestion in the FTT's findings of fact or in the submissions before us that there was any difficulty in making a diagnosis in relation to physical health disorders for any of the Appellant's clients.

118. The Appellant says that the FTT's reliance on a dictionary definition of diagnosis was inconsistent with the concept of medical care being an independent autonomous concept. The CJEU has never sought to define diagnosis in a granular way. The Appellant's criticism was not with the FTT seeking to identify the meaning of the word diagnosis, but with the source it used, namely the Oxford English Dictionary. We do not accept that submission. All the authorities refer to the diagnosis of a health disorder and the FTT was entitled to consider what is meant by the reference to a diagnosis. The FTT had to go somewhere to identify what is meant by a diagnosis and there is nothing to suggest that the word has a different meaning in different member states.

119. It is clear that the FTT's analysis was significantly based on the absence of a diagnosis. We acknowledge that the existence of a diagnosis is not a necessary requirement for exemption. Doctors may diagnose a health condition for which there is no treatment, or treat symptoms for which they cannot make an underlying diagnosis. In some cases, such as a wart or verruca, the

diagnosis may be straightforward. In other cases the diagnosis might already have been made by another health professional. The weight to be attached to the existence of a diagnosis or the absence of a diagnosis was a matter for the FTT.

120. The burden was on the Appellant to establish that the primary purpose of a procedure was to prevent or treat a disease or health disorder. In the absence of an explanation as to why no diagnosis was possible, we consider that the FTT was right to expect a diagnosis to support the principal purpose of the supplies. In particular, we agree with the FTT at [70] where it said:

> "70. … diagnosis is the starting point of medical care, and the backdrop against which medical treatment takes place. Without diagnosis, "treatment", in the sense captured by the exemption, is not something which is being done responsively to a disease or a health disorder. It is an activity which is being done 'untethered' from an anterior diagnosis."

121. If there is no diagnosis, then in our view a taxpayer must offer cogent reasons as to why a treatment is said to have a therapeutic aim. Without a diagnosis or cogent reasons as to why there is no diagnosis it is difficult to see that the taxpayer would be able to discharge the burden of establishing that the principal purpose of a procedure was therapeutic.

122. Having said that, we accept the Appellant's submission that it may not be necessary in all cases to have evidence of a detailed investigation and analysis of symptoms. Whilst we understand that there were very few instances of the Appellant treating warts or verrucae, and none in the period 12/16, there was an example outside the period of a wart being "scraped off". The diagnosis of a wart or verruca may be straightforward following a short consultation. Other conditions may require a more detailed diagnosis and a record of the tests and investigations carried out.

123. One example of a "diagnosis" referred to by the FTT at [86] was "collagen loss secondary to chemo". We cannot tell from the Decision or the material before us what evidence there was, if any, of a link from the cancer treatment to the collagen loss or indeed what other causes there might be for collagen loss and whether or not those causes involved a disease or health disorder. It is well-known that collagen loss can simply be the result of ageing which is not a disease or health disorder. Dr Shotter however appears to have diagnosed that the client was suffering from collagen loss as a result of chemotherapy.

124. The Appellant accepts that there must be a link between the procedure and the client's health. In *Frenetikexito* at [32] and [33] the CJEU stated that an uncertain link to a health condition, without a specific risk of health impairment, is insufficient. The Appellant submits there is a link in the present case given the FTT's findings at [87] but the FTT failed to recognise that link.

125. The FTT did not consider that the records of initial consultations described at [86] and [87] amounted to diagnoses of health disorders. It appears that this was either because the matters identified at [87] were not recognised health disorders or because it was not satisfied that there was a relevant diagnosis.

126. It was not suggested that collagen loss, excess fat, skin excess and volume loss in themselves are recognised medical disorders. However, Ms Hall told us without contradiction that atrophic scarring is scarring that is commonly caused by severe acne or chickenpox, filamentous warts are skin growths which we understand are caused by the human papillomavirus and tension headaches are a recognised disorder which might be treated in various ways including by Botox injections. Ms Hall also submitted that facial asymmetry might be caused by Bell's Palsy, although it was not suggested that there was any evidence that was the cause in relation to a specific client. She also submitted that skin excess might cause discomfort but we are not aware of any evidence that this is a recognised health disorder. It does not appear in the Decision, but HMRC acknowledged before the FTT that some of these

were health disorders and depending on the circumstances a treatment offered by the Appellant could in principle be exempt if it satisfied the principal purpose test.

127. The FTT dealt with the Initial Consultation documents at [89] of the Decision where it stated that they were cursory documents and could not be described as scientific documents. The Appellant submits that this set the bar too high and that it is not necessary for a diagnosis to be contained in a "scientific document".

128. It seems to us that, in observing at [89] that the initial consultation documents were not scientific documents, the FTT meant that they were not a detailed record by Dr Shotter of her investigations and conclusions in relation to the symptoms presented by her clients. The FTT was simply emphasising what it considered to be the cursory nature of the consultation documents. It did not say that a diagnosis must be contained in a scientific document.

129. However, it does appear that the FTT placed no weight on these documents as evidencing a diagnosis by Dr Shotter of any health disorders. In that respect we consider that the FTT did err in law. The initial consultation documents may have been cursory, but on their face they evidenced a diagnosis by Dr Shotter. Where Dr Shotter was diagnosing a recognised medical disorder, which she was qualified to diagnose, that would be relevant to a multi-factorial analysis of the principal purpose of specific supplies.

130. Overall, it does seem to us that the FTT's expectations as to how a diagnosis might be evidenced were too high and over-generalised. The fact is that Dr Shotter is a qualified doctor who is registered with the General Medical Council. If she makes a diagnosis of tension headaches and treats those tension headaches with a Botox injection then that would be relevant in considering whether the principal purpose of the treatment was therapeutic. As *PFC* makes clear, the assessment of a suitably qualified medical practitioner is significant in identifying the purpose of a medical intervention.

(3) Fiscal Neutrality

131. The Appellant submitted that the FTT's conclusion that Dr Shotter was not diagnosing any recognised health disorder amounted to a breach of the principle of fiscal neutrality. As recorded at [32] of *Frenetikexito*, the principle of fiscal neutrality in this context precludes supplies which are identical or similar from the point of view of the consumer and meet the same needs of the consumer, and which are therefore in competition with one another, from being treated differently for VAT purposes.

132. The Appellant argues that the FTT was requiring Dr Shotter's diagnoses to reach a higher standard than supplies by a general practitioner. Further, the FTT's focus on the views of a typical consumer breached the principle of fiscal neutrality in that it is not permissible to discriminate between two customers in same position having the same treatment.

133. It is certainly true that a strict interpretation of the exemption must still comply with the principle of fiscal neutrality. However, we are not satisfied that the FTT's approach breached the principle of fiscal neutrality. There appears to have been some evidence but no finding by the FTT that the Appellant's services in the relevant period were similar to those of GPs or consultants or that GPs would be expected to produce more or less detailed diagnoses than the Appellant. In short, the Appellant did not satsify the FTT that it was being treated differently to any other supplier of medical care.

134. For reasons already stated, we are not satisfied that the FTT focussed on the perspective of a typical consumer.

(4) Qualifications

135. The Appellant says that the FTT wrongly held at [100] – [104] and at [107] that Dr Shotter's medical qualifications were effectively irrelevant. Further, that in failing to attach weight to Dr Shotter's qualifications the Decision breaches the principle of fiscal neutrality.

136. We do not accept that the FTT disregarded or marginalised the significance of Dr Shotter's medical qualifications and the regulated clinical environment in which she worked. The FTT described Dr Shotter's professional qualifications and accepted that she was a skilled and ethical professional. The FTT stated at [100] and [101]:

> "100. Much emphasis was placed on Dr Shotter's training and experience, especially in terms of psychology. For example, she undertook a psychiatry placement as an undergraduate, and had worked in the NHS (whilst training as an anaesthetist) with patients who were psychologically vulnerable. The general thrust of this was to seek to characterise what is being done by her, or under her direction, in the clinics as of a psychological nature.
>
> 101. We accept that the innate character and temperament which led her to train as a doctor in the first place, will have been supplemented by the acquisition of additional skills through her learned experience in the NHS. But we do not consider that the appropriate tax treatment of what is being done should ultimately be made to depend on the identity of the person doing it, or whether that person has psychological training or experience."

137. The exemption under Item 1 depends on the identity of the person making the supply. There is a supplier condition which requires the supplier to be enrolled on one of various medical registers. However, the paragraphs in the Decision relied on by the Appellant are directed towards the question of whether skin tightening treatments for clients suffering from depression consisted of medical care falling within the exemption. As the FTT recorded at [107], Dr Shotter was not qualified to make a diagnosis of depression and skin tightening was not a prescribed treatment for the client's depression. As we have already said, the FTT did not consider that Dr Shotter was qualified to identify a treatment as appropriate to prevent a mental health disorder from arising. It was entitled to make that finding on the evidence.

138. The Appellant says that the FTT wrongly concluded at [100] and [101] that no weight should be attached to Dr Shotter's psychological training and experience. We are satisfied that the FTT was entitled to reach that conclusion on the basis of the evidence available.

(5) Previous medical treatment

139. There was discussion during oral submissions as to the significance of the consequences or side effects of a previous medical intervention in identifying the principal purpose of a supply. For example, restorative breast surgery following a mastectomy. It is not necessary or indeed desirable for us to say anything about supplies in that context. The VAT treatment of such supplies does not arise on the facts of this case.

140. What does arise on the facts of this case in one of the initial consultations is a procedure to address collagen loss following chemotherapy. For the reasons given above, the FTT was wrong to give no weight to Dr Shotter's diagnosis in this regard. It will be a matter for further consideration by the FTT on the evidence adduced and applying the guidance in this decision whether, in all the circumstances, this supply and any similar supplies amounted to medical care.

(6) The Appellant's clinic

141. The FTT found at [96], [116] and [117] that the Appellant's clinic could not be described as a healthcare setting. Essentially, the premises were merely designed to put clients at ease. The Appellant seeks to challenge these findings of fact as irrational. However, the Appellant does not have permission to appeal on that ground and we have not been referred to the

evidence said to support or contradict the findings. On that basis we do not address this challenge.

Setting aside the Decision

142. We have found that the FTT erred in law in placing no weight on the documents as evidencing a diagnosis by Dr Shotter of any health disorders. We are conscious that the FTT concluded that Dr Shotter's oral evidence could not be corroborated by documentary evidence in circumstances where such documentary evidence could have been provided. It also concluded that the documentary evidence that was available was sparse and unrevealing.

143. However, in our view the FTT's error might have made a difference to its decision that none of the Appellant's supplies amounted to medical care. As such we exercise our discretion to set aside the Decision in accordance with the approach set out by Henderson LJ in *Degorce v HM Revenue & Customs* [2017] EWCA Civ 1427 at [95].

144. We are not in a position to remake the decision, and will therefore remit the appeal to the FTT. There is no reason the appeal should not be remitted to the same tribunal panel in so far as that is possible.

145. The FTT was referred to a sample of initial consultations and quoted the contents of two by way of example. It held that these did not amount to a diagnosis in the sense described by the authorities. What the FTT did not do was to consider any individual supplies in context. It is not clear to us that it was invited to do so by the parties, but in our view that is the approach the FTT ought to adopt when reconsidering its decision. The FTT should also adopt the multi-factorial approach we have described above.

Ground 4

146. Ground 4 is that the FTT failed to address or record its response to the Appellant's submission that HMRC were effectively seeking to override a decision of Parliament when implementing Article 132 of the PVD. It is submitted that Parliament decided not to exclude specifically from exemption cosmetic care which also has a therapeutic purpose.

147. Article 131 provides that the exemptions are to apply without prejudice to other Community provisions, which include: the principles of fiscal neutrality, legal certainty, effectiveness and proportionality. It also provides that exemptions are to apply in accordance with conditions which Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.

148. The Appellant says that Parliament has not enacted any conditions pursuant to Article 131 and it is not permissible for HMRC to fill what they may perceive to be a gap in the legislation by administrative fiat, which is what they have effectively sought to do in this case. Nor could the FTT do so. Such an approach is contrary to the principles of legal certainty, proportionality, and Article 131. The FTT's insistence on a highly formulaic diagnosis and/or a formal psychology qualification exceeds the boundaries of Item 1 and is therefore impermissible.

149. We do not consider that this ground of appeal establishes any error of law on the part of the FTT. The FTT simply decided that it was not satisfied that the services supplied consisted of medical care, or at least were not made for the principal purpose of providing medical care. It was not purporting to impose conditions pursuant to Article 131 where Parliament itself had not imposed conditions. The FTT correctly applied the words of Chadwick LJ in *Expert Witness Institute* at [17]:

> "17. … The court must recognise that it is for a supplier, whose supplies would otherwise be taxable, to establish that it comes within the exemption, so that if the court is left in doubt whether a fair interpretation of the words of the exemption covers the supplies in question, the claim to the exemption must be rejected."

150. It is said that the FTT was bound to ensure the correct and straightforward application of the exemption. It failed to do so because the concept of principal purpose does not lead to a straightforward application of the exemption. There are no analytical tools to identify the principal purpose. We have already dealt with this submission under Grounds 1 and 2 and set out what we consider should be the approach to identifying the principal purpose of a supply in the context of cosmetic services.

CONCLUSION

151. For the reasons given above we allow the appeal on Ground 3, set aside the Decision and remit the appeal to the FTT to reconsider its decision in the light of our findings.

152. We hope that the guidance provided by this Decision will be of assistance in cases which are presently stayed and generally in determining whether supplies of cosmetic treatments fall to be treated as exempt supplies of medical care. The supply must be made by a registered person and must have a therapeutic purpose as we describe at [104] above. Where a supply has both a therapeutic purpose and a cosmetic purpose it is necessary to identify the principal purpose. That will be a multi-factorial analysis which is likely to include consideration of the factors described at [105] above.

MR JUSTICE THOMPSELL
JUDGE JONATHAN CANNAN

Release date: 13 October 2025